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Ricci's "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?

*Michael J. Zimmer**

I. INTRODUCTION

In *Ricci v. DeStefano*,¹ the Supreme Court, in an opinion by Justice Kennedy, ruled as a matter of law that the City of New Haven had committed intentional disparate treatment discrimination. The City had violated Title VII² by deciding not to use the results of a test given to promote firefighters to openings as lieutenants and captains.³ Plaintiffs were seventeen whites and one Hispanic who would have been promoted if the test results were used. The City defended its decision by asserting that it acted to avoid Title VII disparate impact liability to African-American and Hispanic test takers who would not be promoted if the test scores were used.

Because the Court found a conflict between disparate treatment law and disparate impact law—a conflict that had not previously existed—it created a defense to a disparate treatment claim based on disparate impact law. To rely on the potential disparate impact liability as a defense to disparate treatment liability, the defendant would have to prove that it had a “strong basis in evidence” that it would be liable for disparate impact discrimination. Despite finding

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1. 129 S. Ct. 2658 (2009).

2. Civil Rights Act of 1964 § 703(a), 42 U.S.C. §§ 2000e-2000e-17 (2006).

3. The Court reversed summary judgment for the defendants and, in an unusual move, granted summary judgment for the plaintiffs. To do that, it had to find that no material issues of fact existed and so plaintiffs were entitled to judgment as a matter of law. That makes the careful analysis of the opinion in light of facts the Court found indisputably true and sufficient to support its decision extremely important.

that it faced a prima facie case of disparate impact discrimination, the Court found as a matter of law that the City had failed to prove it had that strong basis in evidence that it would have violated the disparate impact provisions of Title VII if it had used the test scores for promotions. The decision has already drawn significant and interesting commentary.⁴

This Article will principally focus on the threshold issue of disparate treatment law, to which the Court paid little attention, rather than on the disparate impact issues on which the Court devoted most of its opinion. The thesis of this Article is that it is possible that a conservative majority of the Supreme Court

4. See Barbara Jean D'Acquila, *A Management Employment Lawyer's Perspective on Ricci v. DeStefano*, 25 A.B.A. J. LAB. & EMP. L. 213 (2010) (highlighting the challenge facing employers and their lawyers because of *Ricci*); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Race-ing Test Fairness*, 58 UCLA L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1507344> (undertaking a deep and thorough investigation of the case to demonstrate that antidiscrimination law no longer provides a level playing field for minority plaintiffs because the law grants white plaintiffs significant advantages); Melissa Hart, *Procedural Extremism: The Supreme Court's 2008-2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253 (2009) (using *Ricci* as a prime example of the "procedural extremism" of the Court by reversing summary judgment for defendant and granting it to the plaintiffs); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (describing *Ricci* as at least a partial step toward a "color-blind" standard for both Title VII disparate treatment law and constitutional equal protection law); Joseph A. Seiner & Benjamin N. Gutman, *The New Disparate Impact*, 90 B.U. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1564244> (developing what they see as an emerging employer affirmative defense to a disparate impact case based on its good faith when it took an action that has been challenged); Kerri Stone, *The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 751 (2010) (exploring ways to think about the new approach that finds liability for action taken "because of race" in a general sense that is not directed at the particular plaintiffs adversely affected and placing the decision in a procedural context by viewing it as an expansion of the doctrine of "transferred intent" or "third party standing"); Michael Subit, *A Plaintiffs' Employment Lawyer's Perspective on Ricci v. DeStefano*, 25 ABA J. LAB. & EMP. L. 199 (2010) (acknowledging that the "majority took a very expansive view of disparate treatment" in *Ricci*, and arguing that it is actually bad for minority employees because it is a precursor to finding the disparate impact provisions of Title VII to violate equal protection); Charles Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUOY 201 (2009), available at <http://www.law.northwestern.edu/lawreview/colloquy/2009/40/LRColl2009n40Sullivan.pdf> (analyzing the effect *Ricci* has on the disparate impact doctrine and the relationship between disparate impact and disparate treatment and suggesting the need for Congressional amendments to Title VII to overturn *Ricci*); Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, available at <http://ssrn.com/abstract=1538525> (discussing *Ricci* in context with the background development of the disparate impact doctrine); Howard Wasserman, *Ricci Glitch*, PRAWFSBLAWG (Jul. 6, 2009, 6:46 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/07/ricci-glitch.html>.

inadvertently created new arguments for civil rights advocates representing women and minority group men, the groups for whose protection antidiscrimination statutes were enacted in the first instance. The palpable empathy the majority felt for the *Ricci* plaintiffs may have caused a majority of the Court to leap to a finding of discrimination as a matter of law, thereby transforming disparate treatment law to now make it easier for all plaintiffs to prove their cases.

In short, the Court appears to have established essentially a "color-blind" standard of disparate treatment liability for Title VII.⁵ A "color-blind" standard requires that an employer not know the racial consequences of the employment actions it takes. The violation of the "color-blind" standard leads to disparate treatment liability if the plaintiff proves that (1) the defendant knew the racial consequences of its decision, (2) it then made that decision in light of that knowledge, thus making the decision "because of race," and (3) the plaintiff suffered the effect of an adverse employment action. The Court accepted that the City's motivation for its action was benevolent in the sense that it was taken to avoid disparate impact liability to minority group test takers. In other words, the City decided not to use the test scores "because of" the effect their use would have on African-American and Hispanic test takers. The fact that the City was assumed to have acted benevolently as to some of the members of all three racial groups affected—or at least members of the two minority groups affected—was irrelevant to liability to a different group, the *Ricci* plaintiffs, which included one minority group member. The defendant was liable to these plaintiffs who were adversely affected by the decision even though the decision was made in spite of their race, not because of it.⁶

5. The Court indicated that equal protection constitutional principles provide guidance in the Title VII context. *Ricci*, 129 S. Ct. at 2675. Richard Primus further develops the point that this same standard applies to the constitutional law of equal protection as well as Title VII disparate treatment. See Primus, *supra* note 4, at 1344.

6. In creating this new test of disparate treatment discrimination, Justice Kennedy did recognize one exception where an employer shows that at the time it took action knowing its racial consequences it was in the design phase for an employment policy or practice, before it had been finalized for use. See discussion *infra* notes 67–71. The Court also gave some emphasis, if not making it an element of the *Ricci* "color-blind" test, to the reliance interests of the *Ricci* plaintiffs and their expectation that the test results would be used. It may be that the discussion about these plaintiffs' reliance efforts and their expectation that the test scores would be used is more relevant to the third element of the new test—that the plaintiffs suffered an adverse employment action—than to the showing of intent to discriminate. See discussion

Part II describes the three different racial groups, with members of each racial group being represented in two groups depending on the outcome of the City's decision not to use the test. Some members of each racial group would be favored if the test scores were not used, and some would be favored if the test results were used. In other words, all the test takers can be divided into six different groups depending on their race and on the effect the decision not to use the test scores for promotions had on them.

Because the Court did not expressly adopt a "color-blind" test for disparate treatment liability, Part III sets out and tries to analyze what Justice Kennedy did say which, when all put together, supports the conclusion that the Court has adopted a "color-blind" standard that substantially broadens the scope of application of disparate treatment law. In doing so, the Court appeared to overturn prior disparate treatment law that had made it difficult for plaintiffs to prove their cases. Part IV fleshes out the elements of this new, *Ricci* "color-blind" basis for disparate treatment liability, while Part V discusses two subsequent claims against the City of New Haven now that the results of the test have been used to promote firefighters to lieutenant and captain openings. Part VI shows how this new, *Ricci* "color-blind" standard can be used to advance the general antidiscrimination agenda. Part VII sketches some of the broader potential impacts of *Ricci* in terms of equal protection law. Part VIII concludes the Article.

II. *RICCI*'S THREE RACIAL GROUPS, EACH INCLUDING THOSE WHO WOULD BE PROMOTABLE AND THOSE WHO WOULD NOT BE PROMOTED

Because Justice Kennedy does not explicitly adopt a "color-blind" standard, understanding the change that the Court made to disparate treatment law requires careful analysis of the opinion and the facts that it found to support its conclusion that the City committed disparate treatment discrimination as a matter of law. Justice Kennedy begins by describing the outcome of the test in terms of its impact on the test takers who were members of the three different racial groups:

infra notes 51–65.

Seventy-seven candidates completed the lieutenant examination—43 whites, 19 blacks, and 15 Hispanics. Of those, 34 candidates passed—25 whites, 6 blacks, and 3 Hispanics. Eight lieutenant positions were vacant at the time of the examination. As the rule of three operated, this meant that the top 10 candidates were eligible for an immediate promotion to lieutenant. All 10 were white. Subsequent vacancies would have allowed at least 3 black candidates to be considered for promotion to lieutenant.

Forty-one candidates completed the captain examination—25 whites, 8 blacks, and 8 Hispanics. Of those, 22 candidates passed—16 whites, 3 blacks, and 3 Hispanics. Seven captain positions were vacant at the time of the examination. Under the rule of three, 9 candidates were eligible for an immediate promotion to captain—7 whites and 2 Hispanics.⁷

Thus, the test scores had an impact on three different racial groups—whites, Hispanics, and African Americans—with members of each racial group represented among those who would be advantaged, either by being promoted or at least promotable, if the test results were used as well as in the group of those who could not be promoted if the test scores were used.

Looking at the racial consequences flowing from the administration of the tests, there were six different groups:

1. The 24 lower scoring African Americans who, if the City decided *not* to use the test scores, would have an improved chance for promotion if some alternative method were used to make the promotions. With no chance for promotion if

7. *Ricci*, 129 S. Ct. at 2665 (citations omitted). The “rule of three” is common in civil service systems. It means that the employer is limited to selecting one of the top three scorers on the test and cannot take someone with a lower score. The Court held that as a matter of law the tests resulted in a disparate impact looking only at the pass rates, which did not tell the whole story of that impact since simply passing the test would not necessarily lead to promotion during the two year life span for using the tests:

The racial adverse impact here was significant, and petitioners do not dispute that the City was faced with a prima facie case of disparate-impact liability. On the captain exam, the pass rate for white candidates was 64 percent but was 37.5 percent for both black and Hispanic candidates. On the lieutenant exam, the pass rate for white candidates was 58.1 percent; for black candidates, 31.6 percent; and for Hispanic candidates, 20 percent. The pass rates of minorities . . . were approximately one-half the pass rates for white candidates . . .

Id. at 2677–78. The E.E.O.C. has an 80% rule of thumb to determine whether disparate impact exists. See 29 C.F.R. § 1607.4 (D) (2008) (selection rate that is less than 80% “of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact”).

the test results were used, any alternative would likely improve their prospects. But how much those prospects would improve would depend on what alternative promotion procedures would be used.

2. The 20 lower scoring Hispanic test takers who, like the 24 African-American test takers in group 1, would not have been promoted if the tests scores were used.
3. The 51 lower scoring white test takers who would not be promoted if the test scores would be used. Like the African-American and Hispanic test takers in groups 1 and 2, their chances for promotion improved by the City's decision not to use the test scores because they had no chance for promotion if the test scores were used.
4. The 17 white test takers who did score high enough to be promoted if the test scores were used. With the decision not to use the test scores, their chances for promotion declined. They lost what appeared to be a sure thing. As a result of the City's decision, they would have some chance for promotion under whatever system the City would decide to use for promotions instead of the test scores.
5. The 2 Hispanic test takers who scored high enough to be promoted if the test scores were used. Like the members of group 4, they have a reduced chance of promotion because they lost a sure thing.
6. The 3 African-American test takers who might have a chance of promotion if the test results were used and if there were more openings over the two-year life span for the use of the test results. With the decision not to use the test scores, their chances for promotion probably would decline but it would be unknown until alternative promotion procedures were established.

Table 1 shows the results as to all six groups:

Table 1: Outcome by Racial Groups of Test

	Whites	Blacks	Hispanics	TOTAL
Promotable	17	3	2	22
Not Promotable	51	24	20	95
TOTAL	68	27	22	117

The outcomes in terms of promotable or possibly promotable test takers if the test results were used would be that 25% of the white test takers would be promoted, as would 11.1% of the African Americans and 9% of the Hispanics. The Hispanic rate was a little more than one-third of the white rate and the African-American rate was less than half of the white rate. It is no wonder that the Court found that the test results would, as a matter of law, have a disparate impact on minority test takers.

Table 2 shows the rates of promotion for the three groups and then compares the promotion rates of the African-American and Hispanic test takers to the promotion rate of the white test takers, the group that had the highest rate of promotion.

