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At Fifty, Title VII Needs a Facelift: Two Reforms that Would Ensure Title VII Works to Prohibit All Racial Discrimination in Employment

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AT FIFTY, TITLE VII NEEDS A FACELIFT: TWO REFORMS THAT WOULD ENSURE TITLE VII WORKS TO PROHIBIT ALL RACIAL DISCRIMINATION IN EMPLOYMENT

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INTRODUCTION

Fifty years have elapsed since President Johnson signed the 1964 Civil Rights Act into law in one of the largest signing ceremonies ever held at the White House.[2] Enacted only ten years after Brown v. Board of Education of Topeka,[3] where the Supreme Court held that racially segregated public schools were unconstitutional, the legislation eliminated the most visible forms of discrimination throughout the United States. For example, Title II of the Act eliminated segregation in places of public accommodation, like restaurants, hotels, and swimming pools. Scenes of segregated public places are only recognizable to individuals born after 1964 as historic film footage.[4]

Title VII of the 1964 Civil Rights Act (Title VII) prohibits intentional discrimination on the basis of race in employment.[5] Title VII's success at curtailing employment discrimination, however, is not clear. To be sure, the idea that businesses would intentionally segregate job positions is, thankfully, only a memory.[6] But a series of Supreme Court decisions in the 1970s and 1980s, as well as the passage of the 1991 Civil Rights Act, have

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[2] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.); *see also* Elinor P. Schroeder, *Title VII at 40: A Look Back*, 73 DEC J. KAN. B.A. 18, 21 (Nov./Dec. 2004) (describing the signing ceremony).

[3] 347 U.S. 483, 493-95 (1954).

[4] 42 U.S.C. § 2000a.

[5] *See* 42 U.S.C. § 2000e.

[6] *See* Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 983 (5th Cir. 1969) ("Until May 1964, the Company segregated the lines of progression by race, reserving some lines to white employees and others to Negroes.").

inverted Title VII, which now *requires* racial discrimination in certain circumstances.

Beginning with Griggs v. Duke Power Co.[7] in 1971, the Supreme Court recognized disparate impact theory as a viable method to prove intentional discrimination under Title VII.[8] Disparate impact theory holds that an employment practice amounts to discrimination if its outcome is racially unequal, regardless of its purpose.[9] While the Supreme Court backed away from this theory in the late 1980s,[10] Congress entrenched disparate impact theory into Title VII with the passage of the 1991 Civil Rights Act.[11]

In a separate series of decisions, the Supreme Court held that intentional discrimination in furtherance of a race-conscious affirmative action program is not scrutinized as closely as other examples of overt intentional discrimination.[12] In other words, the Supreme Court literally held that Title VII applies differently depending on the race of the person instituting the suit. While recent developments cast doubt on the continued validity of those decisions,[13] the Supreme Court has yet to squarely rule that they are no longer good law.

This article proposes two reforms to return Title VII it to its origins, where intentional racial discrimination in employment is universally prohibited. The article is divided into two parts. Part I tackles disparate impact theory under Title VII. It begins with some historical background before discussing disparate impact theory's tension with Title VII's disparate treatment provisions and the doctrine's unconstitutionality under the Federal Equal Protection Clause. The disparate impact section shows how current enforcement of Title VII has perverted the statute's promise of discrimination-free employment. Part II of the article discusses the Supreme Court's sanctioning of discriminatory race-conscious employment programs and explains why those decisions have been called into question in recent years. Finally, the article concludes by offering constitutional reasons why Title VII must be interpreted the same for all individuals, regardless of race.

7 401 U.S. 424, 436 (1971).

8 While disparate impact would eventually become a standalone doctrine with the adoption of the 1991 Civil Rights Act, at the time *Griggs* was decided, disparate treatment was the only actionable form of discrimination under Title VII.

9 *Griggs*, 401 U.S. at 431.

10 *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989).

11 *See* 42 U.S.C. § 2000e-2(k).

12 *See* Johnson v. Transp. Agency, Santa Clara Cnty., Cal., 480 U.S. 616, 626 (1987); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

13 *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009).

I. TITLE VII'S DISPARATE IMPACT PROVISIONS PREVENT TITLE VII'S GOAL OF ELIMINATING EMPLOYMENT DISCRIMINATION FROM BEING REALIZED

Disparities are abundant in a free society. From education to employment to housing to religion, disparities exist in various forms and in varying degrees. For example, it is certainly possible that some church exists in America that perfectly resembles the racial, economic, and education level of the community in which it sits,[14] but "the laws of chance" make such a church extremely unlikely.[15] The same is true for employment, education, and any number of other areas of American life where individuals retain freedom of choice.

Despite the inherent and ubiquitous nature of disparities, under Title VII's disparate impact provisions, racial disparities in employment are presumptively illegal. Disgruntled employees may successfully challenge so-called chance disparities in the workplace, and place the onus on employers to justify random happenstance. Discrimination no longer means "differential treatment";[16] it also encompasses unintended outcomes.

The statute that allows such lawsuits to go forward, 42 U.S.C. § 2000e-2(k), has lost all connection to the original purpose of Title VII, which was to prohibit intentional racial discrimination. The civil rights laws were written to prohibit disparate treatment—to bar acts of discrimination on the basis of race. But disparate impact does not arise from acts of discrimination; it arises from the vague realms of statistical regression analysis. As a result, Title VII's disparate impact provisions led government entities and private employers to do exactly what the Constitution forbids: classify and treat individuals differently on account of their race in an effort to avoid liability for disparate outcomes that may not result from discriminatory acts.

Although Title VII has turned 50 years old this year, the disparate impact

[14] Of course, identifying the baseline community for disparate impact purposes is itself problematic. What is the proper "balance" for a church or a business that resides in the Watts neighborhood of Los Angeles? The neighborhood is 61% Latino, the city is 48% Latino and, and the state is 37% Latino. *Compare* Watts, Profile, LA TIMES *available at* http://maps.latimes.com/neighborhoods/neighborhood/watts/, *with* UNITED STATES CENSUS, STATE & COUNTY QUICK FACTS: LOS ANGELES, *available at* http://quickfacts.census.gov/qfd/states/06/0644000.html.

[15] *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) ("It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.").

[16] "Discrimination," BLACK'S LAW DICTIONARY (9th ed. 2009).

provisions of Title VII are not yet 25 years old. In order for Title VII to remain a shining star in America's discrimination laws, its disparate impact provisions need to be abolished or significantly reformed.

A. The Rise, Fall, And Rebirth Of Disparate Impact Under Title VII

Title VII makes no distinction between races;[17] that fact was central to its adoption in 1964. In the debate surrounding the enactment of Title VII, the central concern expressed by the opponents of the bill was that the statute would be used to enforce quotas, racial balance, and other race-conscious remedies.[18] In an oft-quoted rejoinder to these concerns, Minnesota Senator Hubert Humphrey responded:

> "I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provided that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there."[19]

Senator Humphrey's defense carried the day. Importantly, it is unlikely that Title VII would have passed had the text of the bill not been clearly written to avoid claims that it would sanction racial balancing.[20] Very quickly, however, the text of the bill lost out to ideologues[21] who wanted to incorporate their preferred social theories into Title VII. Soon after the statute's adoption, disparate impact theory – and the racial balancing it mandates – made its way to the courts.

Within five years of Title VII's adoption, several disparate impact-like cases were heard in the federal courts of appeals.[22] They arose because businesses attempted to covertly avoid Title VII's non-discrimination mandate. Prior to Title VII, many employers racially segregated jobs. Once Title VII prohibited those overtly discriminatory policies, employers used previous job experience as a means to continue their segregated practices, since no black employees could have previously accrued the necessary seniority.[23] The so-called "seniority cases" challenged

17 See 42 U.S.C. § 2000e-2(a)(1) (West).

18 *See* Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, FIRST HARV. UNIV. PRESS 184-97 (1992).

19 110 Cong. Rec. 7420 (1964).

20 *See* Epstein, *supra* note 18, at 184-97.

21 *See* Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 715-16 (2006) (describing the various individuals who advocated for recognizing disparate impact).

22 *See id.* at 708-14 (explaining the origins of disparate impact theory).

23 *Id.*

employment practices that gave preferential treatment to employees with more seniority. While today these policies would be properly classified as intentional discrimination (disparate treatment), the plaintiffs argued they were illegal under Title VII because of the unequal results.[24]

At the time, there was no framework for rooting out intentional discrimination from racially neutral policies – a hole that would later be remedied by *Arlington Heights*[25] in the equal protection context and *McDonnell Douglas*[26] in Title VII – so it was argued that Title VII's disparate treatment canon covered this behavior because of its racial impact. Indeed, in perhaps the most famous seniority case of the time, the "Papermakers" case,[27] it was widely known that the seniority system was simply a proxy for the employer to continue to intentionally discriminate on the basis of race.[28]

Thus, by the time the Supreme Court heard Griggs v. Duke Power Co.[29] in 1971, disparate impact was already accepted in the federal courts as a means of rooting out covert intentional discrimination.[30] Moreover, *Griggs* was the perfect vehicle for sanctioning disparate impact under Title VII. The company had intentionally segregated individuals on the basis of race until 1966,[31] and it was clear that the employment test at issue in *Griggs* was a blatant attempt to continue that intentional discrimination.[32] But the *Griggs* opinion would not be as notorious today if the Court had simply carved out a mechanism for recognizing intentional discrimination from race-neutral policies. Instead, the unanimous *Griggs* Court famously held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[33] And with that brief statement in the *Griggs* opinion the Supreme Court legitimized the idea that disparities are suspect, irrespective of their cause.

