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ANN C. MCGINLEY

Cognitive Illiberalism, Summary Judgment,  
and Title VII: An Examination of  
*Ricci v. DeStefano*

57 N.Y.L. SCH. L. REV. 865 (2012–2013)

ABOUT THE AUTHOR: William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. J.D., University of Pennsylvania Law School, 1982. I would like to thank Provost John White, Dean Nancy Rapoport, and Library Director, Professor Jeanne Price, for supporting this project and Library Faculty member, David McClure, for his fine work on research and citation for this article. Thanks also to the *New York Law School Law Review* and The Employee Rights Advocacy Institute for Law & Policy for the amazing symposium held on April 23, 2012, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 653, available at <http://www.nylslawreview.com/trial-by-jury-or-trial-by-motion-summary-judgment-iqbal-and-employment-discrimination/>, that brought together judges, practitioners, and scholars to discuss and write about the problem of overly-aggressive dismissal of cases using pre-trial motions. Special thanks to Suja Thomas for inviting me to participate in the symposium and to Liz Schneider, Minna Kotkin, and Jeff Stempel for comments on my paper.

## I. INTRODUCTION

Scholars have long criticized the federal courts for their inappropriate grants of summary judgment in Title VII cases.<sup>1</sup> Empirical research supports the scholars' concerns about summary judgment and also tends to demonstrate an "anti-plaintiff effect" in employment discrimination cases in all stages in federal court. Empirical studies demonstrate that employment discrimination plaintiffs are at a significant disadvantage in both the federal district courts and in the federal courts of appeals.<sup>2</sup> Plaintiffs' win rates in employment discrimination cases at both pretrial adjudication and trial stages are significantly below those of plaintiffs in non-employment discrimination cases.<sup>3</sup> Curiously, plaintiffs' win rates in employment discrimination trials with a judicial fact finder, rather than a jury, are significantly lower than those of plaintiffs who have juries hear their cases.<sup>4</sup> Perhaps even more surprising—especially acknowledging the low win rates of plaintiffs in employment discrimination cases in the trial-level courts—the courts of appeals reverse plaintiffs' employment

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1. See, e.g., Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517 (2010) [hereinafter Schneider, *The Changing Shape*]; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007) [hereinafter Schneider, *The Dangers of Summary Judgment*]. Recently, scholars have also expressed concerns about the effects of two employment discrimination suits: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which overturned the liberal pleading standard and required facial plausibility for a pleading to survive a motion to dismiss in an antitrust suit, and *Asbcroft v. Iqbal*, 556 U.S. 662 (2009), which applied *Twombly* to a civil rights suit and stated that *Twombly's* holding is not limited to antitrust suits. See, e.g., Schneider, *The Changing Shape*, *supra*; Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009).
  2. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127 (2009) [hereinafter Clermont & Schwab, *From Bad to Worse*] (finding that over the period from 1979 to 2006, the win rate for plaintiffs' employment discrimination cases in federal district court was 15%, much lower than the 51% win rate for non-employment cases); see also Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) [hereinafter Clermont & Schwab, *How Employment Discrimination Plaintiffs Fare*].
  3. See Clermont & Schwab, *From Bad to Worse*, *supra* note 2, at 128–29. Plaintiffs in employment discrimination cases during the period 1979 to 2006 have won 3.59% of pretrial adjudications, whereas plaintiffs in non-employment cases have won 21.05% of the pretrial adjudications. *Id.* at 128. At trial, plaintiffs win at a rate of 28.47% in employment discrimination cases whereas non-employment plaintiffs win at a rate of 44.94%. This gap, however, has been closing recently in light of the Civil Rights Act of 1991, which granted a jury trial right in Title VII cases. *Id.* at 129.
  4. The Clermont & Schwab study shows that the win rate of employment discrimination cases heard by juries is 37.63%, compared to 44.41% for other non-employment discrimination cases. *Id.* at 130. In contrast, the win rate of employment discrimination plaintiffs in judge trials is only 19.62%, and the win rate of plaintiffs in non-employment judge trials is 45.53%. *Id.*

discrimination wins at a much higher rate than they reverse defendants' employment discrimination victories.<sup>5</sup>

A number of theories may account for these disparities. Some argue that employment discrimination cases are weaker than other types of cases and, therefore, the good employment discrimination cases settle before adjudication.<sup>6</sup> But there is no evidence to support this claim.<sup>7</sup> Empirical studies demonstrate that employment discrimination cases tend to settle later in the litigation process and go to trial more frequently than non-employment cases.<sup>8</sup> The later settlements may occur because many employers, when faced with an employment discrimination case, file motions for summary judgment. When the employers lose these motions, they are more likely to make serious offers of settlement.<sup>9</sup> This strategy has a distinct advantage for the employer. Because employers may more easily bear the burden of costly discovery, and because courts tend to grant motions for summary judgment at a relatively high rate, it is beneficial for employers and their lawyers to wait until the motion for summary judgment is decided.<sup>10</sup>