Table 2: Comparative Rates of Promotion

	Rate of Promotion	Percentage of White Rate
White	25%	
African American	11.1%	44.4%
Hispanic	9%	36%

Once the racial impact of this test became known to the City and the community—both as to the pass rate and its actual effect on the different racial groups⁸—the use of the scores became a hotly contested political issue.

When the examination results showed that white candidates had outperformed minority candidates, the mayor and other local politicians opened a public debate that turned rancorous. Some firefighters argued the tests should be discarded because the results showed the tests to be discriminatory. They threatened a discrimination lawsuit if the City made promotions based on the tests. Other firefighters said the exams were neutral and fair. And they, in turn, threatened a discrimination lawsuit if the City, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. In the end the City took the side of those who protested the test results. It

8. The identity of the individual test takers was not known to those engaged in the political debate or to the test takers themselves. *Ricci*, 129 S. Ct. at 2666–67.

threw out the examinations.⁹

Based on these facts, Justice Kennedy held that, as a matter of law, the City had engaged in disparate treatment discrimination, that is, intentional discrimination against the plaintiffs.¹⁰

III. *RICCI*'S SIX STATEMENTS THAT ADOPT A "COLOR-BLIND" DISPARATE TREATMENT STANDARD

The most significant question is why these facts support, as a matter of law, a finding of disparate treatment discrimination against these particular test takers—the 17 white and one Hispanic test takers—all of whom would be promoted if the tests results were used. That group did not include all of those who would be promoted or be promotable if the test results were used. Further, the Court did not point to any other evidence that the City's decision was taken because of the race of these particular test takers. The answer the Court gave can be found by analyzing six separate statements that indicate why the City's conduct amounted to disparate treatment discrimination. It is the thesis of this Article that, taken together, these statements mean that the Court has adopted a new, "color-blind" standard of disparate treatment liability. Because the "color-blind" standard was not explicitly adopted, the holding and the text of the Court's opinion has to be parsed rather carefully, quote-by-quote, to unpack its potential meaning for disparate treatment law.

First, and perhaps most important, the Court found that the City had committed disparate treatment discrimination as a matter of law, even though the City's action was found as a matter of law to be motivated by its desire to avoid disparate impact liability. In finding disparate treatment discrimination to exist, the Court had to deal with the conflict created between an employer's obligation to avoid both disparate treatment and disparate impact liability. This conflict had not previously been judicially recognized.¹¹ Under the

9. *Id.* at 2664.

10. That finding set the stage for the Court's extensive analysis of the facts in the record to support its finding that the City did not have a "strong basis in evidence" that it would be liable under disparate impact law if it used the test scores. While it created the "strong basis in evidence" defense to a disparate treatment claim, the Court held that, as a matter of law, the City did not satisfy that test. *Id.* at 2676–77.

11. The closest the Court has gotten to the issue arose in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), a disparate treatment case challenging a

preexisting understanding, an employer was prohibited from acting with intent to discriminate—disparate treatment discrimination¹²—as well as prohibited from using an employment practice that caused a disparate impact on groups protected by Title VII unless the practice had been justified as job related and consistent with business necessity.¹³ Simply knowing the racial consequences of an employment action did not constitute acting with intent to discriminate. As long as the employer did not act with intent to discriminate, an employer could act knowing the racial consequences of its actions and thereby also avoid disparate impact liability.¹⁴

The premise of *Ricci* is that acting with such knowledge is acting with intent to discriminate at least to a prima facie level. After *Ricci*, an employer could avoid both disparate treatment and disparate impact liability only where its action was justified by a “strong basis in evidence” that it would be liable for disparate impact discrimination if it failed to take account of race in making its

retirement plan rule requiring women to contribute a higher percentage of their pay to the plan in order to get monthly retirement benefits equal to men's benefits. In defense of this discriminatory policy, the defendant argued that a gender neutral pension plan would result in disparate impact discrimination against men because, as a group, they would receive less retirement income than women because of their group's shorter life expectancy. In a footnote, the Court avoided deciding whether or not there was a conflict between disparate treatment and disparate impact theories. “[E]ach retiree's total pension benefits are ultimately determined by his actual life span,” so that differences in total benefits received by retirees was because of their actual life spans and not because of sex. *Manhart*, 435 U.S. at 710 n.20. Further, even though such a neutral practice will inevitably have “some disproportionate impact on one group or another,” *Griggs v. Duke Power Co.* “does not imply . . . that discrimination must always be inferred from such consequences.” *Id.* Subsequently, in *Connecticut v. Teal*, 457 U.S. 440 (1980), the Court decided that the fact that, at the bottom line, the employer's selection process did not result in disparate impact against minority group members in general did not prevent employees affected by a particular element of the process that did produce an adverse impact from challenging that element.

12. 42 U.S.C. § 2000e-2(a) (2006).

13. *Id.* § 2000e-2(k).

14. See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 315 (9th ed. 2008):

[D]isparate treatment is not allowed because discriminatory intent is not a permissible basis for denying employment opportunities to individuals in our society; but even a nondiscriminatory motivation will not save practices that are not justified by business necessity and have the effect of falling more harshly on a protected group. So stated, disparate treatment and disparate impact principles seem to work in conjunctions to achieve the basic goal of Title VII.

Id. This assumes that simply knowing the racial consequences of an action does not establish the intent to discriminate element of a disparate treatment case.

decision.¹⁵ In other words, acting with knowledge of the action's racial consequences to take account of potential disparate impact liability constitutes disparate treatment discrimination without having that strong basis in evidence that it would be liable.

As will be developed, the finding that a conflict existed between the obligations on employers to commit neither disparate treatment nor disparate impact discrimination could be based only on the fact that the City knew the racial consequences of its decision when it made it. The City knew the effect its decision would have on all the test takers in all three racial groups. Its motive for not using the test scores was because of the race of lower scoring members of the minority groups. Yet, the Court found this to be "because of [the] race" of the higher scoring test takers, which included members of all three racial groups.¹⁶ Thus, the best way to understand *Ricci* is that acting with knowledge of a particular decision's racial consequences is disparate treatment discrimination because it violates a new "color-blind" standard of disparate treatment liability.

Second, the following six statements made in the opinion do not expressly adopt a "color-blind" standard of disparate treatment liability. They, nevertheless, lead ineluctably to the conclusion that what the City did that constituted disparate treatment discrimination was to act with knowledge of the racial consequences of its decision not to use the test results because that action had an adverse affect on some test takers who would have been promoted if the test scores had been used.

The six statements that are key to understanding *Ricci* were set out in two groups of three. The first three come early in the discussion of what law applies to these facts and form the core findings that establish that there is now a "color-blind" standard of disparate treatment discrimination. The statements in the second set

15. A basis for the Court's rejection of the City's good faith in making the decision and its requirement that the City have a strong basis in evidence that it would be liable under the disparate impact theory may have been the Court's fear that a good faith standard for resolving the conflict between disparate treatment and disparate impact discrimination would too readily allow an employer to resort to the use of racial quotas. In his concurring opinion, Justice Scalia adverts to the quota issue. *Ricci*, 129 S. Ct. at 2682.

16. Professor Stone analyzes this aspect of *Ricci* as the Court expanding the concept of "transferred intent"—the intent of the City's action, because of the race of the lower scoring minority test takers, was transferred to become an intent to discriminate against the *Ricci* plaintiffs. Alternatively, she describes the case as expanding the "third party standing" doctrine. See Stone, *supra* note 4.

appear toward the end of the opinion. The first of that set summarizes the essence of this new standard—the “color-blind” standard. The second in that set explores the reliance or expectancy interests of the test takers to emphasize the seriousness of the harm caused by the City’s conduct. The final statement develops an exception to the “color-blind” standard of liability for employers who know the racial consequences of proposed employment practices during the design phase of those practices.

1. All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—i.e., how minority candidates had performed when compared to white candidates. As the District Court put it, the City rejected the test results because “too many whites and not enough minorities would be promoted were the lists to be certified.” . . . Without some other justification, this express, race-based decisionmaking violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.¹⁷

This first statement finds as fact that, before it acted, the City knew the distribution of test scores by racial groups, including the fact that there was adverse impact on minority test takers when compared to white test takers. It knew that the promotion rate for the group of white test takers was much higher than the rates for the Hispanic and African-American test takers: The Hispanic promotion rate was 36% of the rate for white test takers and the African-American promotability rate was 44% of the white rate. Thus, the

17. *Ricci*, 129 S. Ct. at 2673 (citations omitted). In essence the City was replacing the test scores, which on the surface at least, were achieved in a “color-blind” way, with a decision not to use the test scores, which also on the surface at least, were achieved in a “color-blind” way: All members of all three racial groups were treated the same way since none of their test scores would be used for good or bad. What is different about *Ricci* and a situation where the employer cancelled the test because it learned that security had been breached when the test was administered? All of the test takers would be treated the same as all of the test takers in *Ricci* but it would be doubtful anyone would claim it was because of the race of any particular group of test takers. In *Ricci*, all the test takers were treated the same but the Court found that the City intended to discriminate against some of the test takers because of their race while others of the same and other races were also adversely affected by the decision.

Ricci plaintiffs established that the City was conscious of the consequences for the members of all three racial groups when it decided not to use the test scores. In essence, this confirms that the City knew that there would be a significant disparate impact on minority group members if the test results were used and that some test takers of all three races would not be promoted if the test scores were not used.¹⁸ Saying that this “express, race-based decisionmaking” is disparate treatment comes as close as the Court gets to articulating explicitly a “color-blind” standard.

2. Whatever the City’s ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.¹⁹

This statement drops from the case any issue or evidence of animus, prejudice or other motivation aimed at hurting the *Ricci* plaintiffs or, indeed, any of the test takers. Nevertheless, even without any evidence of animus or intent to discriminate against the *Ricci* plaintiffs, the decision by the City still was characterized as “because of race.” With no animus or other evidence of ill will toward anyone, the “because of race” could only be based on the fact that the City knew the racial effect its decision would have on all the test takers of all three racial groups, some of whom would benefit and some of whom would not if the test results were used. When the City acted with that knowledge, it was “because of race” in the abstract sense that the racial consequences of the action were known. But there was no evidence that the City focused in a negative way on the race of any individuals or of the members of any racial group. No one was treated differently because of their race, whether majority or minority. The Court found that the decision was “because of race” but not “because of” the race of the plaintiffs. In other words, “because of race” means an action that violates a “color-blind” standard.

This is a substantial change in disparate treatment law. Before *Ricci*, proof that an actor was simply conscious of the race or gender

18. See 29 C.F.R. §§ 1607, 1607.4(D).

19. *Ricci*, 129 S. Ct. at 2674. So, the City acted “because of” the race of those minority test takers who did not score highly enough to be promoted or be promotable and not “because of” the race of those test takers, including members of all three racial groups, who did score highly enough.

of the affected individuals would *not* support drawing an inference of the intent to discriminate, the most difficult element in a claim of disparate treatment discrimination.²⁰ For example, Justice O'Connor, in her concurring opinion in *Price Waterhouse v. Hopkins*,²¹ made it clear that intent to discriminate could not be found solely on the fact that the race or gender of the person affected by the decision is known to the decisionmaker:

Race and gender always "play a role" in . . . the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and non-discriminatory fashion. For example, . . . mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex.²²

After *Ricci*, it can be argued that the only factual basis for the Court's determination that the City's action in deciding not to use the test results was "because of race" was simply that it acted knowing the racial consequences—the effect on all of the white, African-American, and Hispanic test takers—of that decision. Acting to avoid negative consequences to some minority group test takers made the decision "because of [the] race" of others, the 17 white and one Hispanic plaintiffs plus another Hispanic test taker who would be promoted if the test scores were used and three African-American test takers who might be promoted over the useful life of the test. While *Price Waterhouse* involved a situation where the decisionmakers knew the gender of an individual candidate for partnership, *Ricci* involved a larger group but it is not clear why that would make a difference in the analysis. After all, in *Price Waterhouse*, the gender of all of the candidates considered for partnership was known to the group making partnership decisions, though a discrimination case was brought by only one of them, Ann

20. Under prior law, an individual disparate treatment case required proof of three elements: (1) defendant's intent to discriminate; (2) plaintiff suffering an adverse employment action; and (3) joining defendant's intent to discriminate to the adverse employment action plaintiff suffered, with that last linkage element proved either to the "but-for" level or to "a motivating factor" level. For a full development of those elements, see Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243 (2008).

21. 490 U.S. 228 (1988).

22. *Id.* at 277.