While Title VII was not at issue, the rationale of the *Griggs* Court's

24 *See id.*; *see also* Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68, 71-72 (1991) (explaining the difference between an effects-based theory and intent-based theory).

25 429 U.S. 252, 266 (1977).

26 411 U.S. 792, 801 (1973).

27 *United Papermakers*, 416 F.2d at 983.

28 *Id.*; Selmi, *supra* note 21, at 709-12 (explaining the history behind the *Papermakers* case).

29 Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

30 Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506 (2003); Selmi *supra* note 28, at 717 ("At the time it arose, the *Griggs* case fit easily within the developing case law.").

31 Griggs v. Duke Power Co., 420 F.2d 1225, 1227-29 (4th Cir. 1970).

32 Selmi *supra* note 28, at 717-18 (detailing the company's hiring practices following Title VII).

33 *Griggs*, 401 U.S. at 431.

disparate impact theory came into question five years later in Washington v. Davis.[34] *Davis* was a challenge brought under the Due Process Clause[35] to a hiring test of the Washington, D.C. Police Department.[36] The *Davis* Court rejected the claim that disparate impact – untethered to a claim of intentional discrimination – was prohibited by the Constitution. Despite ruling five years earlier that Title VII prohibited discriminatory impacts, the *Davis* Court had "difficulty understanding" how a neutral law could deny equal protection simply because it resulted in a racially disproportionate impact.[37]

For the next fifteen years there was little movement in disparate impact law: The Court continued to find disparate impact in Title VII, and failed to find it under the Equal Protection Clause.[38] That changed in 1989 when the Court decided Wards Cove Packing Co., Inc. v. Atonio.[39] *Wards Cove* was a challenge under Title VII by nonwhite cannery workers who alleged that the company's hiring and promotion policies caused a racially disparate impact.[40] While the Court did not completely reject the plaintiffs' legal claim, it significantly limited the ability of plaintiffs to prevail when alleging solely disparate results. Most importantly, it clarified that the burden of persuasion in a Title VII disparate impact lawsuit always remains with the plaintiff, and it curtailed the employer's burden of production to require that she need only show that the challenged practice was "reasoned."[41] The effect of the Court's decision in *Ward's Cove* was to transform disparate impact law from a plaintiff-friendly standard – where any statistical disparity had to be compellingly justified – into a more employer-friendly standard where the employer's legitimate business decisions could not be immediately haled into court.[42]

34 426 U.S. 229, 236-38 (1976).

35 U.S. CONST. AMEND. V. Because the District of Columbia is a federal actor, the Equal Protection Clause did not apply. But the Court explained that "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals." *Davis*, 426 U.S. at 239.

36 *Davis*, 426 U.S. at 232. Interestingly, the plaintiffs in *Davis* relied on equal protection theory and not Title VII because Title VII did not become applicable to the government until 1972 – two years after the lawsuit was filed. Selmi, *supra* note 21, at 726.

37 *Davis*, 426 U.S. at 245.

38 For example, in 1977 the Court reaffirmed that Title VII permits disparate impact claims in *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977), and also reaffirmed that an equal protection challenge requires a showing of discriminatory intent in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265 (1977).

39 490 U.S. 642, 657-58 (1989).

40 *Id.* at 645-48.

41 *Id.* at 659.

42 *See* Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald A New Disparate Impact?*, 90 B.U. L. REV. 2181, 2192 (2010).

Two commentators persuasively argue that the Court's decision in *Ward's Cove* was intended to bring Title VII back to its roots, where disparate treatment is the primary prohibition and disparate impact's role is to root out covert intentional discrimination.[43] They note:

> The changes announced in Wards Cove therefore brought disparate-impact analysis closer to disparate-treatment analysis. The parallels suggest that the Court might have been heading in a direction that would have largely collapsed the two theories into mere burden-of-production-shifting frameworks that focused on the question of discrimination rather than on the justification for the employer's actions. . . . Disparate impact, under this approach, would have been nothing more than a tool for smoking out hidden intentional discrimination.[44]

That reasoning makes sense both historically and logically. Historically, it is clear that Title VII's primary purpose was to eliminate intentional discrimination in employment. Moreover, by the time *Ward's Cove* was decided, the early disparate impact cases like *Griggs* – where employers intentionally discriminated through covert means – would have been brought under Title VII's disparate treatment provisions. Logically, discrimination law should not make it more difficult to eliminate intentionally discriminatory practices than it is to impugn legitimate practices that merely have an unequal effect. But the victory for logical consistency and historical accuracy was short-lived; less than two years later Congress superseded *Ward's Cove* by passing the Civil Rights Act of 1991.[45]

The Civil Rights Act of 1991 provided – for the first time – a statutory basis for disparate impact.[46] Congress also clearly demarcated a plaintiff-friendly burden-shifting framework that replaced the *Ward's Cove* decision. Under Title VII's freshly-minted disparate impact provisions, a racially disparate outcome is presumptively illegal, and the employer bears the burden of showing that the employment practice "is job related for the position in question and consistent with business necessity."[47] Furthermore, even if the employer can demonstrate that the challenged practice is "job related and consistent with business necessity," a plaintiff could still prevail by showing that there are "alternative employment

43 *Id.* at 2193.
44 *Id.*
45 Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).
46 42 U.S.C. § 2000e-2(k) (2006).
47 *Id.* at (k)(1)(A)(i).

practices" that the employer refused to adopt.[48]

The evolution of disparate impact in Title VII law is an important foundation for the discussion that follows. Four points are especially noteworthy: (1) disparate impact was never intended to be included in Title VII, and had it been included, the statute would likely never have passed; (2) *Griggs* was decided shortly after Jim Crow when employers were openly designing employment policies that, while facially race-neutral, intentionally discriminated against racial minorities; (3) shortly after *Griggs*, the Supreme Court recognized that disparate impact was not cognizable under the Constitution's prohibitions on discrimination and provided a framework for proving intentional discrimination from covertly-designed, facially-neutral policies; and (4) the Court retreated from liberal disparate impact liability in *Ward's Cove*, but its decision was superseded by the passage of the Civil Rights Act of 1991.

B. The Inherent Tension Between Title VII's Disparate Treatment And Disparate Impact Provisions

Title VII is intended to root out disparate treatment—*i.e.* specific acts of intentional discrimination—based on race.[49] To that end, the disparate treatment canons of Title VII, which prohibit an employer from taking adverse action because of a person's race, directly reflect Title VII's goals.[50] As explained above, for years, Title VII did not expressly include disparate impact provisions. Its "nondiscrimination provision held employers liable only for disparate treatment."[51]

While disparate impact may be proper as an "evidentiary tool used to identify genuine, intentional discrimination—to 'smoke out,' as it were, disparate treatment,"[52] regarding it as an end in itself perverts a law against racial discrimination into a law essentially requiring racial discrimination. That perversion is precisely what happened in Ricci v. DeStefano, where the threat of disparate impact liability resulted in "a de facto quota system, in which a 'focus on statistics . . . put undue pressure on employers to adopt inappropriate prophylactic measures.'"[53] There, a statistical imbalance led "employers to discard the results of lawful and beneficial promotional

48 *Id.* at (k)(1)(A)(ii).

49 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.").

50 *See* Seiner & Gutman, *supra* note 42, at 2185 (citing 42 U.S.C. § 2000e-2(a)(1)).

51 Ricci v. DeStefano, 557 U.S 557, 577 (2009).

52 *Id.* at 595 (Scalia, J., concurring).

53 *Id.* at 581 (quoting *Watson*, 487 U.S. at 992).

examinations even where there [was] little if any evidence of disparate-impact discrimination."[54]

Disparate impact claims often lead to Title VII liability for legitimate practices that merely have an unequal effect.[55] The fact that people of one race, sex, or class sometimes choose to practice a specific trade, or are statistically more likely to succeed at those jobs, does not mean employers are discriminating, since it "is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."[56] Yet disparate impact doctrine imposes liability on precisely this unrealistic basis. Considering the ubiquity of statistical disparities in the workforce, the prospect of a catastrophic disparate impact lawsuit requires employers to search out—and to take whatever steps are necessary to quash—any such disparity. Employers have "little choice" but to adopt race- conscious measures—even though the Supreme Court has recognized that such is "far from the intent of Title VII."[57] Disparate impact is not being used as a tool to smoke out intentional discrimination; instead it is being used as a mechanism to justify intentional discrimination in pursuit of an unrealistic goal of absolute statistical equality of result.