Hopkins. Based on the evidence the Court refers to in *Ricci*, it applies this new, “color-blind” standard of what constitutes disparate treatment to find liability when a decisionmaker knows the racial consequences of an action that it takes. Anyone adversely affected by a decision made under such circumstances would be able to bring an action for disparate treatment discrimination.

Unlinking liability from any showing that the employer focused on the race of those affected helps explain why the Court found disparate treatment against the 17 white and one Hispanic who were the *Ricci* plaintiffs, without regard to the fact that those adversely affected included members of two different racial groups.²³ It is reduced to a simple, straightforward case determined by whether or not the defendant knew the race of those affected by the decision and whether or not at least one person was adversely affected by the defendant’s decision.

Putting together the first two statements, there is disparate treatment discrimination when an employer acts with knowledge of how different racial groups would be affected since acting with that knowledge, even if motivated by a desire to avoid harm to some members of two racial groups, makes the decision “because of race” of some of the members of all three racial groups.

If the decisionmaker knew the race of those affected by its action, whether positively or negatively, the employer is liable unless it had a sufficient justification for its disparate treatment. This is an extreme standard but is consistent with what Richard Primus calls his “general reading” of *Ricci*.²⁴ From the viewpoint of civil rights plaintiffs, this new standard would make it much easier than under the preexisting law to establish disparate treatment liability: Evidence that the decisionmaker knew the racial consequences in general of its action suffices to establish liability if the plaintiff was adversely affected by the action, even if there was no evidence that the action was taken “because of” the race of that plaintiff. Liability would be established even if the action was taken in spite of the plaintiff’s race because it was taken to benefit the members of the same as well as the other racial groups.²⁵

23. Another Hispanic, who did not join the *Ricci* action, also lost his immediate promotion when the City decided not to use the test and three African Americans lost the chance to be promoted during the period in which the test results would be used.

24. Primus, *supra* note 4, at 1363.

25. Evidence that the decisionmaker was not “color-blind” is not necessary to proving

3. The City rejected the test results solely because the higher scoring candidates were white.²⁶

This statement is intriguing for its finding that the action of the City was “solely because the higher scoring candidates were white.”²⁷ The word “solely” gives one pause since there is no evidence that the City acted other than because it knew all the scores as they affected the members of all three racial groups and acted to avoid adversely affecting the members of the two minority groups. As the Court acknowledged, it inevitably follows from the City’s announced reason for not using the test scores—the test results would cause a disparate impact on minority group members—that the City also knew that the white candidates, as a group, scored higher. Because a disparate impact showing by its nature is a comparison of outcomes between two racial groups,²⁸ the facts here would also just as readily support a finding that the City acted “solely” because the scores of minority test takers taken as groups were too low when compared with the scores of the group of white test takers.²⁹ That, of course, is the explanation the City claimed was the basis of its decision not to use the test results, which claim the Court accepted. That being true, it is hard to square the use of the word “solely” in reference to the test scores of either the white or of either minority group of test takers, especially since some members of all three racial groups were affected positively and others were affected negatively by the decision not to use the test results. The evidence the Court relied on showed that the City acted with knowledge of the test scores of all of the test takers, at least by their representation in the three different racial

discrimination under previous authority for proof of intent to discriminate. For a description of the various ways of proving intent to discriminate to which the *Ricci* approach should be added, see Zimmer, *supra* note 20.

26. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

27. *Id.* (emphasis added). It is, of course, true that the City acted because of the racial consequences of using the test scores. That is not in dispute. What is in dispute is whether it acted because of the adverse racial consequences—i.e., “because of” the race of the seventeen white and one Hispanic plaintiff.

28. The Court recognized that fact with its statement that the City acted because it knew the “statistical disparity based on race—i.e., how minority candidates had performed when compared to white candidates.” *Id.* at 2673.

29. That is, after all, what disparate impact means.

groups of test takers. Thus, the decision was “solely” because of the known racial consequences of all the test takers.

Justice Kennedy does not explain how “because of race” was linked *solely* to the race of this group of some of the white test takers, when there were test takers from the two other racial groups who were also adversely affected when the City decided not to use the test scores. That these white test takers would be adversely affected by the decision not to use the test results was clear but it would also be clear for the higher scoring members of the two other racial groups. The impact on all the lower scoring test takers who were represented in all three racial groups was also clear: Their chance for promotion improved to something better than no chance at all. Putting all this together, the City was found to have acted with an intent to discriminate against this particular set of test takers, including the *Ricci* plaintiffs (and the one Hispanic who did not join in the suit), “because of their race” where that finding is based simply on the City’s knowledge of the racial consequences of its decision as to all the test takers.

Since the Court assumed there was no evidence of animus against these particular white test takers (or anyone else), a “color-blind” standard would support a finding that the City’s decision constituted disparate treatment of all of the test takers but would not support a finding that the decision was “solely” because of the race of one particular group of test takers—the higher scoring white test takers. A possible way of interpreting the term “solely” here is that the Court assumed that this subset of all the white test takers was the only group adversely affected by the City’s decision not to use the test results.³⁰

To put this into the context of the preexisting disparate treatment law, Justice Kennedy may have used the “solely because” language to bolster the Court’s apparent finding as a matter of law that this group satisfied the separate, “adverse employment action” element of a disparate treatment case.³¹ While a decision that was not

30. The opinion of Justice Kennedy exhibited such a strong empathy for the high scoring white test takers that he may have been blinded to the actual fact that high scoring members of the other two racial groups also were adversely affected by the decision not to use the test scores. That a present majority of the Court is sensitive to the claims of whites, rather than of minority groups, is a point strongly made by Harris & West-Faulcon, *supra* note 4.

31. See *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (“[H]undreds if not thousands of decisions say that an ‘adverse employment action’ is essential to the plaintiff’s prima facie case”).

"color-blind" would be "because of [the] race" of all those affected, positively or negatively, only those who were adversely affected would be able to challenge that decision. A problem with that interpretation is what to do with one of the plaintiffs in *Ricci* who was a Hispanic test taker disadvantaged in exactly the same way as the group of white test takers who sued the City. Thus, unless the term "white" was simply a misstatement because Justice Kennedy overlooked the fact that one plaintiff was not white,³² so that the term meant all the plaintiffs in this case, it is counterfactual to say that the decision was made "solely because the higher scoring candidates were white." The Hispanic plaintiff cannot be differentiated from the other *Ricci* plaintiffs except as to his race. This supports the finding that the challenged decision need not be focused on the particular plaintiffs, or even the race of the particular plaintiffs, if the decisionmaker knew the racial consequences of its decision.

Even if the term "white" was mistakenly meant to include the one Hispanic plaintiff or was a mistaken description of all of the *Ricci* plaintiffs, that interpretation still cannot be squared with the record in the case. The evidence referred to by Justice Kennedy shows that there was another Hispanic who would have been promoted if the tests were used but who did not join in the *Ricci* lawsuit. While he was adversely affected by the City's decision in the same way as the *Ricci* plaintiffs, was he somehow not within the scope of the City's discrimination that the Court found against these plaintiffs?

It might be possible to interpret the Court's statement indicating that the City focused its intent to discriminate only on the white test takers, and not on the rest of the group of high scorers in the other two racial groups, without regard to who ended up suing. To say that another way, perhaps the Court is suggesting that the City was motivated to decide not to use the tests because of the high test scores of some white test takers, even though there were other high scorers in the other racial groups affected in the same way. That would make the group who were the victims of the City's intent to discriminate under-inclusive of all those who were disadvantaged by

32. Overlooking the fact that one plaintiff was an Hispanic is an example of the extraordinary empathy exhibited by the Court's opinion focused on the white test takers who got high scores.

that decision.³³ Proof of such unequal treatment would be classic evidence of intent to discriminate in a disparate treatment case brought under preexisting law.³⁴

The problem with that analysis is that there is no evidence to support it. Justice Kennedy did not point to any evidence that the City, out of all the test takers, picked just the white test takers who scored high enough to be promoted if the test scores were used and discriminated against them rather than the larger group of high scoring test takers from all three racial groups who were adversely affected. If there was evidence to support a finding that the City intended to discriminate against only a subset of all those who scored highly enough to be promotable, that would be inconsistent with the Court's assumption that the City's decision was "well intentioned or benevolent." But, there is no indication that such evidence was in the record upon which the Court decided the case as a matter of law.

Beyond the under-inclusion of the two Hispanic test takers who would be promoted immediately if the test scores were used, there were three African-American test takers who scored high enough that they might be promoted over the life span of the test should more lieutenant and captain positions open up. These African Americans were not exactly in the same situation as the two Hispanic and 17 white test takers who would be promoted to fill existing openings, but they did lose some real chance to be promoted when the City decided not to use the tests. There is no evidence that the City had any intent to discriminate against them, even though they were disadvantaged by the City's decision.

Finding that the City made its decision "solely because the higher scoring candidates were white," without any evidence to support that conclusion, is at odds with prior law. Until *Ricci*, a finding of disparate treatment discrimination required that the challenged decision was made because of its effect on the plaintiffs, not despite it. In the context of equal protection law, the Court, in *Personnel Administrator of Massachusetts v. Feeney*,³⁵ found that an

33. The concept of "under-inclusion"—the classification covered some but not all of those who were similarly situated—is an equal protection concept. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348-53 (1949).

34. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-101 (2003); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

35. 442 U.S. 256 (1979). For a Title VII case finding no liability "because of" sex in

absolute preference for hiring military veterans at a time when men were 98% of the veterans was not intentional discrimination against women even though almost all women were disqualified if even one veteran applied for any particular job. The *Feeney* Court noted:

“Discriminatory purpose,” however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.³⁶

This is the opposite of what the *Ricci* Court did in finding the City liable where it acted “in spite of” the race of the plaintiffs. Although the City surely knew that deciding not to use the test would disadvantage the white and Hispanic test takers who would be promoted if the test were used, as well as the African-American test takers who in the future might be promoted if the test results were implemented, the evidence alluded to by Justice Kennedy appears to only support the conclusion that the City made its decision to avoid disparate impact liability to minority test takers “in spite of,” rather than “because of,” its impact on any of the high test scorers of any race.³⁷

With no evidence of animus aimed at any individuals or at the members of any racial group, the term “solely” is incoherent unless what is meant by a decision being “because of race” was that it violated a “color-blind” standard. If action taken “in spite of” its impact on some members of all three racial groups suffices to establish that the action was “because of race” of some members of all three groups that only makes sense if the “color-blind” standard is used. The “color-blind” standard appears to impose a flat prohibition on an employer acting when it knows the race of those affected, even if there is no proof that its action was intended to hurt those adversely affected because of their race.

face of an extremely strong and un rebutted statistical showing of impact, see *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1982).

36. *Feeney*, 442 U.S. at 279 (citations omitted).

37. See Sullivan, *supra* note 4, at 207 (“It seems strange to view the city of New Haven as canceling the test *because* it wanted to disadvantage the white firefighters, although New Haven certainly knew that that would be the result. A better reading of the facts (or at least a plausible one) is that New Haven acted to avoid disparate impact liability *despite* the ‘adverse effects upon and identifiable group’ of whites.” (citations omitted)).

The Court further eased the proof requirements of a disparate treatment case. Violating the *Ricci* “color-blind” standard appears to establish disparate treatment liability even if there is an affirmative finding that the motivation of the decisionmaker had nothing to do with its adverse effect on the plaintiffs challenging the decision as discriminatory. In *Ricci*, Justice Kennedy accepted, as a matter of law, that the City’s explanation for its action, which was to avoid disparate impact liability to minority group members, was the actual motivation for its decision not to use the results of the test for promotion.³⁸ But, if that explanation were true, there would be no basis for concluding that the City’s reason was “solely because the higher scoring candidates were white.” If the reason was “solely because the higher scorers were white,” it would be impossible to also conclude that the City was motivated by a desire not to create an adverse impact on the members of minority groups. Thus, there is an apparent contradiction between the finding that the City’s action was motivated by a desire to avoid disparate impact liability against minority test takers and the conclusion that the motivation for the City’s decision was “solely because the higher scoring candidates were white” if the prior distinction between actions taken “because of” versus “in spite of” still pertains.

All of this reinforces the new thrust of disparate treatment law: Liability is established to those adversely affected if it is found that the decisionmaker acted knowing the racial consequences of its decision. That remains true even if there are affirmative findings that the decisionmaker was motivated by some reason other than the intent to discriminate against the plaintiff or against anyone else. Liability attaches even in face of a finding that the motivation for the decision was “well intentioned and benevolent” and was made “in spite of” rather than “because of” its impact on the plaintiffs. All this supports the conclusion that *Ricci* establishes a “color-blind” standard of liability: Knowing the race of those affected by a decision violates that standard and anyone adversely affected by that decision can bring a *Ricci*-style disparate treatment claim.