The Supreme Court recognizes the injustice of imposing on innocent persons the cost of remedying the long-term effects of racial discrimination for which those persons were in no way responsible.[58] But the racial balancing that results from disparate impact theory also imposes costs on minorities who purportedly benefit from the disparate impact approach. The threat of such liability "makes it more costly for a firm to operate in an area where the labor pool contains a high percentage of blacks, by enlarging the firm's legal exposure."[59] For example, in Terry Props. Inc. v. Standard Oil Co.,[60] the defendant chose to build a plant in a location with fewer than 35% minority workers "because it had previously experienced difficulty meeting affirmative action goals in communities with proportionately larger minority populations."[61] It also makes it more

54 *Id.*

55 *See generally* Epstein, *supra* note 18, at 222-25 (discussing over enforcement of Title VII in terms of statistical error).

56 *Watson*, 487 U.S. at 992 (plurality opinion).

57 *Id.* at 993.

58 *See, e.g.,* Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 276; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 505.

59 Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987).

60 799 F.2d 1523 (11th Cir. 1986).

61 *Id.* at 1527.

expensive to employ minority workers because the firm runs an increased risk of being sued in a disparate impact lawsuit if it discharges such employees.[62]

To avoid disparate impact litigation, an employer may take measures to ensure that its workforce represents the racial balance of the available labor force – to the detriment of minorities. In Frank v. Xerox Corp.,[63] the company instituted a "Balanced Workforce Initiative" to ensure that "all racial and gender groups were proportionally represented."[64] This policy led to favoring white employees in Houston where the black employees were "over-represented."[65] Title VII may therefore have the perverse effect of discouraging employers from hiring minorities.

So long as disparate impact remains a stand-alone doctrine—instead of a means of proving intentional discrimination—it will continue to force governments and private actors to engage in blatant, and blatantly unconstitutional, racial discrimination. And it will often be directly at odds with Title VII's disparate treatment provisions.

C. The Unconstitutionality of Title VII's Disparate Impact Provisions

The Equal Protection Clause mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[66] This rule admits no exception: "all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry."[67] Title VII's disparate impact provisions cannot survive strict scrutiny.[68]

The difficulty in scrutinizing disparate impact in Title VII is that the statute is facially race neutral. But facial neutrality does not shield a statute from strict scrutiny where either the statute was passed with a discriminatory motive,[69] or, the statute requires third parties to engage in race-conscious action.[70] Title VII's disparate impact provisions succumb to

62 *Id.*

63 347 F.3d 130 (5th Cir. 2003).

64 *Id.* at 133.

65 *Id.*

66 U.S. CONST. AMEND. XIV, § 1.

67 Grutter v. Bollinger, 539 U.S. 306, 326 (citations omitted); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730; Primus, *supra* note 30, at 504.

68 While the Equal Protection Clause only applies to state and local governments, the Supreme Court has recognized that the Fifth Amendment's Due Process Clause contains an identical equal protection component. *See* U.S. CONST. AMEND V; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

69 *See Arlington Heights*, 429 U.S. at 264-65.

70 *See Watson*, 487 U.S. at 993; Norwood v. Harrison, 413 U.S. 455, 465 (1973); *Ricci*, 557 U.S. at

both inquiries, and as demonstrated below, should be held unconstitutional.

1. Title VII's Disparate Impact Provisions Were Adopted With Discriminatory Intent

Laws that are race-neutral – like Title VII's disparate impact provisions – may violate equal protection guarantees. Under *Arlington Heights*, the Supreme Court explained that laws which are enacted with a discriminatory purpose or intent "show a violation of the Equal Protection Clause," even if they are facially race-neutral.[71]

At issue in *Arlington Heights* was a village's denial of a petition to rezone land for the development of low-income housing units. [72] The Seventh Circuit Court of Appeals held that the decision to not rezone the land had a "discriminatory effect," and therefore could only be constitutional if it survived strict scrutiny.[73] The Supreme Court reversed, reaffirming its decision a year earlier in *Davis* that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[74] The Court went on to explain that facially-neutral legislation may still be prohibited by the Equal Protection Clause, but it requires a plaintiff to prove that "a discriminatory purpose has been a motivating factor in the [government's] decision."[75]

In order to show that facially-neutral legislation was in fact motivated by an invidious purpose, the *Arlington Heights* Court explained that courts must undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[76] The Court explained factors that trial courts should consider:

(1) Disproportionate impact[77]
(2) The historical background of the decision; for example, a series of official actions taken for racial purposes or departures from normal procedures

594 (Scalia, J., concurring).

71 *Arlington Heights* at 265.

72 *Id.* at 258-59.

73 *Id.* at 260.

74 *Id.* at 265.

75 *Id.* at 265 - 66.

76 *Id.* at 266.

77 The *Arlington Heights* Court noted that disproportionate impact that results in a "clear pattern, [that is] unexplainable on grounds other than race" would suffice to show a violation of the Equal Protection Clause. 429 U.S. at 266 (citing Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886)). In such circumstances, further inquiry is not required.

(3) Legislative or administrative history
(4) Testimony from individuals with knowledge (if not privileged).[78]

The Court explained that this was not an exhaustive list, and that these factors simply typify evidence that could be used to prove discriminatory intent.[79]

Each of the factors weighs against the constitutionality of Title VII's disparate impact provisions. With respect to disproportionate impact,[80] it should come as little surprise that throughout the statute's twenty-plus years, the authors are aware of no Title VII disparate impact claim that has been successfully litigated by a white plaintiff.[81] In fact, recent scholars have concluded that "employment practices with disparate impacts on historically dominant classes are, as a matter of law, not actionable under Title VII."[82] If it is true that Title VII's disparate impact provisions are only available to minorities, it is doubtful they would survive constitutional muster.[83] And as discussed earlier, the historical background leading to the enactment of Title VII's disparate impact provisions makes clear that Congress was intending to overrule the Court's decision in *Ward's Cove* – a case that aimed to tie disparate impact to intentional discrimination.[84]

Most damning to disparate impact's constitutionality, however, is the legislative history. During the enactment debate over the 1991 Civil Rights Act, Congress was aware that disparate impact would result in discriminatory mandates being placed on employers.

78 *Arlington Heights*, 429 U.S.at 266-68.

79 *Id.* at 268.

80 The irony that the disparate impact provisions of Title VII cause a racially disproportionate impact is not lost on the authors.

81 *See, e.g.*, Johnson v. Metro. Gov't of Nashville & Davidson Cntys., 502 F. App'x 523 (6th Cir. 2012). The court dismissed the disparate impact claim brought by white plaintiffs. *Id. See also* Sims v. Montgomery Cnty. Comm'n, 887 F. Supp. 1479, 1485 (M.D. Ala. 1995). The court also dismissed a disparate impact claim brought by white plaintiffs. *Id* Although decided before the 1991 Civil Rights Act, the Tenth Circuit held that white males were precluded from bringing disparate impact claims under Title VII. *See* Livingston v. Roadway Express, Inc., 802 F.2d 1250, 1252 (10th Cir. 1986). In another pre-1991 decision, the Supreme Court rejected the suggestion that a gender-neutral pension plan would violate Title VII because of its disproportionate impact on *male* employees. City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702, 710 n.20 (1978). The Court explained that such a disparate impact claim would be unavailable to males, because "even a completely neutral practice will inevitably have some disproportionate impact on one group or another," and "*Griggs* does not imply . . . that discrimination must always be inferred from such consequences."

82 Primus, *supra* note 30, at 528; *see* John J. Donohue III, *Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers*, 53 STAN. L. REV. 898 n.2 (concluding that disparate impact analysis does not protect white males as a matter of theory).

83 *See* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1550, 1544-55 (2004) (discussing how disparate impact doctrine would likely fail strict scrutiny if it is only available to racial minorities).

84 *See supra* Part I.A.

> Virtually all of the congressional debate that culminated in the Civil Rights Act of 1991 dealt with whether and to what extent the law of disparate impact under Title VII encouraged employers to implement quotas or other forms of discrimination in favor of minorities. In the end, Congress codified the judicially-created doctrine of disparate impact with minor modifications. [85]

Lastly, it is even possible that direct testimony could be obtained by former White House counsel Boyden Gray, who "disclosed that a 'principal motivation' for the Civil Rights Act of 1991, which codified the disparate-impact provision, was to achieve racial balancing."[86]

Each of the *Arlington* Heights factors demonstrate that the disparate impact provisions written into Title VII through the 1991 Civil Rights Act were adopted with a discriminatory motive. Since the disparate impact provisions were enacted with full discriminatory intent, with an eye towards achieving racial balancing in the workforce, they violate equal protection and are "patently unconstitutional."[87]

2. Title VII's Disparate Impact Provisions Force Employers Into Unconstitutional Racial Balancing

While racial classifications are not inherent in Title VII's disparate impact provisions, they necessarily result from its enforcement. "A plaintiff cannot bring a disparate impact claim without a statistical showing that sorts employees or applicants into groups, and neither the EEOC nor a court can assess a disparate impact claim without deciding whether the classification system the plaintiff used is accurate."[88] Thus, the statute requires potential plaintiffs, as well as government Title VII enforcers – like the DOJ, the EEOC, and federal courts – to make explicit racial classifications in order to give the statute effect.

Further, the manner in which the federal government has enforced Title VII's disparate impact provisions has a coercive effect, because the business may adopt race-conscious measures to avoid liability arising from commonplace disparities. Yet, racial imbalance cannot justify racial

85 *See* Nelson Lund, *The Law of Affirmative Action in and After the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87, 88 (1997).

86 *See* Kenneth L. Marcus, *The War between Disparate Impact and Equal Protection*, 2008-2009 CATO SUP. CT. REV. 53, 64 (2009); *see also* C. Boyden Gray, *The Civil Rights Act of 1991: A Symposium: Disparate Impact: History and Consequences*, 54 LA. L. REV. 1487, 1491 (1994) ("There were private indications that a desire to codify a quota regime was the principal motivation behind the legislation.").

87 *See Grutter*, 539 U.S. at 330; *see also Parents Involved*, 551 U.S. at 723.

88 Primus, *supra* note 30, at 508.

preferences, let alone warrant racial quotas.[89] Because the government is prohibited from implementing quotas, it is also prohibited from enacting policies that force employers to do the same.[90]

While disparate impact theory was intended to combat employment practices that are the functional equivalent of intentional discrimination, in practice, the theory has the perverse effect of encouraging the very behavior our civil rights laws are designed to prevent. If employers can be liable for even those hiring disparities that result from innocuous, race-neutral, job-related practices, the specter of disparate impact liability will steer them toward race-based hiring criteria to prevent disparities from arising in the first place.[91] Employer responses may include deliberate racial balancing, or discarding race-neutral standards after they prove to result in imbalance.[92] In this way, disparate impact subverts Title VII's primary purpose—prohibiting disparate treatment, to its secondary purpose—preventing disparate impact.

In theory, an employer's ability to assert that its hiring criteria are "job-related" means that it should only be held liable if it uses potentially discriminatory measures. An employer's ability to prove its criteria are "job-related," or consistent with "business-necessity," reduces the likelihood that its criteria are designed to harm or help a given race.[93] In some cases, employers are even permitted to adopt classifications that would normally be considered impermissible when those classifications are a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[94] But that is not how

89 *See, e.g.*, Eisenberg ex rel. Eisenberg v. Montgomery Cnty. Pub. Schs., 197 F.3d 123, 132 (4th Cir. 1999); *see* Lewis v. Tobacco Workers' Int'l Union, 577 F.2d 1135, 1142 (4th Cir. 1978).

90 *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988); Norwood v. Harrison, 413 U.S. 455, 465 (1973); *see also* Joshua P. Thompson, *Towards A Post-Shelby County Section 5 Where A Constitutional Coverage Formula Does Not Reauthorize the Effects Test*, 34 N. ILL. U. L. REV. 585, 600-01 (2014) (explaining why a disparate impact-like provision of the Voting Rights Act leads local governments to engage in unconstitutional racial balancing).

91 *See* Marcus, *supra* note 86, at 63.

92 *See* Michael Evan Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L. J. 429, 461 (1985). Additionally, empirical estimates indicate that employers who are able to perform criminal background checks are *more* likely to hire black applicants than employers that do not. Harry J. Holzer et. al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 473 (2006). These findings suggest that employers with a particularly strong aversion to ex-offenders may be more likely to overestimate the relationship between criminality and race and therefore hire fewer blacks as a result. Thus, the threat of disparate impact litigation forcing employers to abandon pre-employment criminal background checks may actually "harm more people than it helps and aggravate racial differences in labor market outcomes." *Id*.

93 *Griggs*, 401 U.S. at 436 (Title VII's job-related requirement "measure[s] the person for the job" by ignoring irrelevant criteria).

94 See 42 U.S.C. § 2000e-2(e).

Title VII's disparate impact provisions are enforced.[95]

Indeed, disparate impact was never meant to mandate that employers hire unqualified individuals in order to eliminate all racial disparities.[96] Disparate impact liability only makes unlawful those disparities that arise from one of the "prohibited bases."[97] Congress was concerned that disparate impact would spawn quota systems and thus specifically prohibited interpreting the Act to require racial balancing.[98]

But as demonstrated by current enforcement of Title VII's disparate impact provisions, even obviously job-related race-neutral criteria can be subject to an EEOC lawsuit.[99] Thus, proving job-relatedness can be a technically difficult and economically burdensome endeavor.[100] Given the threat of an expensive and onerous disparate impact lawsuit, an employer may use improper, secret racial profiling in its hiring to ensure that disparities do not arise from the outset. Unless employers are given wide discretion to choose their employment protocol, disparate impact theory "is a government mandate for proportional quotas in violation of the Equal Protection Clause."[101]

The Supreme Court has long recognized the risk to equal protection posed by the disparate impact approach.[102] In Albemarle Paper Co. v.

95 *See infra* Part. I.C.

96 *Griggs*, 401 U.S. at 434.

97 *Lewis*, 560 U.S. at 206.

98 *See Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98, 103-04 (1974).

99 In addition to the cases discussed below in Part I.D., two other recent cases are demonstrative of current disparate impact enforcement. In EEOC v. Freeman, 961 F. Supp. 2d 783 (D. Md. 2013), the Obama Administration is currently attempting to prevent a business from conducting criminal background checks on prospective employees. In a very strongly worded opinion, the court dismissed the lawsuit. *Id.* at 803 ("Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require."). Nevertheless, the EEOC appealed, and the case is scheduled for oral argument before the Fourth Circuit in December 2014. Similarly, private enforcement of Title VII's disparate impact provisions led to the Seventh Circuit allowing a disparate impact challenge that was premised on the business's use of performance as an evaluation tool to go forward. *See* McReynolds v. Merrill Lynch, 672 F.3d 482, 484-85 (7th Cir.). In *McReynolds*, the court held that disparate impact liability can attach to a business practice that rewards brokers who perform their job well. *Id.* at 488-89 (the firm's "account distribution" policy distributed the accounts of brokers who left the firm to brokers who generated the most revenue). The Supreme Court denied certiorari. 133 S.Ct. 338 (2012).

100 *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1235 (1995).

101 *See* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1153 (1993).

102 *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 652 (1989) ("The only practicable option for many employers would be to adopt racial quotas, insuring that no portion of their work forces deviated in racial composition from the other portions thereof.").

Moody,[103] the Court held that a private employer's pre-employment tests did not comply with guidelines of the Equal Employment Opportunity Commission, and that the employer failed to satisfy its burden of showing that its pre-employment tests were job related.[104] Concurring in the judgment, Justice Blackmun warned that a "too-rigid" enforcement of the guidelines would force the employer to either commission "an impossibly expensive and complex validation study," or "engage in a subjective quota system of employment selection," which would be "of course . . . far from the intent of Title VII."[105] Echoing Justice Blackmun's concerns, Justice Scalia more recently noted that disparate impact "not only permits but affirmatively requires" race-conscious decision making when a disparate impact violation would "otherwise result."[106] The danger is that "disparate-impact provisions place a racial thumb on the scales, often requiring" businesses "to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."[107]

As a consequence of the disparate impact provisions of Title VII, employers engage in acts of racial discrimination. Doing so is a simple, and insidious, form of government-encouraged racial discrimination. "An employer seeking to achieve a particular racial outcome need only identify a racial disparity, locate a selection mechanism that achieves the desired demographic mix, and identify whatever business necessities best justify the mechanism."[108] If "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"[109] then government has no business enacting laws that pressure employers to discriminate.

D. Title VII's Disparate Impact Provisions Have Run Amok

Despite its unconstitutionality, disparate impact litigation has exploded in recent years. One civil rights official explained that "disparate impact is woven throughout civil rights enforcement in [the Obama] administration."[110] Another official described disparate impact as the

103 422 U.S. 405, (1975).
104 *Id.* at 435-36.
105 *Id.* at 449 (Blackmun, J., concurring).
106 *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).
107 *Id.*
108 Marcus, *supra* note 86, at 64.
109 *Parents Involved*, 551 U.S. at 748 (plurality op.).
110 *See* Terry Eastland, *Thomas Perez Makes a Deal: How Obama's Labor nominee made a Supreme Court case disappear*, THE WEEKLY STANDARD, *available at* http://www.weeklystandard.com/keyword/St.-Paul.

"lynchpin" of the Administration's civil rights enforcement.[111] Indeed, under the Obama Administration, disparate impact has been used in unprecedented ways.[112]

One of the most extreme cases of the Obama Administration's disparate impact policy comes from EEOC v. Kaplan Higher Educ. Corp.[113] Like any prudent employer, after Kaplan University experienced employee theft, it instituted new screening criteria for job applicants.[114] Under its new policy, Kaplan screened the applicants' credit histories for indications of financial stress on the theory that individuals who were subject to a financial burden would be more likely to steal from the company. Kaplan's policy was entirely race-neutral. The race of the applicants was not reported with the credit check results.[115] Furthermore, Kaplan's policy was business-related, as evidenced by EEOC's own use of credit checks to evaluate potential employees.[116] Nevertheless, EEOC brought a Title VII claim against Kaplan alleging that the corporation's use of credit checks disproportionately affected black applicants.

To reiterate, EEOC brought a Title VII disparate impact lawsuit against a business for a practice that the EEOC itself used, and for which the business had a demonstrable reason for instituting. Sadly, that was not the most egregious aspect of the lawsuit. Because Kaplan had not asked for the race of the job applicants, EEOC was unable to easily demonstrate that the policy resulted in statistical disparities. Rather than asking the applicants to self-identify their race – as EEOC itself counsels employers to do[117] – EEOC resorted to establishing a panel of "race raters" to assign a race to each Kaplan applicant based on nothing more than the applicant's driver's license photo.[118] In other words, EEOC assigned races to individuals based on what they looked like.