Justice Alito, in his concurrence, which was joined by Justices Scalia and Thomas, goes much further in unlinking disparate treatment liability from any focus on the race of the individuals

38. See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682–83 (2009). While accepting that explanation as true, the Court, nevertheless, held it inadequate as a defense to plaintiffs’ disparate treatment claim.

affected. He acknowledges that the City claimed that its motive was to avoid disparate impact liability.³⁹ He calls that the decision's objective motivation, because that is the one the City announced in public and relied on as a defense to this case.⁴⁰ But he goes behind that announced motive and argues that the City advanced this disparate impact rationale as a pretext to hide its real reason, which was that the mayor was bending to political pressure in the community, particularly pressure brought by a politically powerful African-American minister.⁴¹ In other words, the hidden, but actual motivation was not an intent to discriminate against, or in favor of, any of the test takers but was made for political reasons with the result affecting all the test takers of all three racial groups, some positively and some negatively. Nevertheless, for Justice Alito that motive suffices to establish disparate treatment liability to adversely affected test takers because the political pressure was tinged with race.

If caving in to political pressure, even pressure that is racially motivated by those exerting it, is the true motivation for the City's decision, that would be, at least under preexisting law, a successful rebuttal to the claim that the City acted "solely because the higher scoring candidates were white" and would be a basis to deny disparate treatment liability to all those adversely affected by the decision. Justice Alito's reasoning in *Ricci* is at odds with *Hazen Paper Co. v. Biggins*.⁴² There, the Court, in an age discrimination case, held that an illegitimate, even unlawful, motivation to deny the plaintiff his pension was not evidence relevant to proving age discrimination in violation of the Age Discrimination in Employment Act.⁴³ If pension discrimination was the sole motivation for the employer's action, that meant for the *Hazen Paper* Court that there was no evidence supporting finding discrimination "as a result of . . . age."⁴⁴ Based on the law established in *Hazen Paper*, Justice Alito's argument would not be a basis for plaintiffs' disparate treatment claim but would appear to provide a good defense for the City.

39. *Ricci*, 129 S. Ct. at 2684 (Alito, J., concurring).

40. *Id.* at 2683–84.

41. *Id.* at 2683–88.

42. 507 U.S. 604 (1993).

43. *Id.* at 612–13.

44. *Id.* (emphasis omitted).

From the point of view of the preexisting law, the City's best defense may have been to admit that the City gave in to political pressure and that responding to that pressure was the sole motivation for its decision not to use the test scores for promotions. If accepted as true, that would undercut any basis for finding an intent to discriminate "solely because the higher scoring candidates were white" or because of the race of any of the test takers. It would have taken the case outside of Title VII.⁴⁵ Of course, decisions can be motivated by more than one factor, but there was no evidence of a factor other than racial politics and the subjective intent to *not* disadvantage African American test takers. Whether or not what Justice Alito claims was the motivation for the City's action is true, his position does not support, but rather undermines, a finding that the City acted with intent to discriminate against the *Ricci* plaintiffs, assuming the preexisting law applied. The best interpretation of Justice Alito's position is that a defendant commits disparate treatment discrimination if race enters the decisionmaking process in any way and the decision adversely affects anyone. This step—to prohibit race from ever being considered for any reason if the resulting action adversely affects anyone without regard to the race of that person—although taken by only three members of the Court, points out the extreme direction the Court appears to be taking disparate treatment law under this newly minted "color-blind" standard.⁴⁶

Even without Justice Alito's extreme position, the first three statements of Justice Kennedy's opinion support the finding that disparate treatment discrimination exists if an employer knows the consequences, in terms of the racial groups affected, of an action that it takes. This new "color-blind" standard of liability is bolstered by the Court's rejection, *sub silentio*, of much of preexisting disparate treatment doctrine that had constrained the scope of application of disparate treatment law to adverse employment decisions that were

45. Ironically, the decision not to use the test scores might be vulnerable to attack as disparate impact against the white test takers. See generally Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505 (2004).

46. Should Justice Alito's approach be extended to apply in equal protection cases, the decisionmaking by virtually every governmental actor would be subject to challenge as discrimination if the actor knew the racial consequences of its actions. That would potentially cripple the ability to govern.

based on an intent to discriminate and were "because of" and not "in spite of" the race of those adversely affected.

4. [A]fter the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results.⁴⁷

While the first three statements are grouped near the beginning of the legal analysis in the opinion, the last three come near the conclusion when Justice Kennedy is summing up why the City's action constituted disparate treatment. The fourth statement reinforces the earlier conclusion that the decisive factual finding, made as a matter of law, was that the City acted because it knew the "raw racial results" of the test and what the use of those results would mean in terms of promotions to lieutenant and captain.⁴⁸ But the City knew and acted based on the results of the test for all three racial groups—the promotion rates for African Americans and Hispanics were too low, i.e., the test resulted in disparate impact, compared to the higher scoring whites. But not all Hispanics, African Americans, or, for that matter, all whites, scored either high enough to be promotable or too low to be promoted. Acting on such "raw racial results" triggered the finding that the decision was because of race. However, the Court points to no evidence, other than the City's knowledge of the racial consequences of the action it took, that the City acted the way it did to discriminate against the white test takers at all and especially because they were white. What is true is that the City's action, which the Court found it had taken to avoid disparate impact claims by minority group members, had an inevitable effect on all the higher scoring test takers, including, but not limited to, the white test takers.

Under the *Ricci* "color-blind" standard, simply knowing the consequences of an employer's action is the harm to be prohibited by disparate treatment law. If the goal of this standard is to expunge any and all knowledge of race from governmental decision-making, then the race of any of the people affected by any particular action is not important. Where race is implicated because of the knowledge of the decisionmaker, it is irrelevant whether the action is "because of"

47. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009).

48. *Id.*

or “in spite of” the race of any affected individual: “color-blind” means taking race out of the picture entirely.

While not an affirmative action case, *Ricci* does show that acting benevolently to avoid disparate impact against the member of one racial group inevitably affects the members of all the other racial groups involved in the decision. More simply, reducing the negative impact on the promotability of minority group members has an inevitable consequence of increasing the negative impact on the majority whenever there is competition among many for only a few promotions or other benefits. The Court in *Ricci* finds that negative impact to be disparate treatment against the members of the white racial group, even if there was no intent to discriminate against them, at least as that term had been used up until *Ricci*. Presumably, actions that favor members of the white race and have negative impact on minority group members will also trigger liability if the decisionmaker knows that is the consequence of its actions. In other words, an employer is liable whichever way the decision cuts, if the decision is made when its racial consequence is known.

In sum, a “color-blind” standard prohibits decisions when the actor knows the racial consequences of its actions on members of all racial groups. With that “color-blind” standard, any person, regardless of their race, can bring an action if she is adversely affected by the employer’s decision. This is a radical expansion in the scope of application of disparate treatment law. Indeed, it makes every employment decision vulnerable to disparate treatment attack simply on the basis of a factual showing that the employer knew the racial consequences of its action. The next two statements by the Court explore whether or not this new “color-blind” standard is one of general application or if any exceptions exist.

5. The injury arises in part from the high, and justified, expectations of the candidates who had participated in the testing process on the terms the City had established for the promotional process. Many of the candidates had studied for months, at considerable personal and financial expense, and thus the injury caused by the City’s reliance on raw racial statistics at the end of the process was all the more severe.⁴⁹

49. *Id.*

This statement raises the reliance interests or the expectations of the test takers that the test results would be used to make promotions. Although the Court appears to focus on the facts supporting a finding of reliance interests by the *Ricci* plaintiffs, all of the test takers from all three racial groups invested time, effort, and money to prepare for the test. What is interesting is that the statement of the role of this reliance factor does not seem to rise to the level of an element of a *Ricci* "color-blind" disparate treatment claim. Plaintiffs' reliance made the consequences of the City's decision "all the more severe."⁵⁰ Thus, reliance may be a factor but is not always necessary to make out a claim. The fact of plaintiffs' reliance was only part of the injury resulting from the City's violation of the "color-blind" standard thus adding to the severity of the consequences. Based on that, it can be argued that injury would have occurred even if there were no reliance interest established on the part of the adversely affected firefighters. If the underlying harm that is caused is the violation of the "color-blind" standard, then the defeated expectation interest that the "color-blind" standard would be used is important only because that shows who was adversely affected by the action.

The scope of application of this *Ricci* "color-blind" standard will depend significantly on whether this reliance aspect of the case becomes an element that must be proved to establish a *Ricci* disparate treatment claim. The alternative, as it appears from Justice Kennedy's wording, is that reliance is only a factor that is used to weigh the severity of the discrimination.⁵¹ If reasonable expectations or reliance becomes a separate element needed to be proven to establish *Ricci* disparate treatment discrimination, the *Ricci* "color-blind" standard would likely be of more limited application. Suppose that after *Ricci*, a city, in deciding how to promote firefighters to lieutenant and captain, announced to the potential test takers that it reserved the right to review the test scores before deciding to use them. The stated reason for that reservation is to "ensure that all groups have a fair opportunity to apply for promotions and to

50. *Id.*

51. Presumably, the severity issue would be relevant to the remedy issues of compensatory and punitive damages. *See generally* 42 U.S.C. § 1981(a) (2006) (allowing a civil rights plaintiff to recover punitive damages against certain employers if the employer engaged in a discriminatory practice with malice or reckless indifference to the protected rights).

participate in the process by which promotions will be made.”⁵² Similarly, post-*Ricci*, well-advised employers may well amend their employment policy manuals to include a provision that, because of its obligations under antidiscrimination laws and its desire “to provide a fair opportunity for all individuals,”⁵³ it reserves the right to review the results of any employment practice if the use would result in disparate impact on protected groups and to remedy that impact if necessary. Announcements or policy manual statements along those lines would potentially undermine any expectations that the results of the implementation of any employment practice would actually be used or be used in the form originally contemplated.

Any efforts, in terms of time, effort, and money, to establish a basis for a reliance element would come up against the employer’s announced policy that it is not reasonable for the employees to have any expectations based on what they do. Employees, having notice of such a reservation, arguably lack any basis for a “legitimate expectation not to be judged on the basis of race,”⁵⁴ even in the indirect sense that the actor knew the racial consequences of what she was planning to do. Given the deference that the Court has given employer promulgated policies, even in the context of adhesion contracts,⁵⁵ *Ricci* may be rendered of little effect, except as a trap for unwary employers who are poorly advised, should reliance morph into an element of a *Ricci* “color-blind” disparate treatment claim.

It would be difficult to predict whether the Court’s deference to private ordering by employers would hold up in a case, like *Ricci*, where the Court would have strong empathy for the plaintiffs. Assuming facts just like *Ricci* but with a clear statement that those taking the test should not have any expectation that its results would be used for promotions, the Court would be faced with a collision of

52. *Ricci*, 129 S. Ct. at 2677.

53. *Id.*

54. *Id.*

55. See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (discussing that an age discrimination claim under the ADEA is subject to compulsory arbitration pursuant to an arbitration agreement in a securities registration application). More recently, the Court has abandoned even the need for the fig leaf of consent in adhesion contracts and has forced employees into collective bargaining agreement arbitration to which they gave no consent at all. See *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009). See generally Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825 (2010) (critiquing *Pyett*).

two of its policies: one is the newly minted "color-blind" standard of *Ricci* and the other would be its high deference to employer private ordering of the employment setting.⁵⁶ The race of those adversely affected by a decision not to use the test scores may be very relevant to the outcome.⁵⁷ Justice Kennedy, for the majority, appeared to emphasize the equities of the high scoring white firefighters.⁵⁸ Justice Ginsburg agreed that empathy toward the white test takers was important but she also stressed the equities of the minority firefighters who had long been victims of exclusion and discrimination by the New Haven fire department.⁵⁹ All the test takers, without regard to their race or to how well they scored on the test, had invested time, effort, and money preparing to take the test. It would be highly ironic if racially selective empathy factored into the application of what is supposed to be a "color-blind" standard.⁶⁰

Even in absence of a disclaimer in an employment policy manual, the instances in which employees might be found to have established reliance interests may be limited. Although posting the scheduling of a promotion test at least lets potential test takers know of the test and makes "clear the[] selection criteria,"⁶¹ employers quite frequently undertake the implementation of employment practices without notice of any kind to the potentially affected employees. In

56. *Ricci*, 129 S. Ct. at 2677.