111 *Id.*

112 *See* Joshua P. Thompson, *Obama Administration taking disparate impact theory to a new level*, PAC. LEGAL FOUND. LIBERTY BLOG (May 8, 2012), http://blog.pacificlegal.org/2012/obama-administration-taking-disparate-impact-theory-to-a-new-level/ (cataloging various ways disparate impact is being used by the Obama Administration).

113 748 F.3d 749 (6th Cir. 2014).

114 *Id.* at 751.

115 *Id.*

116 Equal Opportunity Emp't Comm'n v. Kaplan Higher Learning Edu. Corp., No. 1:10 CV 2882, 2013 WL 322116, at *3 (N.D. Ohio, Jan. 28, 2013), *reconsideration denied sub nom.* Equal Opportunity Emp't Comm'n v. Kaplan Higher Educ. Corp., No. 1:10 CV 2882, 2013 WL 1891365 (N.D. Ohio, May 6, 2013) *and aff'd sub nom.* E.E.O.C. v. Kaplan Higher Educ. Corp., 748 F.3d 749 (6th Cir. 2014). According to the EEOC's Personnel Suitability and Security Program Handbook, credit checks are required for 84 of the 97 positions at the EEOC.

117 *See* EEOC, QUESTIONS & ANSWERS -IMPLEMENTATION OF REVISED RACE & ETHNIC CATEGORIES, *available at* http://www.eeoc.gov/employers/eeo1/qanda-implementation.cfm.

118 *Kaplan*, 748 F.3d at 751-52.

The Sixth Circuit rightly affirmed the lower court's dismissal, and did so with undisguised disgust. It explained that "[t]he EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself."[119] In order to "enforce" Title VII's disparate impact provisions, EEOC stereotyped individuals based on their "look," which, even if done scientifically, is a woefully inadequate proxy for race.[120] Indeed, because race is so indeterminate, individuals may choose to hold themselves out as one race or another.[121]

Worse, such action is flatly unconstitutional. Stereotypes of any kind are repugnant to the Constitution.[122] Stereotyping "consists of inferring a relatively complete idea about a specific subject based on a small amount of information."[123] Thus, stereotypes reduce race to a simplistic notion, and reduce an individual to his or her race.[124] EEOC's race raters' judged individuals based on the color of their skin, and the shape of their physical features. These classifications—which were necessarily premised upon stereotypes of the way certain races "look"—are pernicious. Whereas *Grutter*[125] and *Fisher*[126] permitted race-conscious measures in order to break down stereotypes, the EEOC's actions in *Kaplan* expressly relied on and perpetuated racial stereotypes. Regardless of one's purpose, to rely on stereotypes "retards . . . progress and causes continued hurt and injury."[127]

Even if the race raters could determine the race of the Kaplan applicants by looking at their driver's license photo, they would do so at a significant cost; they would violate the individualized treatment promised by the Constitution. Disparate impact thus is being used in a manner that directly contradicts everything equal protection stands for. Equality before the law means that government will not categorize people based on unscientific,

119 *Id.* at 754.

120 *See* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 722 (2000).

121 *See generally* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1136 (2004).

122 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 565 (1996) (Rehnquist, C.J., concurring); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 630-31 (1991).

123 Antony Page, Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 187 (2005).

124 *See Miller*, 515 U.S. at 912, 920 (stating that the assumption that individuals of a same race "think alike, share the same political interests, and will prefer the same candidates at the polls" is "racial stereotyping at odds with equal protection mandates.").

125 *Grutter*, 539 U.S. at 330.

126 Fisher v. Univ. of Tex.,133 S. Ct. 2411, 2418 (2013).

127 *Edmonson*, 500 U.S. at 630-31.

stereotypical criteria, and it allows each person to define himself or herself, and thrive as an individual. As demonstrated by the EEOC's actions in *Kaplan*, current enforcement of disparate impact does the opposite.

Title VII litigation is not limited to enforcement by federal officials. Private parties may also bring disparate impact claims.[128] One of the most extreme cases of disparate impact being used by private litigants comes from Pippen v. Iowa,[129] a case decided by the Iowa Supreme Court in 2014. In *Pippen*, several black employees and job applicants filed a lawsuit claiming that the entire executive branch of Iowa systematically discriminated against them–not intentionally, but because of "implicit biases" harbored by state hiring personnel.[130] That dubious social science theory pegs the majority of people as unconsciously racially prejudiced, even if they are consciously committed to the ideas of equality and merit.[131] Plaintiffs argued that these implicit biases caused a disparate impact on the basis of race in violation of Title VII.[132] They hoped to make Iowa the first state in the nation to recognize a causal link between subconscious tendencies and racial disparities in the workforce. Fortunately, the Iowa Supreme Court affirmed the dismissal of the lawsuit.[133]

The plaintiffs' attorneys in *Pippen* did not blink at spending $4 million on the lawsuit, and hinted that more implicit bias disparate impact cases could be brought under Title VII.[134] Recognizing a cognizable link between implicit bias theory and disparate impact would compound the constitutional problems with Title VII. The argument rests on a theory that individuals harbor subconscious prejudices against other racial groups that cannot be overcome by impassioned conscious efforts toward fairness and equality.[135]

Disparate impact already sets the bar for actionable discrimination low, but implicit bias would compound the problem to such an extent that the

128 42 U.S.C. § 2000e-2.

129 Pippen v. State of Iowa, 854 N.W.2d 1 (2014), *reh'g denied* (Oct. 13, 2014).

130 *Id.* at 3.

131 *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

132 *Pippen*, 854 N.W.2d at 5-6.

133 *Id.* at 32.

134 Gabriella Dunn, *Iowa Supreme Court: State's employment practices are not discriminatory*, CEDAR RAPIDS GAZETTE (November 17, 2014), *available at* http://thegazette.com/subject/news/iowa-supreme-court-states-employment-practices-are-not-discriminatory-20140718.

135 *See* Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126 (2012) (explaining implicit bias theory and how it could alter the law).

overwhelming majority of the American population would be guilty.[136] Implicit bias research qualifies most people as bigots because they "blink[] more frequently in the presence of a minority" or "associat[e] elderly persons with positive traits milliseconds slower than they associate young persons with positive traits."[137] Title VII causation cannot reasonably be implicated through such benign acts.[138]

Nevertheless, some scholars have already proposed that society combat implicit prejudice by requiring institutions to treat racial minority status as a plus factor.[139] Such proposals argue that "treating the trait that triggers a negative stereotype as a plus factor will help offset the effect of the stereotype."[140] If such lawsuits gain steam, Title VII's disparate impact provisions will work the precise harm they were designed to prevent. Pressuring employers to make surreptitious and unlawful race-conscious decisions in order to avoid Title VII liability is precisely the equal protection harm identified by the Supreme Court in *Ricci*.[141]

Both *Kaplan* and *Pippen* demonstrate that America is at a crossroads with disparate impact under Title VII. These cases demonstrate how disparate impact encourages "the institutionalization of race-consciousness and, with it, the entrenchment of pernicious stereotypes, social division, resentment, and stigmatization."[142] Either the Supreme Court needs to strikes down Title VII's disparate impact provisions as unconstitutional, or the statute needs a complete overhaul. Twenty-plus years is too long to allow Title VII's promise of equality under the law to be so perverted.

II. TITLE VII'S DISPARATE TREATMENT PROVISIONS SHOULD APPLY EQUALLY TO ALL INDIVIDUALS REGARDLESS OF RACE

As employers increasingly strive to achieve a racially diverse workforce,

136 *See* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1032 (2006).

137 *Id.*

138 *See* Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to* Bagenstos, 37 HOFSTRA L. REV. 737, 738 (2009) (stating that courts should not jump to transform current law based on implicit bias theory).

139 *See* Ivan E. Bodensteiner, *Although Risky After* Ricci *and* Parents Involved*, Benign Race-Conscious Action Is Often Necessary*, 22 NAT'L BLACK L.J. 1, 33 (2009).

140 *Id.*; *see also* Jolls & Sunstein, *Symposium on Behavioral Realism: The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 976-86 (2006) (arguing that direct and indirect means of "debiasing," such as affirmative action, may overcome implicit bias); Ivan E. Bodensteiner, *Benign Race-Conscious Actions Are Necessary to End Race Discrimination and Achieve Actual Equality* (2008) (on file with Valparaiso Univ. Sch. of Law).

141 *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (probing whether disparate impact is consistent with equal protection due to the race-based classifications it encourages).