57. This has led Primus to make an interesting argument: the context, particularly the race of the plaintiffs, of the next disparate treatment case to get before the Supreme Court may determine the scope of the *Ricci* "color-blind" standard. See Primus, *supra* note 4. If the next case getting to the Court is brought by minority plaintiffs, Primus suggests that the Court might stop short of clearly adopting a general "color blind" standard. But, he thinks, if the case is brought by whites, the Court may take that step. This goes to the point raised by Harris & West-Faulcon, *supra* note 4, that the Court has refocused discrimination law to protect whites.

58. See *Ricci*, 129 S. Ct. at 2677.

59. *Id.* at 2690–91 (Ginsburg, J., dissenting).

60. See Harris & West-Faulcon, *supra* note 4. A backdrop is the role of the unconscious in shaping the perceptions of everyone, Supreme Court Justices included. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995). Recently this issue has focused on the use of evidence of "implicit bias" by way of expert testimony. See generally David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389 (2008); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM. L. REV. 37 (2009). For a broader context, see Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529886.

61. *Ricci*, 129 S. Ct. at 2677.

those situations, it would be difficult for an employee bringing a *Ricci* “color-blind” case if she had to prove reliance as an element. A good example would be promotions. Unlike civil service systems like the one involved in *Ricci*, many, maybe most, employers undertake to evaluate employees for purposes of making promotion decisions without even announcing that that is what they are doing, much less making clear the selection criteria that are being used.⁶² Another example is hiring where criteria are frequently not set forth or not set forth very clearly. If reliance is an element, it could be argued that the affected employees in these situations lack any reliance basis that might trigger the *Ricci* “color-blind” standard.

Perhaps the reason for the qualified language used by Justice Kennedy to describe the role of the plaintiffs’ reliance interests is that the Court was bolstering its conclusion that these plaintiffs were actually adversely affected by the decision not to use the test results. Some courts find that only “ultimate” employment decisions, such as discharges, satisfy the adverse employment action element of the disparate treatment law preexisting *Ricci*.⁶³ Deciding not to implement the results of a promotion procedure would not satisfy those courts. Justice Kennedy may have been responding to the notion that nothing actually happened to these plaintiffs, at least nothing sufficient to constitute an adverse employment action. Where a more clear-cut impact resulted from the challenged decision,⁶⁴ there would be no need to point out that the plaintiff had established a reliance interest.

Finally, while the Court emphasized the reliance interests that the *Ricci* plaintiffs had established by their long, hard, and expensive preparation for the promotion test, the language Justice Kennedy used to describe this interest did not turn on reliance interest in the sense of the effort test takers took to prepare for the test. Instead, there was a general statement of “an employee’s legitimate

62. *Dukes v. Wal-Mart, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), involves a class action challenge to the promotion practices of the employer claiming that those practices were unstructured and without clearly stated criteria which allowed supervisors to discriminate consciously and unconsciously in making promotion decisions.

63. For an excellent analysis of the issue, see Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998).

64. See generally *Connecticut v. Teal*, 457 U.S. 440 (1982) (discussing disparate impact plaintiffs who were rejected from further participation in a hierarchical promotion system because they failed the written test that they challenged).

expectation not to be judged on the basis of race.”⁶⁵ Given the general prohibition of race discrimination in employment established in Title VII and in 42 U.S.C. § 1981, it can be argued that all employees, all the time, have a legitimate expectation not to be discriminated against in their employment on the basis of race. If employees always have such an expectation, then reliance would not be a separate element of a *Ricci* claim just as it is not an element of any other theory of Title VII liability.

The development of this reliance issue will, in the future, be one of the biggest variables in the ultimate scope of *Ricci* “color-blind” disparate treatment claims of discrimination. The soft language used in describing the issue suggests that it is not to be taken as too significant of an issue. But that same soft language opens up a range of discretion, the exercise of which may depend in fact on the strength of the particular reliance interests that plaintiffs can prove or the empathy they receive from a court.

6. Nor do we question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made. But once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee’s legitimate expectation not to be judged on the basis of race. . . . Title VII does not prohibit an employer from considering, before administering a test or practice, how to design that test or practice in order to provide a fair opportunity for all individuals, regardless of their race.⁶⁶

Unlike the ambiguity as to the role of reliance, this statement does appear to establish a limit on the scope of application of the *Ricci* “color-blind” standard of disparate treatment discrimination: the employer may, during the initial design phase setting up a new employment practice, investigate the potential consequences that its use might produce, including its consequence in terms of race, in

65. *Ricci*, 129 S. Ct. at 2677.

66. *Id.*

order to allow the employer to plan, in light of that knowledge, how to provide a fair opportunity for everyone.⁶⁷

Justice Kennedy does not explicitly say that during the design phase the employer is safe even though it knows the race of those potentially affected. But he does say that the employer can design its employer practices “in order to provide a fair opportunity for all individuals, regardless of their race.”⁶⁸ The relatively clear import of what he said is that during the design phase of an employment practice, the employer can know and take account of the racial consequences of its ultimate use of that practice. Thus, the Court did not “question an employer’s affirmative efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made.”⁶⁹ Since employers are prohibited by Title VII from engaging in disparate impact discrimination, one aspect of providing a fair opportunity to all is to avoid unjustified disparate impact against the members of any racial group, including, perhaps, whites.⁷⁰

It appears to be Justice Kennedy’s view that an employer does not violate the “color-blind” standard if, before a practice is actually used, the employer reviews the likely racial consequences of the employment practice in order to shield itself from disparate impact liability and to provide equal opportunity to everyone. *Ex ante*, it is,

67. Justice Scalia, in his concurring opinion, appears not to accept the design phase exception that the Court adopts:

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level.

Id. at 2682 (Scalia, J., concurring). For Justice Scalia, the design phase is no different for purposes of disparate treatment liability because it is “just one step up the chain.” *Id.* Further, considering the racial consequences on all the racial groups involved violates Title VII because it is “consideration of race on a wholesale, rather than retail, level.” *Id.* Thus, Justice Scalia would not accept the “visible-victims” interpretation of *Ricci* advanced by Richard Primus. Primus, *supra* note 4, at 1369.

68. *Ricci*, 129 S. Ct. at 2677 (majority opinion).

69. *Id.*

70. Title VII protects everyone from race discrimination. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). For an argument that, to survive equal protection attack, the disparate impact provisions of § 703(k) of Title VII have to apply to whites as well as members of minority groups, see Sullivan, *supra* note 45.

of course, not always clear whether the future use by an employer of a particular practice will, or will not, result in disparate impact discrimination. But, it appears that investigating the potential impact, which requires that the employer know the racial groups that would be subjected to the practice and predict the impact upon them, does not trigger disparate treatment discrimination. Another way of looking at why racial consequences may be investigated during the design phase is not that this period is an exception to the "color-blind" definition of the intent element of a disparate treatment claim but instead it reflects that, at this stage, no one has yet suffered an adverse employment action, a separate element in a disparate treatment case.⁷¹

IV. THE ELEMENTS OF A *RICCI* "COLOR-BLIND" STANDARD OF DISPARATE TREATMENT

Where it applies, *Ricci* does seem to have tremendous potential for changing the approach to proving intentional discrimination that can work to the advantage of plaintiffs generally: A plaintiff can establish disparate treatment liability simply by proving that (1) the defendant knew the racial consequences of its decision—violating "color-blindness" is equated with the traditional intent to discriminate element; (2) it then made that decision in light of that knowledge—making the decision "because of race"; and (3) the plaintiff suffered an adverse employment action taken by the defendant.

Proving that the defendant knew the racial consequences of its action either satisfies the traditional intent to discriminate element, or replaces it with an easy to prove factual question. Traditionally, intent to discriminate has been the hardest element of a disparate treatment case to prove.⁷² In a *Ricci* "color-blind" case, that element becomes simply a question of the defendant's knowledge, without more, of the racial consequences of its potential action.⁷³ Not only is

71. See Sullivan, *supra* note 4, at 208.

72. For a description of the various ways of proving intent to discriminate to which the *Ricci* approach should be added, see Zimmer, *supra* note 20.

73. Even under the newly announced and more stringent fact pleading requirement announced in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a plaintiff relying on a *Ricci* "color-blind" claim would merely have to plead that the defendant knew her race when it made the decision she is challenging as discriminatory. Pleading sufficient facts to support the intent to discriminate element under preexisting law would appear to be much more difficult.

plaintiff's burden of proving intent vastly simplified, "because of race" is simply established by that knowledge followed by a decision by the defendant. In other words, acting while knowing the racial consequences of a decision equals acting "because of race."⁷⁴ The Court's approach knocks out any need to focus on linking defendant's intent to the plaintiff and her race. "Because of race" is satisfied simply by the fact that the defendant knew the racial consequences of the situation and then acted, even if the effect on the plaintiff was "in spite of" her race, with no need to prove it was "because of plaintiff's race."

Under prior law, the "because of" race element was used in the sense that the defendant's intent had to be shown to be focused on the race of the plaintiff. Now, acting "because of race" in the abstract sense of knowing the consequences in terms of the race of those affected, without any focus on the plaintiff or her race, suffices to establish the second element of a *Ricci* case. The third element, that the plaintiff suffered an adverse employment action, may even have been made easier for plaintiffs. While the Supreme Court has yet to rule on the question, there is some authority among the lower courts that only serious employment actions—some say "ultimate" ones like discharge—are sufficiently adverse to sustain a disparate treatment action.⁷⁵ In *Ricci*, nothing actually happened to the plaintiffs when the City decided not to use the test scores. What they lost was a promotional opportunity, which, presumably, would be replaced with a different procedure that would likely give them another opportunity to be promoted. In other words, it may be that all they suffered was a delayed promotion or a lowered chance for promotion.⁷⁶

74. In his separate concurring opinion, which suggests that the disparate impact provisions of antidiscrimination laws may violate equal protection, Justice Scalia appears to confirm the ease with which disparate treatment can be established: "Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory." *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). In *Ricci*, the City put "a racial thumb on the scales" and evaluated the racial outcome if the test results were used. Acting on that knowledge was disparate treatment discrimination that the *Ricci* plaintiffs could challenge because they were adversely affected by it.

75. See *Minor v. Centacor, Inc.*, 457 F.3d 632 (7th Cir. 2006), for a description of some of the "adverse employment action" jurisprudence.

76. See Sullivan, *supra* note 4, at 208.

In other words, *Ricci* can be argued to have established disparate treatment as a strict liability offense: Liability attaches by showing the employer violated the "color-blind" standard by taking action knowing the race of those affected, which action adversely affected an employee or applicant. If the City in fact made its decision to avoid disparate impact liability to minority test takers, as the Court found as a matter of law, or, if that explanation was a pretext for a decision to give in to community political pressure as argued by Justice Alito,⁷⁷ that would make no difference for finding liability under this new "color-blind" standard. Since the harm is acting with knowledge of the racial consequences, it makes no difference even if there was not any focus on the white test takers who got high scores on the test, on the *Ricci* plaintiffs, or on the two Hispanics and three African Americans who were disadvantaged by the decision not to use the test scores for promotion. If disparate treatment discrimination is now based on strict liability, all of those issues that have proved so daunting under preexisting disparate treatment law are rendered irrelevant at least to the extent this new "color-blind" standard applies.

While the role of a reliance or expectations factor is not clear, there appears to be one exception to the scope of the *Ricci* "race-blind" standard, and that is the narrow ground that during the design phase of an employment practice an employer can investigate, come to know and to act on its potential racial consequences. Presumably, this is an affirmative defense to be proven by the defendant. Up to that point, no one has been adversely affected. Once the design phase of the employment practice is completed and it is set in place, thereafter the knowledge of the racial consequences is enough, by itself, to establish that the decision and the resulting action was "because of race." Those who could show that they were adversely affected by that decision—here the *Ricci* plaintiffs, among others—would establish liability. While apparently not an element of a *Ricci* "color-blind" disparate treatment claim, the fact that the plaintiffs acted in reliance on the City's plan to use the test results for promotions adds to the injury flowing from a decision that was made "because of race."

In sum, the Court appears to have created a new, "color-blind" standard of disparate treatment discrimination that imposes a prima

77. Only Justices Scalia and Thomas joined in Justice Alito's concurring opinion.

facie case of strict liability on an employer who acted knowing the race of those affected. The Court appears to have recognized two defenses that would overcome the prima facie case: (1) if the use of race took place during the design phase of an employment policy or practice or (2) if there is a “strong basis in evidence” that the defendant would be liable for disparate impact liability under Title VII.⁷⁸

V. ADDITIONAL NEW HAVEN FIREFIGHTER TESTING CASES

Two more cases, one pending in court and the other at the E.E.O.C. administrative stage, have arisen because the City has now implemented the test results to fill the existing lieutenant and captain openings.⁷⁹ Trying to apply the new *Ricci* “color-blind” standard to them may help to develop the architecture of this new disparate treatment theory. One case that was already brought in federal court, *Briscoe v. City of New Haven*,⁸⁰ was a disparate impact challenge to the weight given to the written and oral portions of the test. Plaintiff, an African-American firefighter who took the test at the same time as the *Ricci* plaintiffs, claims that he would have been promoted if the weighting formula had been modified because the 60/40 formula favoring the written over the oral component had a disparate impact on African-Americans. He has now been adversely affected because the City has used the test results for the available promotions to lieutenant and captain positions. Further, he claims that, based on prior experience using the same weighting formula,

78. Even though using the test results would result in a prima facie case of disparate impact discrimination, the Court found that the City failed to satisfy the “strong basis in evidence” defense to disparate treatment liability because the test satisfied the job-related and consistent with business necessity defense in §703(k) and disparate impact plaintiffs would not be able to show that there was an available alternative that the City had failed to use. *Ricci*, 129 S. Ct. at 2677–78.

79. See Daniel Schwartz, *Wait, There’s ANOTHER Firefighter Race Discrimination Case in New Haven? (Yes, and the Conn. Supreme Court Just Ruled On It)*, CONN. EMP. L. BLOG, Dec. 9, 2009, <http://www.ctemploymentlawblog.com/2009/12/articles/decisions-and-rulings/wait-theres-another-firefighter-race-discrimination-case-in-new-haven-yes-and-the-conn-supreme-court-just-ruled-on-it/>.

80. No. 3:09-cv-1642, 2010 WL 2794212, at *8 (D. Conn. July 12, 2010) (case dismissed because “the Supreme Court in *Ricci* specifically anticipated and explicitly foreclosed subsequent disparate impact suits” against the City based on the test that was at issue in that case). The order of the Supreme Court in *Ricci* is an example of the interference with the proper discretion of district courts that is criticized as excessive judicial activism by Paul Gewirtz, *Supreme Court Press*, N.Y. TIMES, Op-Ed, Tuesday, July 6, 2010, at A-19.

the City knew, even before it decided to use a written test for promotions, that this 60/40 weighting would result in a disparate impact on minority group members. Nothing was done about the weighting issue because it was a long-standing feature of the collective bargaining agreement between the City and the firefighters' union.⁸¹

Briscoe's claim of impact is that, of the seventy-seven candidates for the lieutenant position, he scored the highest on the oral part of the exam, but that his overall score using the 60/40 weighting left him twenty-fourth on the list and thus not eligible to be promoted. His complaint alleges:

The City did not believe that the 60 percent weighting that it required was job related, and it knew . . . that the weighting would have a disparate impact on African-American candidates: for example, on the lieutenant exam immediately preceding the 2003 exam, the African-American candidates as a group performed substantially better than the white candidates on the oral exam, but they were scored much lower overall because of the 60 percent weighting given to the written test.⁸²

Briscoe raises some interesting questions. It appears that plaintiff framed his approach in *Briscoe* to avoid any preclusive effect from one rather obtuse sentence of Justice Kennedy's opinion dealing with any subsequent disparate impact action arising from the test at issue in *Ricci*. That sentence is in the second to last paragraph:

If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.⁸³

81. The fact that the City had a contractual obligation to the union to use the 60/40 weighting formula would not be a defense to a Title VII claim.

82. Complaint for Damages and Injunctive Relief, ¶ 5, No. 3:09-cv-1642 (D. Conn. filed October 15, 2009).

83. *Ricci v. DeStafano*, 129 S. Ct. 2658, 2681 (2009). The district judge relied on this sentence to dismiss Briscoe's suit, *see supra* note 78. For an extended discussion on the meaning of this sentence for the future of disparate impact law, see Seiner & Gutman, *supra* note 4.

While this is a disparate impact case, the *Briscoe* claim is focused on the time period before the test was administered, i.e., during the design phase. In contrast, *Ricci* focused on the implementation of the test and its results. The potential disparate impact of the weighting formula was not at issue in *Ricci*.⁸⁴ Why Justice Kennedy's sentence is inscrutable is that, in *Ricci*, seventeen white and one Hispanic plaintiffs ultimately prevailed by claiming that they were victims of intentional disparate treatment discrimination when the defendant decided not to use the results of its promotion procedure. The City's defense was that using the test scores would cause a disparate impact on minority test takers. But the African-American, Hispanic, and white test takers who were benefited by the City's decision *not* to use the test scores, including *Briscoe*, were not party to *Ricci*. Generally, only parties to an action are bound by a judgment in that action but, nevertheless, there is an argument that the Civil Rights Act of 1991 provides for preclusion.⁸⁵ The

84. The only reference to the weighting issue in Justice Kennedy's opinion is as to the question of whether the City had a strong basis in evidence that it would be liable for disparate impact because minority group challengers to the implementation of the test would succeed in proving, pursuant to § 703(k)(1)(A)(ii), that a different weighting formula was an alternative employment practice and the "employer refuses to adopt [that] available alternative employment practice." *Ricci*, 129 S. Ct. at 2673.

85. In dismissing *Briscoe*, the court did not address the procedural issues involved; rather, it simply did what the Supreme Court said to do: dismiss all other disparate impact cases based on the *Ricci* test. See *supra* note 78. For a discussion of those procedural issues, see Sullivan, *supra* note 4, at 213-214. The preclusion issue ultimately turns on the impact of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which overruled *Martin v. Wilks*, 490 U.S. 755 (1989). Ironically, *Martin v. Wilks* was another firefighters' case, again involving white plaintiffs. The white firefighters were negatively affected by actions taken by the City of Birmingham to implement a consent decree it had agreed to with the N.A.A.C.P. that settled a discrimination claim by African-American firefighters. The actions of the City that the white plaintiffs' challenged in *Martin v. Wilks* were those that benefited black firefighters, which they claimed disadvantaged them. Because the white firefighters were not party to the action leading to the consent decree nor to the decree itself, the Court found that they were not precluded by that decree from bringing a discrimination action. But *Martin v. Wilks* is no longer good law. See *Landgraf v. USI Film Products*, 511 U.S. 244, 249 (1994) (recognizing that the Civil Rights Act of 1991 overruled *Martin*).

The Civil Rights Act of 1991, 42 U.S.C. §2000-e(n), provided two scenarios by which these disparate impact plaintiffs might be barred. The first is whether they had "actual notice of the proposed judgment" that "might adversely affect their interests" and they had a "reasonable opportunity to present objections." Because the Supreme Court granted summary judgment in *Ricci*, which was the first time the City lost, there was no opportunity for the disparate impact plaintiffs to present their objections. But the question would be whether the potential for adverse action resulting from the *Ricci* case as it was working its way up to the Supreme Court should have clued them to the risk that their interests "might" be adversely affected. In other words, a lot depends on the meaning given the word "might."

allegations in *Briscoe's* claim is that the events he is challenging all occurred (1) before the test was finalized or administered; (2) before any potential test takers had invested time, effort and money to prepare for a test that had yet to be implemented in any way; (3) before the consequences in terms of the scores of different racial groups were known; and (4) before the City decided not to use the test results because it knew the racial consequences of using or not using the scores.⁸⁶ If the "design" exception to the *Ricci* "color-blind" standard is found to apply, then the fact that the City knew the potential racial consequences in terms of the likelihood that the 60/40 weighting of the written and oral scores would produce a disparate impact, would not amount to disparate treatment discrimination.⁸⁷ To the extent that reliance or expectation interests are relevant, the City's determination of how the two aspects of the test would be weighted occurred before any expectations had been established by any of the firefighters who were interested in attempting to be promoted. Thus, disparate impact law would seem to apply in *Briscoe* in its traditional way.⁸⁸ In other words, *Briscoe* is

Alternatively, the question would be whether the City, when defending against the white plaintiffs' disparate treatment claim, had "adequately represented" the disparate impact claims of these plaintiffs. The City tried to defend against a judgment on the disparate treatment ground by relying on the potential disparate impact liability if it had used the test scores. While disparate impact would in some sense be the same legal grounds whether it was used offensively or defensively, it seems odd that the earlier legal actions of the party these plaintiffs were now suing, the City, would be the basis for precluding their suit. It would seem there are due process issues of allowing the fox to guard the chicken coop. The consequence of the dismissal of the *Briscoe* case was that the fox apparently had done a good enough job protecting the chickens, in this case, *Briscoe* and other minority firefighters now adversely affected because the City made the promotions based on the test results have lost their chance to challenge that implementation, at least on disparate impact grounds.

86. See *Briscoe v. City of New Haven*, No. 3:09-CV-1642 (CSH), 2010 WL 2794212, at *4 (D. Conn. July 12, 2010).

87. If the design phase exception to the *Ricci* "color-blind" standard does not apply, the City could try to defend its action from attack in *Briscoe's* disparate impact claim by arguing that the disparate impact provisions in § 703(k) of Title VII, 42 U.S.C. §2000e-2(k), are unconstitutional because they require an employer to know the racial consequences of its use of employment practices with that knowledge the basis for a finding that equal protection has been violated. See *infra* Part VI. It would be highly ironic if the City that tried to defend its action in *Ricci* on disparate impact grounds would now turn around and challenge the constitutionality of disparate impact law.

88. Ironically, by focusing his disparate impact claim on the design phase of the promotions procedures to avoid the risk of preclusion, *Briscoe* may have lost a *Ricci* "color-blind" claim of disparate treatment discrimination because such a claim does not apply to the design phase of employment practices. As to his disparate impact claim, it would be held timely because the implementation of a practice that has a disparate impact can be the basis for a new

an example of the design phase exception to the *Ricci* “color-blind” standard of disparate treatment discrimination.

There is another claim arising out of the test that produced *Ricci*.⁸⁹ That claim, by a number of African-American test takers who took the *Ricci* test, is that the City’s recent use of the test results to promote firefighters to lieutenant and captain positions is disparate treatment discrimination.⁹⁰ By claiming disparate treatment discrimination, such a claim appears to escape any preclusive effect, at least any based on Justice Kennedy’s rather obscure suggestion that disparate impact actions flowing out of the *Ricci* facts might be barred.⁹¹ Further, the *Ricci* “color-blind” approach to proving disparate impact appears to apply rather readily. Based on the same evidence relied on in *Ricci*, the six groups of test takers are the same. All that has changed is that the valence has flipped: Those white, Hispanic and African-American test takers who were advantaged by the earlier decision of the City not to use the test scores, including these claimants, are now adversely affected because they will not be promoted during the life span of the test.

Since the test results have now been used, those with high scores on the test—some of whom were plaintiffs in *Ricci*—have been promoted. Assuming there is no new evidence of subjective intent to discriminate because of the race of anyone, the question is whether the City is liable for intentional disparate treatment because it has now used the test scores for promotions knowing the racial consequences of its action. The answer seems to be yes since all three elements of the *Ricci* “color-blind” test of disparate treatment are satisfied: (1) the defendant knew the racial consequences of its decision, (2) it made the decision to use the test scores with that knowledge thus making the decision “because of race,” and (3) the

charge of discrimination. See *Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010).

89. The Connecticut Employment Law Blog reported that African-American firefighters, who took the test at issue in *Ricci* but did not score high enough to be promoted, have now filed E.E.O.C. charges claiming disparate treatment and impact discrimination because those test results have now been used. Daniel A. Schwartz, *Black Firefighters Move to Intervene in Ricci v. Destefano*, CONN EMP. L. BLOG (Nov. 17, 2009), <http://www.ctemploymentlawblog.com/2009/11/articles/decisions-and-rulings/black-firefighters-move-to-intervene-in-ricci-v-destefano>.

90. These African-American plaintiffs also claim disparate impact discrimination.

91. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009). It may be, however, that the lower courts will read the majority as telling them not to allow any further litigation over the test challenged in *Ricci*.

plaintiffs suffered adverse employment impact because they have not been and will not be promoted. The fact that the adverse impact on these plaintiffs was "in spite of" and not "because of" their race should make no more difference for these plaintiffs than it did for the *Ricci* plaintiffs.