142 Marcus, *supra* note 86, at 81.

some scholars have advocated that Title VII be construed to permit voluntary race-conscious affirmative action in the interest of diversity.[143] Recent Supreme Court decisions counsel against an interpretation of Title VII that would allow employers to grant preferential treatment to individuals on the basis of race. In Grutter v. Bollinger,[144] the Court approved, against an equal protection challenge, a law school's use of race in admissions to further the compelling interest of attaining a diverse student body.[145] But in doing so, the Court signaled its increasing disapproval of policies that allow an entity to provide favorable treatment to individuals on the basis of their race.[146] In Ricci v. Destefano,[147] the Court again conveyed its growing concern over racial classifications, this time in the context of employment discrimination cases brought under Title VII.[148] *Ricci* restricted an employer's ability under Title VII to act race-consciously in order to ameliorate the adverse impact from an otherwise race-neutral procedure.[149] Specifically, the Court explained that Title VII's disparate treatment provisions are paramount and employers may not purposefully discriminate against employees of one race in order to avoid causing a racially disparate impact.[150]

In addition to announcing the strong basis in evidence standard for situations where Title VII's disparate impact and disparate treatment canons conflict, *Ricci* raises significant question about employers who adopt voluntary race-conscious affirmative action plans.[151] For if *Ricci* rejects the idea that an employer can act race-consciously to avoid a

143 *See* Richard N. Appel, Alison L. Gray & Nilufer Loy, *Affirmative Action in the Workplace: Forty Years Later*, 22 HOFSTRA LAB. & EMP. L.J. 549, 574 (2005).

144 539 U.S. 306 (2003).

145 *See id.* at 328.

146 *See Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also Fisher*, 133 S. Ct. at 2420 (making the government's use of race more difficult by holding that strict scrutiny now imposes on public universities "the *ultimate burden* of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives *do not suffice*" (emphasis added)); Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1639 (2014) (Scalia, J. concurring) (warning that "*Grutter*'s bell may soon toll.").

147 557 U.S. 557 (2009).

148 Some scholars have argued that the Court's earlier decisions in *Watson*, 487 U.S. 977, *Atonio*, 490 U.S. 642, Lorance v. AT&T Techs., 490 U.S. 900 (1989), and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) reflect the Court's changing judicial approach towards Title VII. *See* John E. Nowak, *Symposium: Brown v. Board of Education After Forty Years: Confronting the Promise: The Rise and Fall of Supreme Court Concern for Racial Minorities*, 36 WM. & MARY L. REV. 345, 390-404 (1995).

149 *Ricci*, 557 U.S. at 584.

150 *See id.* at 583 (noting its new standard limits an employer's discretion when making race-based decisions).

151 The Supreme Court has held race-conscious, voluntary affirmative action plans to a lesser standard of review. *See Johnson*, 480 U.S. at 626; *see also United Steelworkers*, 443 U.S. 193.

disparate impact, the employer should not be able to act race-consciously when there is no fear of disparate impact litigation.

Title VII should not apply differently depending on the race of the person bringing suit. The text of Title VII prohibits intentional discrimination in all its forms; there is no affirmative action exception.[152]

A. Race Conscious Affirmative Action Plans Before Ricci

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[153] Section 703(a) of the Act prohibits disparate-treatment discrimination.[154] That section makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[155]

Section 703(a) claims are analyzed under the burden-shifting rules of McDonnell Douglas Corp. v. Green.[156] Under *McDonnell Douglas,* a plaintiff must first make out a *prima facie* case by demonstrating that: (1) he belongs to a member of a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[157] Once the *prima facie* case has been shown, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action.[158]

The *McDonnell Douglas* burden-shifting framework applies in nearly all Section 703(a) claims with one notable caveat. Under Johnson v. Transp. Agency, Santa Clara Cnty., Cal.,[159] if an employer intentionally discriminates against self-identifying white applicants pursuant to an affirmative action plan, the employer satisfies the "non-discriminatory reason" requirement of *McDonnell Douglas*.[160] If the employer produces

152 42 U.S.C. § 2000e-2(a)(1).
153 42 U.S.C. § 2000e *et seq*.
154 42 U.S.C. § 2000e–2(k).
155 § 2000e–2(a)(1); *Ricci*, 557 U.S. at 577.
156 411 U.S. 792, 802–04 (1973).
157 *Id*. at 802.
158 *Id.*
159 480 U.S. 616 (1987).
160 *Id.* at 626.

an affirmative action plan to justify its discrimination, the burden shifts back to the plaintiff who then must prove that the employer's justification is pre-textual and the plan is invalid.[161] Reliance on an affirmative action plan is not to be treated as an affirmative defense, meaning the employer does not have to carry the burden of proving the validity of its race-conscious plan.[162] The employer's burden is one of production, not persuasion.[163]

To show that an employer's affirmative action plan is pre-textual, a nonminority plaintiff must first show that the plan was not designed to remedy a "manifest imbalance" of minorities or women in "traditionally segregated job categories."[164] An employer could demonstrate a manifest imbalance solely on statistical evidence, through a combination of statistical and anecdotal evidence, or even based on anecdotal evidence supporting a weak statistical showing.[165] Prior to *Ricci*, "An employer need point only to a conspicuous imbalance in traditionally segregated job categories."[166] To implement race-conscious measures that favored minority employees over nonminority employees, an employer did not have to admit to any prior discrimination, nor even point "to evidence of an 'arguable violation' on its part."[167]

If an affirmative action plan has been found to be justified by a "manifest imbalance" of minorities or women in "traditionally segregated job categories," a nonminority plaintiff may still succeed at showing the plan was pre-textual if she can show that the affirmative action plan unnecessarily trammels the interests of non-minorities.[168] Relevant factors in determining the proper scope of affirmative relief include whether such relief is temporary and limited in nature, and whether it involves layoffs or less burdensome promotions.[169]

The Court's decisions in *Johnson* and *Weber* make Title VII's disparate treatment provisions largely illusory for a significant number of individuals who suffer from intentional racial discrimination in employment. Not only is an employer's discriminatory affirmative action plan presumed legal, but the burden is placed on plaintiffs to prove the illegality. Fortunately, the

161 *Id*.
162 *Id*. at 627.
163 *Hicks*, 509 U.S. at 509.
164 *Weber,* 443 U.S. at 208.
165 *See* Palmer v. Shultz*,* 815 F.2d 84, 91, 96-97 (D.C. Cir. 1987).
166 *Johnson*, 480 U.S. at 630 (internal quotations and citations omitted).
167 *Id*.
168 *Weber,* 443 U.S. at 209.
169 *See* United States v. Paradise, 480 U.S. 149, 182 (1987); *see also Wygant,* 476 U.S. at 282–283.

Court's decision in *Ricci* suggests that employers defending against a Title VII claim must be held to a higher standard when their decisions subject non-minorities to disparate treatment pursuant to an affirmative action plan.[170]

B. Ricci Presumes Race-Conscious Action Violates Title VII's Disparate Treatment Provisions

In *Ricci*, the City of New Haven, Connecticut, administered written and oral examinations to promote ten firefighters to the rank of lieutenant, and nine firefighters to the rank of captain. The examinations were created by a consulting firm, which performed an exhaustive job analysis to identify the tasks, knowledge, skills, and abilities essential for the pertinent positions.[171] Of the top scoring candidates for the nineteen lieutenant and captain positions, seventeen were white and two were Hispanic. Based on the disproportionate results the test had on black test takers, the City declined to certify the results and refused to promote the top scoring candidates.[172] Seventeen white firefighters and one Hispanic firefighter sued the City for intentional race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII.[173] The district court granted summary judgment for the City finding that its refusal to promote the top test scorers did not constitute discrimination in violation of Title VII.[174] The Second Circuit affirmed.[175]

The Supreme Court reversed, holding that absent a compelling justification, the City violated Title VII when it declined to certify the examination results due to the race of the higher scoring candidates.[176] The Court rejected the City's assertion that a public employer's good-faith belief that its actions are necessary can justify race-conscious conduct.[177] Where the disparate impact provisions are used as a justification for

170 *See* Leyland Ware, *Ricci v. Destefano: Smoke, Fire and Racial Resentment*, 8 RUTGERS J.L. & PUB. POL'Y 1, 49 (2011) ("[The *Ricci*] decision created an entirely new standard that imposes a heavy burden on employers.").

171 *Ricci,* 557 U.S. at 564-566.

172 *Id*. at 567-574.

173 *Id*. at 575.

174 *Id.* at 576. The District Court rejected the nonminority firefighters' equal protection claim, believing that the City had not acted because of discriminatory animus. It concluded that the City's actions were not "based on race" since "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted." *Id.*

175 *Id*.

176 *Ricci,* 557 U.S. at 579. The Court never reached the nonminority firefighters' equal protection claim, since its decision on the Title VII claim resolved the case. *Id*. at 576-77.

177 *Id*. at 581.

engaging in disparate treatment, the Court reviews the race-conscious action under the higher legal standard used in constitutional challenges to affirmative action programs.[178]

The *Ricci* majority relied upon the constitutional framework for equal protection challenges to government affirmative action programs when it determined that an employer had violated Title VII.[179] Specifically, the Court incorporated the strong basis in evidence standard into its Title VII analysis to find the employer liable for its disparate treatment of non-minorities.[180] Under equal protection analysis, courts subject all government race-conscious affirmative action programs to strict scrutiny.