The City could try to shift its position to raise as a defense the basis for its liability as asserted by Justice Alito in his concurrence: That all of its decisions about the entire promotion process were motivated by factors that had nothing to do with the race of any of the plaintiffs. The argument would be that the decision not to use the test was solely motivated by community political pressure put on the mayor. Now, the City is solely motivated to act by its need to implement the remedy for the *Ricci* plaintiffs.⁹² While the majority did not address this issue, Justice Alito's concurrence rejects that as a defense to a *Ricci* "color-blind" action. Acting with knowledge of the racial consequences—violating the "color-blind" standard—is the key element. It is irrelevant that the actual motivation was not aimed at anyone affected by the action but was the result of things that had nothing to do with the race of the employees subject to the decision. That view is only the view of three of the five Justices in the *Ricci* majority and so *Ricci* did not decide that issue but the City might

92. The City could try to defend its use of race by claiming that it was justified by a compelling governmental interest to remedy its own discrimination. See *United States v. Paradise*, 480 U.S. 149 (1987). If successful, this defense would have the odd consequence of privileging one group of victims of the City's disparate treatment—the *Ricci* plaintiffs who were among the first group adversely affected by the City's violation of the "color-blind" standard—over those later affected by a subsequent decision. This would also involve a violation of the "color-blind" standard, by providing a remedy only to the first group affected by the initial decision. What makes this seem odd is that it would leave it to the defendant to decide which group would receive a remedy for its disparate treatment discrimination against both groups.

If, in the first instance in *Ricci*, the City had decided to use the test scores for promotions while knowing the racial consequences of that decision, those not promoted could challenge that decision as disparate treatment discrimination. If successful, those plaintiffs would be entitled to a remedy, even though implementing that remedy would entail another action violating the "color-blind" standard. The *Ricci* plaintiffs, along with other test takers with high enough scores to be promoted, would be promoted and those adversely affected by the decision to use the test results would also be entitled to a remedy for the City's disparate treatment discrimination.

If, as happened, the City decided not to use the test scores, it is liable to the *Ricci* plaintiffs. That would shield the City from disparate treatment liability to those adversely affected by that decision because the use of race to remedy disparate treatment to the *Ricci* plaintiffs would be justified by the compelling governmental interest in remedying discrimination.

raise for this new defense. It would, however, be ironic if a court would now accept as a defense for the City what three justices viewed as a basis for its liability in *Ricci*.

Finally, the claim by these African-American test takers does not seem to be within the design phase exception that the Court created along with its new *Ricci* “color-blind” approach to disparate treatment discrimination. Just like the plaintiffs in *Ricci*, these plaintiffs are challenging an action the City took well after the design phase of the employment practice was over. Further, even if reliance would be construed to be an element of a *Ricci* “color-blind” case, these plaintiffs had the same reliance and expectation interests as the *Ricci* plaintiffs. They also had spent time, effort, and money preparing to take the test in the first place and they had the same “legitimate expectation not to be judged on the basis of race.”⁹³ If the *Ricci* plaintiffs’ expectations of not being judged on the basis of race were defeated when the City decided not to use the tests to avoid disparate impact liability, then these plaintiffs’ expectations of not being judged on the basis of race were also defeated now that the City has decided to use the tests since the City knew the racial consequences of using the test.⁹⁴ Thus, *Ricci*’s “color-blind” standard applies and the City would seem to be liable under it.

VI. CIVIL RIGHTS ADVOCATES USE OF THE *RICCI* “COLOR-BLIND” STANDARD

If the *Ricci* “color-blind” standard applies to this new disparate treatment case as it did in *Ricci*, this makes the City damned for having decided, in the first instance, not to use the test scores because it knew the racial consequences of that decision and damned now for using the test results, again because it knew the racial consequences of that decision.⁹⁵ At first blush, that may seem unfair or somehow wrong. Although *Ricci* is a substantial change in antidiscrimination law, the damned-if-you-do, damned-if-you-don’t outcome is exactly the way a “color-blind” standard appears to work:

93. *Ricci*, 129 S. Ct at 2677.

94. Unlike in *Ricci*, where the decision makers for the City did not know the test scores of the individual test takers but only the consequences in terms of the three different racial groups, when the City used the test results it did know the individual identity of the test takers, including the racial group to which each belonged.

95. It is also possible that the City could be damned a third time by losing the *Briscoe* disparate impact case.

The violation simply is acting knowing the racial consequences of that action.

How the "color-blind" standard works may be seen by looking at the plurality part of Chief Justice Robert's opinion in the school assignment case, *Parents Involved*, where he appeared to announce a "color-blind" standard to be applied in all pupil assignment decision making: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁹⁶ This seems a slight variant of simply describing the "color-blind" standard that *Ricci* has now established as to the meaning of disparate treatment.⁹⁷ Looking to the outcome in *Parents Involved*, the reason that the section of Chief Justice Robert's opinion is only a plurality opinion is that Justice Kennedy did not agree to it. Thus, Justice Kennedy's concurring opinion in *Parents Involved* is the holding of the Court. Unlike the absolute, across-the-board "color-blind" standard asserted by the Chief Justice, Justice Kennedy provides an exception to the general application of that standard that foreshadows the approach he takes for the Court in *Ricci*. He makes the following point in *Parents Involved*:

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.⁹⁸

Thus, in both *Parents Involved* and *Ricci*, race conscious decision making does not constitute a violation either of equal protection or disparate treatment law as long as that consciousness occurs during the planning stage of school assignments or of employment promotion procedures. Race consciousness, at least by itself, is not

96. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

97. For an argument that post-*Ricci* disparate treatment and equal protection standards are the same, see Primus, *supra* note 4, at 1345–46.

98. 551 U.S. at 788–89 (citation omitted).

prohibited early on, before identifiable individuals know that they are affected.

Richard Primus calls this his “visible victims” reading of *Ricci*.⁹⁹ Primus suggests that this may reflect an underlying equal protection value and is not merely a compromise position of the Justice who straddles the middle of a sharply divided Court. Primus argues that “[e]qual protection aims to reduce the public salience of race. When considering the constitutionality of a race-conscious intervention, it is therefore useful to ask whether the measure will reduce or exacerbate the racial divides within the American public.”¹⁰⁰ When individuals know that they are likely to be affected by action taken when the racial consequences are known, that, for Primus, increases the salience of race. That exacerbates, rather than minimizes or reduces, the racial divide in our society. Accordingly, the salience of race is increased when students (and their parents) know that they were individually assigned to one particular school rather than another because of their race and that students of another race are assigned to that first school rather than the second one because of their race. Similarly, the salience of race increases when workers take a promotion test but have their expectations for the use of the test deflated when the test scores are not used because of the impact on some other racial group.

To the extent this reduction of the salience of race rationale is now the driving force of equal protection as well as disparate treatment law, racial salience is increased, not reduced, when members of different racial groups are affected by an action taken with consciousness of the racial consequences.¹⁰¹ This helps explain the *Ricci* “color-blind” standard as well as the design phase exception that Justice Kennedy establishes to that standard. The planning process used to decide where to build schools and how to draw pupil assignment zones as well as the design phase of new employment practices, such as promotion procedures, does not have

99. See Primus, *supra* note 4, at 1369.

100. *Id.* at 1371.

101. An interesting empirical question would be to measure the intensity of reaction to a decision, for example, not to promote firefighters to lieutenant and captain positions because of budgetary problems of the employer versus the reaction in a situation like *Ricci*. If the reaction is markedly more intense in a *Ricci*-type scenario than in the budget crunch situation, this would seem to support Primus’ theory that race is a particularly hot issue. The question then would be whether a “color-blind” standard in fact would reduce the salience of race.

any individuals identified by their race who are affected by any action that is taken at that time.

Once the schools are built and their assignment zones established, the assignment of individual students to particular schools will more likely be perceived as being because of the assignment plan and not "because of the race" of individual students, even though race entered into the planning process. Similarly, with a promotion procedure, the design phase does not involve any individualized treatment based on race and so there is a reduced risk that race will be salient, even if the design takes into account potential racial consequences. Once the procedure is set in place, then those who are promoted expect to be promoted by the use of the test results and will view attempts at that stage to ameliorate any disparate impact to be race-based. Thus, at the individual pupil assignment or the implementation of the promotion procedures stages, a "color-blind" standard sets in to minimize the focus on issues of race. At that point, members of all races have "legitimate expectation[s] not to be judged on the basis of race" and so any action based on knowledge of its racial consequences violates the "color-blind" standard and makes the actor liable to anyone adversely affected by the action.¹⁰²

This may explain why in *Ricci* Justice Kennedy dropped the preexisting requirement that, to prove disparate treatment discrimination, the plaintiff had to prove that the defendant's action was "because of" and not merely "in spite of" plaintiff's race. "In spite of" now suffices because the harm done by violating the "color-blind" standard is that a decision was made that involved race, even if that use of race does not involve any focus on the plaintiff or her race. A "color-blind" standard prohibits the consideration of race when an action is "because of" the race of anyone, or of race in the abstract, not just because of the race of a particular person or group of people. To evoke a description from a long gone era, plaintiffs who have been adversely affected because a defendant acted knowing the race of affected individuals become "private attorneys general"¹⁰³

102. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2677 (2009).

103. See *Newman v. Piggie Park Enter.*, 390 U.S. 400, 401-02 (1968) ("A Title II [of the Civil Rights Act of 1964] suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority."). Professor Kerri Stone describes *Ricci* as an expansion of

entitled to challenge the violation of the *Ricci* “color-blind” standard, even in absence of evidence that the defendant acted because of their race.

For civil rights advocates, the establishment of the *Ricci* “color-blind” standard makes disparate treatment cases easier to prove, assuming the “color-blind” test is applied in a “color-blind” way. The members of minority groups for whose protection the antidiscrimination statutes were originally enacted should receive, if not the same empathy, at least the same protection that the *Ricci* plaintiffs ultimately received.¹⁰⁴ Eliminating the need to prove more than an employer’s action with knowledge of the racial consequences and having that showing suffice to establish that the action was “because of race” streamlines disparate treatment actions enormously. Applying a general “color-blind” standard—a plaintiff need only show that the defendant acted with the knowledge even “in spite of” her race—further simplifies disparate treatment cases for all plaintiffs.

From the viewpoint of civil rights advocates, there is now a basis—though only supported by a concurring opinion joined by three Justices at the right end of the spectrum—for finding disparate treatment discrimination even in face of a defendant’s evidence that a reason unrelated to the race of the plaintiffs, or of any of the employees, was the actual motivation for the action.¹⁰⁵ All plaintiffs

“third party standing” and “transferred intent” doctrine in Title VII. Stone, *supra* note 4.

104. Professors Harris and West-Faulcon describe the consequences of *Ricci* as turning antidiscrimination law on its head to protect whites and to make it more difficult for minority group members to enforce their rights:

Although the holding in *Ricci* is not unambiguous, and in some respects the unusual factual predicate may ultimately limit its reach, *Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury. *Ricci* facilitates this racial project in two distinct but interrelated ways: by whitening discrimination—that is reframing anti-discrimination law’s presumptions and burdens to focus on disparate treatment of whites as the paradigmatic and ultimately preferred claim, and by race-ing efforts to install fair selection measures—that is, treating the use of job-related assessment tools that correct racial imbalance and better measure merit as racially disparate treatment of whites.

Harris & West-Faulcon, *supra* note 4, at 10–11. The easy and quick leap the Court took to find disparate treatment liability certainly supports their conclusion. Nevertheless, it is important for civil rights advocates to take advantage of that to benefit, if possible, those groups for whom the antidiscrimination statutes were originally adopted. It may be that Congress will address *Ricci* in amendments to Title VII or a more comprehensive Civil Rights Act of 2010. But pressure to do something may increase if *Ricci* can be seen as a radical expansion of the scope of the antidiscrimination laws to the disadvantage of employers generally.

105. Such a holding would require a majority of the Court to accept Justice Alito’s

need to prove is that race was in some way implicated and they were adversely affected when challenging a decision. Actual intent to discriminate against the plaintiffs would be irrelevant because the violation would be the failure to make "color-blind" decisions.

VII. THE POTENTIAL BROADER IMPACT OF *RICCI*

By leaping so easily to a finding that the City committed disparate treatment discrimination as a matter of law, the Court appears, at least potentially, to have revolutionized discrimination law because the new "color-blind" approach makes a plaintiff's burden so much easier. Assuming the Court meant what it said in *Ricci*, employers now face tremendous challenges in complying with this "color-blind" approach to what constitutes disparate treatment discrimination. Up until now, an employer acting with knowledge of the racial consequences of that action has not faced much risk of liability based on that knowledge alone; much more was needed to prove an action was "because of" the race of the plaintiff. *Ricci* changes that. Knowing the racial consequences of an action now violates this "color-blind" approach and anyone adversely affected by that action could bring a challenge.

The thrust in the Court toward this "color-blind" standard has taken place in cases where the actor has acted benevolently toward members of minority groups. Those cases include affirmative action cases,¹⁰⁶ a school assignment case,¹⁰⁷ and now, the *Ricci* case. *Ricci* did not involve affirmative action favoring members of minority groups but instead was a situation where the defendant acted to avoid imposing an adverse impact on minority group members.¹⁰⁸

The first big step that needs to be taken to complete the revolution of disparate treatment law is for this new "color-blind" approach to be applied in claims brought by members of minority groups.¹⁰⁹ The second round of cases against the City of New Haven

approach that he set forth in his concurring opinion in *Ricci*, 129 S. Ct. at 2683 (Alito, J., concurring).

106. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (discussing affirmative action in higher education).

107. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

108. In that way it more nearly resembles *Parents Involved* in which the defendant school districts acted on the racial identity of students in assigning them to schools in order to avoid racial resegregation.

109. A more technical first question may be whether *Ricci* applies in both systemic and individual disparate treatment cases. The *Ricci* Court speaks of disparate treatment in general

may be a good indicator of whether that step will be taken. But strategically, at least, there seems to be good reason for members of groups protected by the enactment of antidiscrimination laws to bring cases based on this new, simplified law of disparate treatment discrimination. It would be the highest irony if the courts, particularly the Supreme Court, were to reject a “color-blind” or equal treatment approach to this new “color-blind” standard.¹¹⁰

Assuming this “color-blind” standard of disparate treatment discrimination applies to claims of race discrimination by members of minority groups as well as by whites, the next set of questions is whether disparate treatment discrimination now includes “gender-blind,” “age-blind,” and other such standards.¹¹¹ While *Ricci* is a statutory interpretation case, the background equal protection issues, raised but not decided, may influence the extent to which *Ricci*’s approach is extended to other discrimination issues.

Consciousness of race, gender, etc., is ubiquitous in our society. Because of that, *Ricci* will put all employment decisions made beyond the design phase of an employment policy at risk of being challenged as discriminatory because the race or gender of those involved are typically known to employers when they make those decisions. Proving such consciousness is likely to be easy. All the more that is needed is proof that someone is adversely affected by the decision. Employers will likely have considerable difficulty

terms and Justice Kennedy does not cite to the iconic individual disparate treatment decision, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Justice Scalia in his concurrence and Justice Ginsburg in her dissent do cite *McDonnell Douglas*, for what that is worth. Certainly nothing in the opinion for the Court suggests that this “color-blind” standard is limited to systemic cases or that it does not apply to individual disparate treatment cases.

110. In *Bush v. Gore*, the Rehnquist Court attempted to limit its holding to the particular case without presumably any precedential effect: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.” 531 U.S. 98, 109 (2000). Nothing in Justice Kennedy’s opinion for the Court in *Ricci* suggests that this decision is without precedential effect. Given the long term push by the right wing of both the Rehnquist and Roberts Courts to adopt a “color-blind” standard of discrimination, it would be surprising if the Court would deny precedential effect to *Ricci*. But the Court does do surprising things.

111. Given the requirements for employers to reasonably accommodate workers because of the workers’ religious beliefs and practices under Title VII, § 701(j), 42 U.S.C. § 2000e(j), and because of their disability under the Americans with Disabilities Act, § 102(b)(5), 42 U.S.C. § 12112(b)(5), special issues may arise in imposing “religion-blind” or a “disability-blind” rules. Given the specialized approach to defining an “individual with a disability,” § 3(1), 42 U.S.C. § 12102, it may be that the entire area of disability discrimination would not be affected by the extension of *Ricci*.

complying with this "color-blind" standard. If the approach is extended to other issues, such as gender, the risk of liability is greatly expanded.

Some employers, symphony orchestras for example, have adopted approaches to the selection of new orchestra members where the candidates play behind a curtain so those making the decision do not know anything about the race, sex, or age of those auditioning. While such a "veil of ignorance"¹¹² approach may work for musical groups, it would seem more daunting in the general run of employment decision-making. Recently some employers have adopted procedures to try to insulate the ultimate decision maker from whatever discriminatory influence that may have taken place at lower levels.¹¹³ Needing to remove all indications of race, gender, etc., from such processes will make those attempts all the more challenging if the employer is to be insulated from disparate treatment liability.

There have already been calls for action by Congress to overturn *Ricci*.¹¹⁴ Professor Sullivan suggests that Congress could overturn the holding that employers would need a "strong basis in evidence" to defend against a disparate treatment claim based on the "color-blind" standard and return to an interpretation that there is no conflict between employer compliance with the disparate treatment prohibition and the disparate impact one.¹¹⁵ Alternatively, the "good faith" standard urged by the concurrence in *Ricci* might be adopted.¹¹⁶ If *Ricci* is taken seriously, employers would have the

112. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (introducing the concept of a "veil of ignorance"). See also Jean D'Acquila, *supra* note 4 (highlighting the challenges facing employers and their lawyers because of *Ricci*).

113. One circuit has held that an employer is only liable for discrimination if the actual decision maker harbored the intent to discriminate, even if underlings who did discriminate influenced the final decision. See *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277 (4th Cir. 2004) (en banc). For the other circuits the question is whether that decisionmaker is in fact fully insulated from the discrimination of those down the hierarchy, with that issue described as a question whether the decisionmaker was in fact "the cat's paw" of the actual discriminator. If so, the employer is liable even in absence of proof that the decisionmaker even knew of the discriminatory actions that nevertheless influenced the decision. See generally Stephen Befort & Alison Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383 (2009); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001).

114. See, e.g., Sullivan, *supra* note 4.

115. *Id.* at 215.

116. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring).

greatest incentive to push for amendments to the discrimination laws to eliminate the “color-blind” standard of liability established in *Ricci*. It might be that a coalition made up of civil rights advocates, employers and others interested in discrimination law could be formed to propose amendments to Congress in much the same way that a coalition of interested parties formed to seek the recent amendments to the Americans with Disabilities Act of 2008.¹¹⁷

Whether or not the antidiscrimination statutes are amended to somehow take account of and perhaps overturn *Ricci*, a potential limitation is that the background constitutional question of equal protection may then come to the forefront.¹¹⁸ In answering the statutory question in favor of the plaintiffs in *Ricci*, the Court avoided having to decide the constitutional question. “Our statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII.”¹¹⁹ Justice Scalia, however, says it is only a matter of time until the constitutional question must be addressed: The “resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? The question is not an easy one.”¹²⁰

Justice Scalia does, however, lay out the constitutional issue in a way that suggests that he would hold those provisions unconstitutional: “Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on

117. See Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

118. As *Ricci* came to the Court, it did involve both statutory and constitutional equal protection issues: “Petitioners raise a statutory claim, under the disparate-treatment prohibition of Title VII, and a constitutional claim, under the Equal Protection Clause of the Fourteenth Amendment.” 129 S. Ct. at 2672.

119. 129 S. Ct. at 2676. The Court further emphasized that it was not reaching any constitutional questions:

We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case. As we explain below, because respondents have not met their burden under Title VII, we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.

Id.

120. *Id.* at 2681–82.

(because of) those racial outcomes. That type of racial decision making is, as the Court explains, discriminatory."¹²¹ Putting "a racial thumb on the scales" because employers evaluate the "racial outcomes of their policies"—violating the "color-blind" standard—may, according to Justice Scalia, amount to more than the statutory violation the Court found in *Ricci*.¹²² It could also be the basis for finding that the disparate impact provision of § 703(k) of Title VII is unconstitutional. Congress is prohibited from requiring by law the violation of equal protection: "[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race."¹²³

Justice Scalia's approach is premised on treating the "race-blind" standard to be the same for equal protection as the Court found it to be in defining disparate treatment under Title VII. None of the other justices joined Justice Scalia's concurring opinion, so it is not clear that a majority of the Court would accept that equation.¹²⁴ If Justice Scalia is successful in persuading a majority of the Court that the "race-blind" standard applies to equal protection, that would put the disparate impact provisions of Title VII as well as any amendments aimed at overturning *Ricci* in jeopardy: An employer trying to avoid disparate impact liability would perforce be required to know the racial consequences of the employment practice in question and that knowledge would, when acted upon, violate the "color-blind" standard.

Any employer, public or private, could challenge the power of Congress to enact a law that was at odds with the equal protection requirements that apply to the federal government. Assuming a *prima facie* equal protection case, the question would become whether the disparate impact provisions are justified by a compelling governmental interest. Given the narrow range of interests found compelling,¹²⁵ it is not likely that the Court would find that the

121. *Id.* at 2682.

122. *See id.*

123. *Id.* (citations omitted).

124. Professor Primus, however, concludes that disparate treatment and equal protection now have the same "color-blind" standard. *See Primus, supra* note 4.

125. *See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 737–40 (3rd ed. 2006) (compelling governmental interests limited to remedying past

disparate impact provisions of Title VII would constitute a compelling interest. In her dissent, Justice Ginsburg points out that such an interpretation would be radical.¹²⁶ And so it would be, especially if Congress had been persuaded by a broad coalition of groups, including representatives of employers, to overturn *Ricci*. Adopting such a “color-blind” standard for equal protection would make all governmental actors vulnerable to attack for actions they take in almost every sector of government.¹²⁷ That is what would make the “color-blind” standard of equal protection, if applied in a “color-blind” or equal treatment way, so radical.

It is possible, though very unlikely, that the Court could take another, even more radical step. And that would be to extend the “color-blind” standard of equal protection to courts.¹²⁸ Judges inevitably need to know the race of the parties to an equal protection claim. If the “color-blind” standard applies to courts, then the action of a court deciding a case while knowing the racial consequences of the decision would violate equal protection. That would mean that the equal protection clause would become essentially unenforceable. In other words, the strict scrutiny and compelling governmental interest approach to equal protection that originated in *Korematsu v. United States*¹²⁹ would be superseded. Instead, the equal protection clause would become unenforceable, just as the privilege or immunities clause of the Fourteenth Amendment was rendered a nullity in the *Slaughter House Cases*.¹³⁰ Such a result would be the

discrimination and enhancing educational diversity).

126. 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

127. The governing bodies of every community, every school board or public institution and every state with a racially diverse population will know the racial consequences of the actions taken. That makes their decision vulnerable to equal protection attack by anyone adversely affected by that action.

128. Even with Chief Justice Robert’s expansive call for a “color-blind” standard for assigning students to schools in the plurality part of his opinion in *Parents Involved*, he did appear to accept the concept of strict scrutiny that could be met with proof of a compelling governmental interest. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007). Justice Kennedy, in *Ricci*, also looked to the law involving compelling governmental interests when he was creating the new “strong basis in evidence” defense to a disparate treatment claim. 129 S. Ct. at 2681.

129. 323 U.S. 214 (1944).

130. 83 U.S. 36 (1873). It would be truly ironic if the equal protection clause was rendered unenforceable because the Supreme Court imposed a “color-blind” standard on itself along with all other governmental actors at a time when the privilege or immunities clause may be taking on new life in the context of the Second Amendment. See *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

final irony because it would mean that the courts would lack the capacity to decide cases such as *Ricci*. And that means that plaintiffs, like the *Ricci* plaintiffs, would be denied any remedy for the disparate treatment by their employers.¹³¹

VIII. CONCLUSION

The obvious empathy for the plaintiffs expressed by Justice Kennedy in his opinion in *Ricci* resulted in the Court's creation of a radical new standard of disparate treatment liability. The Court easily leaped over preexisting law to reach the conclusion that, as a matter of law, these plaintiffs were the victims of disparate treatment discrimination. While most of the Court's opinion dealt with disparate impact law and the interrelationship between disparate treatment and disparate impact law, the case with which it found disparate treatment may have the ironic effect of opening new avenues for civil rights advocates to more easily and therefore more successfully bring disparate treatment actions. That this result may be an unintended consequence of the Court's solicitude for these particular plaintiffs in *Ricci* should not forestall every effort to turn the tide of antidiscrimination litigation back toward a more empathetic treatment of those for whom the legislation was enacted to protect.¹³²

131. This does not mean that the employers did not violate equal protection. But it does mean that no governmental actor, including the courts, could do anything about the violation.

132. See Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUMAN RTS. L. REV. 575 (2003).