In Adarand Constructors, Inc. v. Pena,[181] the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[182] Therefore, a government's race-conscious affirmative action plan is presumptively unconstitutional unless the government's use of race is narrowly tailored to further compelling governmental interests.[183] The government can demonstrate a "compelling governmental interest" only when it shows, by a "strong basis in evidence," that its racial classifications are necessary to remedy prior governmental discrimination.[184]

Similarly, to justify disparate treatment of non-minorities, *Ricci* held that the employer must demonstrate by a strong basis in evidence that it would have been subject to disparate impact liability from minority employees had it certified the test results.[185] This requirement imposes a far heavier burden on the employer than *Weber* and *Johnson* had imposed upon employers in those cases.[186] Ultimately, the Court applied that standard to the facts in *Ricci* and reasoned that the employer could not prove, by a strong basis in evidence, that the promotion examinations were not job-related or consistent with business necessity.[187]

178 *Id*. at 583.
179 *Id*. at 582.
180 *Id*. at 584.
181 515 U.S. 200 (1995).
182 *Id*. at 227.
183 *Id*.
184 *See Wygant* 476 U.S. at 274, 277 ("In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.").
185 557 U.S. at 584.
186 *See* Herman N. (Rusty) Johnson, Jr., *The Evolving Strong-Basis-in-Evidence Standard*, 32 BERKELEY J. EMP. & LAB. L. 347, 366 (2011) (arguing that the strong basis in evidence standard imposes a burden of persuasion on employers).
187 557 U.S. at 587, 592 (the employer could not prove "that the tests were flawed because they were not job related or because other, equally valid and less discriminatory tests were available. . . .").

C. *Ricci's Strong Basis In Evidence Standard Appears To Have Overruled Weber And Johnson*

1. How *Ricci* Overruled *Weber*

In United Steelworkers of America v. Weber,[188] the non-minority plaintiff argued that any racial preference granted by the employer violated sections 703(a) and (d) of Title VII.[189] Both the district court and Fifth Circuit accepted this argument and held that the employer's disparate treatment of a nonminority violated Title VII and could not be justified – even by the employer's affirmative action plan.[190] The Supreme Court reversed, holding that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.[191] Title VII allowed private employers the discretion to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.[192] The employer defended against the lawsuit, in part, by arguing that it feared minority employees would bring suit under Title VII if it did not adopt an affirmative action plan. [193] But the Court found it unnecessary to even consider the employer's defense in light of its holding that Title VII did not prohibit all voluntary, race-conscious affirmative action efforts.[194]

The *Ricci* Court's analysis is at odds with the aspects of *United Steelworkers of Am.,* that hold: (1) an employer's consideration of race and the granting of racial preferences may not in all circumstances violate Title VII; and (2) Title VII permits an employer to remedy discrimination for which it was not responsible. *Ricci*'s premise signals an abandonment of the Court's conclusion in *Weber*, that an employer's disparate treatment of non-minorities could be justified without even considering the employer's defenses. *Ricci* proclaimed at the outset that "[t]he City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."[195] Where the *Weber* court rejected the argument that any

188 443 U.S. 193 (1979).

189 Brief of Appellees at 29-34, *Weber*, 563 F.2d 216 (No. 76-3266) *rev'd sub nom.* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

190 *See Weber*, 415 F. Supp. 761 (district court's ruling); *Weber*, 563 F.2d at 226 (Fifth Circuit refusing to justify employer's remedial race-conscious measures in lieu of Title VII's "unequivocable prohibitions against racial discrimination against any individual").

191 *Weber*, 443 U.S. at 208.

192 *Id.* at 209.

193 *Id.* at 209 n.9.

194 *Id*.

195 *Ricci*, 557 U.S. at 579.

disparate treatment by the employer would violate Title VII, and felt it unnecessary to even consider the employer's defenses, the *Ricci* Court embraced that argument as its starting point.

Weber's interpretation of Title VII allowed employers to take race-conscious measures to "eliminate traditional patterns of racial segregation."[196] The *Weber* court considered a job category to be "traditionally segregated" even if minority underrepresentation was caused by societal discrimination.[197] Thus, an employer could make racially preferential hiring decisions even if it had not engaged in discriminatory practices in the past.[198] The employer merely had to show a statistical disparity, even though such a showing would "not conclusively prove a violation of the Act."[199] But *Ricci* rejected this argument outright. It held that an employer's purposeful discrimination against non-minorities violates Title VII unless the employer can demonstrate, through a strong basis in evidence, that had it not taken its action, it would have been liable under the disparate-impact provision of Title VII.[200] An employer may only be found liable for its own discriminatory conduct under Title VII.[201] Thus the *Ricci* Court overruled *Weber's* holding that an employer could take race-based action to remedy discrimination that it did not engage in, and for which it would not face liability. Under *Ricci*, an employer has the burden to prove that it would be liable for its own discrimination absent the implementation of its race-conscious affirmative action plan.

2. How *Ricci* Overruled *Johnson*

Ricci overruled Johnson v. Transp. Agency, Santa Clara Cnty., Cal.,[202] to the extent *Ricci* held that an employer's disparate treatment against non-minorities violates section 703(a)(1) unless the employer prevails on a

196 *Weber*, 443 U.S. at 201.

197 *Id*. at 212 (Blackmun, J. concurring) ("the Court considers a job category to be 'traditionally segregated' when there has been a societal history of purposeful exclusion of blacks from the job category).

198 *Id.* at 213 (Blackmun, J., concurring) ("The individual employer need not have engaged in discriminatory practices in the past."); *see Johnson*, 480 U.S. at 630 ("As Justice Blackmun's concurrence made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part.").

199 *Weber*, 443 U.S. at 213 (Blackmun, J., concurring).

200 *Ricci*, 557 U.S. at 563.

201 *See* 42 U.S.C.A. § 2000e-2 ("It shall be an unlawful employment practice for *an employer* to . . . [discriminate against an individual] . . . because of such individual's race, color, religion, sex, or national origin."); *see Fairley v. Fermaint*, 482 F.3d 897, 903 (7th Cir. 2007) (only employers are subject to Title VII because employers are responsible for what *they* do, "rather than what everyone [else] does").

202 480 U.S. 616 (1987).

strong basis in evidence defense.[203]

Johnson held that a public employer's decision to promote an employee on the basis of sex did not violate Title VII, because the decision was made pursuant to an affirmative action plan directing that sex or race be taken into account to remedy underrepresentation.[204] *Johnson* placed the burden of persuasion on the plaintiff challenging the race- and sex-conscious plan.[205] The majority in *Johnson* rejected Justice O'Connor's suggestion that the inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII should be no different from that required by the Equal Protection Clause.[206] She argued that the employer "must have had a firm basis for believing that remedial action was required."[207]

The *Johnson* Court agreed that once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer. But *Johnson* held that all that the employer must do to meet its burden of articulating a nondiscriminatory rationale for its decision is to show the "existence of an affirmative action plan."[208] If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff. Under *Johnson*, the burden of proving the invalidity of the proffered justification for an employer's consideration of race and sex remains on the plaintiff.[209] Moreover, the employer's affirmative action plan accepted in *Johnson* was not even designed to remedy the employer's discrimination, but simply to eliminate imbalances in traditionally segregated job categories.[210]

Ricci found that the plaintiffs made their prima facie showing of a section 703(a)(1) violation by establishing that the employer refused to certify the promotion test results because of a statistical race disparity. But rather than having to merely articulate a nondiscriminatory rationale for its decision, the *Ricci* Court required the employer to prove as a "valid defense" that it had a strong basis in evidence for concluding its actions were necessary to avoid liability for disparate impact discrimination.[211]

203 *Ricci*, 557 U.S. at 584.

204 *Johnson*, 480 U.S. at 634.

205 *See id.* at 626 (noting that in *Wygant* that the Court held "'[that] [t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program,' and we see no basis for a different rule regarding a plan's alleged violation of Title VII.") (internal quotations omitted).

206 *Id*. at 649 (O'Connor, J., concurring).

207 *Id*.

208 *Id*.

209 *Johnson*, 480 U.S. at 634

210 *Id*. at 637.

211 *Ricci*, 557 U.S. at 579 ("valid defense"); *id*. at 583 (applying strong basis in evidence standard).

This requirement by *Ricci* is inconsistent with *Johnson*'s holding that justification for an employer's race-conscious measures is not to be treated as an affirmative defense.[212]

D. Ricci's Strong Basis In Evidence Standard Should Apply To All Title VII Cases Where An Employer Acts Intentionally On The Basis Of Race

Ricci held the City of New Haven to the strong basis in evidence standard in order to resolve the conflict between the disparate-treatment and disparate-impact provisions of Title VII.[213] In other words, the Court determined when it is permissible under Title VII for an employer to purposefully discriminate against employees of one race to avoid discriminating against employees of other races. Thus, *Ricci*'s holding applies where an employer acting pursuant to its affirmative action plan provides racial preferences to minority employees, while affirmatively discriminating against nonminority employees.

The policy concerns and rationale that guided the Court's holding in *Ricci* are present when an employer purposefully discriminates against non-minorities according to its voluntary affirmative action plan.[214] In *Ricci*, the Court noted that an employer may take "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."[215] But these efforts must be made while protecting an "an employee's legitimate expectation not to be judged on the basis of race."[216]

In her dissent in *Ricci*, Justice Ginsburg noted that the case "does not involve

affirmative action."[217] Some courts have interpreted this sentence to mean that *Ricci* does not govern instances where an employer has subjected non-minorities to disparate treatment pursuant to an affirmative action

212 *See Johnson*, 480 U.S. at 627 (rejecting the notion that the existence of an affirmative action plan is to be treated as an affirmative defense); *see also* Lynda L. Arakawa & Michele Park Sonen, *Caught in the Backdraft: The Implications of Ricci v. Destefano on Voluntary Compliance and Title VII*, 32 U. HAW. L. REV. 463, 481 (2010) ("The likely effect of the *Ricci* standard is that an employer must prove that it discriminated against its minority employees[]" before implementing a race-conscious affirmative action plan).

213 *Ricci*, 557 U.S. at 584.

214 *See* Arakawa & Sonen, *supra* note 212, at 481.

215 *Ricci*, 557 U.S. at 585.

216 *Id.*

217 *Id*. at 626 (Ginsburg, J., dissenting).

plan.[218] Yet Justice Ginsburg also recognized in her dissent that *Ricci* cannot be squared with the deferential standard described in *Johnson* and *Weber*: "[I]f the voluntary affirmative action at issue in *Johnson* does not discriminate within the meaning of Title VII, neither does an employer's reasonable effort to comply with Title VII's disparate-impact provision."[219] Justice Ginsberg's argument could only be true if the Title VII injury in *Ricci* is indistinguishable from that in *Johnson*, since both were made pursuant to race-conscious conduct presumed to be lawful. It therefore follows that, because *Ricci* holds that an employer's efforts to comply with Title VII's disparate impact provisions *are not* a sufficient defense for engaging in the injury-inducing race-conscious action, neither can the existence of an injury-inducing affirmative action plan shield an employer's discriminatory conduct. Even prior to *Ricci*, some circuits had suggested that if *Johnson* were decided today, the Court would assign to the employer – rather than the non-minority plaintiff – the burden of proving the validity of an affirmative action plan.[220]

In *Ricci*, the Court was specifically concerned about circumstances in which an employer could discriminate against nonminority employees to avoid disparate impact liability from potential Title VII claims brought by minority employees. The overall rationale that guided the Court in *Ricci* is the same concern presented by cases challenging race-conscious affirmative action plans: to avoid "the sort of racial preference that Congress has disclaimed [in] § 2000e–2(j)."[221] Racial preferences are "antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race."[222]

The Court originally adopted and applied the strong basis in evidence standard, in the equal protection context, to address the conflict created when an employer enforces a voluntary race-conscious affirmative action plan which discriminates against non-minorities. In *Wygant*, the Court relied upon this standard to resolve "the tension between eliminating

218 *See* United States v. Brennan, 650 F.3d 65, 98 (2d Cir. 2011).

219 *Ricci*, 557 U.S. at 626 (Ginsburg, J., dissenting).

220 *See* Bass v. Bd. of Cnty. Comm'rs, Orange Cnty., Fla., 256 F.3d 1095, 1114 (11th Cir. 2001) (explaining that failing to place the burden of showing that an affirmative action plan is valid on a Title VII defendant is contrary to the trend since *Johnson* towards heightened, rather than relaxed, scrutiny of affirmative action plans); Hill v. Ross, 183 F.3d 586, 590 (7th Cir. 1999) (discussing that *Johnson* has been undermined by subsequent Supreme Court decisions, but declining to decide whether it survived those decisions).

221 *Ricci*, 557 U.S. at 585. Section 2000e-2(j) states that Title VII is not to be interpreted as requiring any employer to grant racial preferences on account of an imbalance with respect to the number of minority employees and the total number of minorities in the available work force. 42 U.S.C.A. § 2000e-2.

222 *Id*.

segregation and discrimination on the one hand and doing away with all governmentally imposed discrimination based on race on the other."[223] When a case presents this conflict, the Court holds that the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.[224]

Ricci imposed the strong basis in evidence standard because "[e]videntiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees."[225] Reconciling those two differences requires the employer to produce "evidentiary support" for its determination that remedial action is necessary,[226] and not base it on "an amorphous claim that there has been past discrimination."[227]

Incorporating the strong basis in evidence standard into its Title VII analysis, the *Ricci* Court noted that "[t]he same interests are at work in the interplay between the disparate-treatment and disparate-impact provisions of Title VII."[228] The Court applied the strong-basis-in-evidence standard to Title VII to "give[] effect to both the disparate-treatment and disparate-impact provisions," and allow "violations of one in the name of compliance with the other only in certain, narrow circumstances."[229]

Similarly, whenever there is a conflict between an employer's voluntary efforts to "eliminate[] . . . discrimination on the one hand," [230] and the statutory prohibition of taking adverse employment actions "because of" race"[231] on the other, the rationale behind *Ricci* also requires that employer be held to the strong basis in evidence standard – even where employer acted pursuant to its affirmative action plan.[232]

No court has squarely addressed whether *Ricci* overruled *Johnson* and *Weber*. However, a case currently pending in the D.C. Circuit Court of

223 *Wygant*, 476 U.S. at 277 (plurality opinion); *see id*. at 291 (O'Connor, J. concurring) (describing how employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to non-minorities if affirmative action *is* taken.)

224 *Id*. at 277.

225 *Id*.; *See also* George Rutherglen, Ricci v. Destefano: *Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 93-94 (2009) ("[W]hat reasons justify actions, which might be characterized as race-conscious, in order to avoid liability?").

226 *Ricci*, 557 U.S. at 582-83 (quoting *Wygant,* 476 U.S. at 277).

227 *Id.* at 583 (quoting *J.A. Croson Co.*, 488 U.S. at 499.

228 *Id*.

229 *Id*.

230 *Id*. at 582 (citing *Wygant*, 476 U.S. at 277).

231 42 U.S.C.A. § 2000e–2(a)(1).

232 *See Ricci*, 557 U.S. at 582 (citing *Wygant*, 476 U.S. at 277).

Appeals raises this precise issue.[233] Forty years ago, Title VII provided the promise that any racial discrimination in employment would be eradicated. The Supreme Court's decisions in *Johnson* and *Weber* retreated from that promise. As Title VII enters its fifth decade, it is time to return the statute to its original purpose. If *Ricci* hasn't done so already, *Johnson* and *Weber* should be overruled.

III. CONCLUSION

Title VII's primary purpose is – and should remain – the elimination of intentional discrimination in employment. The Civil Rights Act of 1964 did not prohibit policies or practices that produce a disparate impact. That doctrine was read into Title VII by the Supreme Court in *Griggs,* which interpreted the Act to prohibit, in some cases, employers' facially neutral practices that are "discriminatory in operation."[234] Though the *Ward's Cove* Court tried later to rein in this doctrine with respect to Title VII, Congress provided a statutory basis for disparate impact when it enacted the Civil Rights Act of 1991. *Griggs* and the 1991 amendments to Title VII encouraged the expansion of disparate impact doctrine which subjects employers to liability for discrimination even when they do not engage in discrimination.

By codifying in Title VII the prohibition on disparate-impact alongside its disparate treatment provisions, Congress placed into one law two doctrines that cannot coexist. To steer clear of liability for a disparate impact on individuals of one race, government entities and private employers must treat individuals from other races unequally and less favorably, thereby expressly violating Title VII's original disparate treatment provisions. And the escalation of disparate impact litigation underscores its unconstitutionality. Employers must take race-conscious prophylactic measures to racially classify and balance their workforces. Race-conscious decisions have become the norm as employers attempt to avoid liability by ensuring racially equal outcomes.

Fortunately, in *Ricci*, the Court has again attempted to rein in disparate impact doctrine and emphasize Title VII's primary goal of eradicating disparate treatment. *Ricci* showcased the tension between those two

233 *See* Shea v. Kerry, 961 F. Supp. 2d 17 (D. D.C. 2013) (appeal pending); *See also* Joshua Thompson, *Fighting to restore Title VII* — Shea v. Kerry, PAC. LEGAL FOUND. LIBERTY BLOG (March 11, 2014), http://blog.pacificlegal.org/2014/fighting-restore-title-vii-shea-v-kerry/ (explaining the D.C. Circuit arguments in *Shea*).

234 401 U.S. at 431.

doctrines, and disparate treatment emerged victorious. Post-*Ricci*, employers may not grant racially preferential treatment at will – the burden now falls on the employer to prove that its race-conscious actions are justified.

Ricci also calls into question the Supreme Court's decisions in *Weber* and *Johnson*. If race-conscious action can only be undertaken when an employer has a strong basis in evidence that it would have been subject to liability had it not taken a particular action, then voluntary race-conscious affirmative programs should violate Title VII. The rationale for the Court's resolution of the tension between disparate treatment and disparate impact in *Ricci* exists whenever a decision maker prefers one employee over another because of race.

Title VII's fiftieth birthday should be celebrated, even if the statute's full potential has yet to be realized. The path towards eliminating racial discrimination in employment begins with ensuring that all racial discrimination in employment is rejected as "odious to a free people whose institutions are founded upon the doctrine of equality."[235] To do that, Title VII's disparate impact provisions and the Supreme Court's decisions in *Johnson* and *Weber* need to be left on the "ash-heap of history."[236]

235 Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

236 Ronald Reagan, U.S. President, Address to the Members of the British Parliament (June 8, 1982).