Moreover, while there was a large increase of employment discrimination cases brought in the early 1990s, a sharp decline of cases brought in federal court has occurred since 1998.<sup>11</sup> Employment discrimination scholars Kevin Clermont and Stewart Schwab suggest that the sharp drop responds to a hostile climate in federal courts toward employment discrimination claims.<sup>12</sup> The decrease suggests that

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5. *See id.* at 111. Courts of appeals reverse plaintiffs' employment discrimination pretrial adjudications at a rate of 30%; they reverse defendants' pretrial adjudications at a rate of 11%. They reverse plaintiffs' trial wins at a rate of 41% and defendants' trial wins at a rate of 9%. *Id.*
  6. *See* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 118 (2007).
  7. *See id.* at 144 (concluding from an empirical study of settlements that plaintiffs neither bring frivolous suits nor receive unnecessary windfalls, but also concluding that the mean settlement was \$54,651 with a median of \$30,000, which was congruent with lost wages). This sample included only settlements that occurred as a result of judicial intervention through settlement conferences with magistrates. It did not include those cases that did not settle after the conferences or cases that settled with no judicial intervention. *See id.* at 130–31.
  8. *See* Clermont & Schwab, *From Bad to Worse*, *supra* note 2, at 122–23 (finding that 37% of employment discrimination cases ended earlier in the litigation process, compared with 59% of non-employment cases); Clermont & Schwab, *How Employment Discrimination Plaintiffs Fare*, *supra* note 2, at 440 (finding that employment discrimination cases settle less frequently than other cases).
  9. *See* Kotkin, *supra* note 6, at 149 (finding that denial of a summary judgment motion to the defendant is linked to higher settlement outcomes).
  10. *See id.* at 122, 125; Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 178, 195 (2010).
  11. *See* Clermont & Schwab, *From Bad to Worse*, *supra* note 2, at 119.
  12. *See id.* at 121. In their earlier article, Clermont and Schwab state:  
Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their

plaintiffs and their lawyers may be screening their cases more carefully before filing in court. If so, one would expect the plaintiffs to be filing only the stronger cases. Consequently, plaintiffs' success rates should have risen since 1998. There is no evidence that they have risen, however. In fact, they have remained fairly constant.<sup>13</sup>

Law professor Katie Eyer attributes the poor showing of employment discrimination plaintiffs to fundamental American beliefs concerning meritocracy and discrimination.<sup>14</sup> She explains that psychological research demonstrates that most people in most situations are "unwilling to make robust attributions of discrimination."<sup>15</sup> An unwillingness to make attributions to discrimination would certainly account in part for the poor rates of success of employment discrimination plaintiffs, but it does not explain why plaintiffs enjoy higher success rates in jury trials than in bench trials.<sup>16</sup> Nor does it fully explain the very high reversal rate of plaintiffs' successful employment discrimination claims in the courts of appeals. Clermont and Schwab attribute a "double standard" to the courts of appeals when it comes to employment discrimination cases, which results in an "anti-plaintiff effect."<sup>17</sup> They state:

Study of appeals is . . . essential to understanding employment discrimination litigation. One can easily see that these plaintiffs do not do well in the district courts, although it is difficult to say exactly why. One can, with more effort see that these plaintiffs do not do well in the courts of appeals and here one can somewhat more solidly conclude that judicial attitudes are at play. The anti-plaintiff effect on appeal raises the specter that federal appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories.<sup>18</sup>

Whether the "anti-plaintiff effect" is based on conscious, discriminatory attitudes on the part of judges is unlikely and unknowable. What we do know is that the gap in success between employment discrimination plaintiffs and defendants raises serious questions about procedural and substantive fairness, and the proper role of judges and juries. Moreover, it may threaten the perceived legitimacy of the federal courts.

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successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.

Clermont & Schwab, *How Employment Discrimination Plaintiffs Fare*, *supra* note 2, at 429.

13. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009).

14. See Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275 (2012).

15. *Id.* at 1278. The term "attributions to discrimination" is a psychology term of art that describes whether people attribute a negative outcome to discrimination. *Id.* at 1278 n.7.

16. See Clermont & Schwab, *From Bad to Worse*, *supra* note 2, at 130–31.

17. See *id.* at 115.

18. *Id.*

The new literature on cognitive illiberalism, which has yet to be applied in the employment discrimination context,<sup>19</sup> considers the effect of judges' grants of summary judgment and their statements that no reasonable jury could find different facts. Law professors Dan Kahan, David Hoffman, and Donald Braman performed an empirical study<sup>20</sup> to investigate the Supreme Court's conclusion in *Scott v. Harris* that no reasonable person would find, having viewed a videotape of a police chase of a suspect, that the officer's decision to ram the suspect's car was unjustifiable.<sup>21</sup> The study results showed that even when faced with a videotape of events, people of different cultural viewpoints and identities interpreted the facts differently.<sup>22</sup> In fact, based on established scales measuring cultural worldviews—whether a person is a communitarian or an individualist, hierarchical or egalitarian—responses were, to a large extent, predictable.<sup>23</sup> The study demonstrated that it is not only the inferences that people draw from facts, but the facts themselves that differ depending on who the viewer of the videotape is.

While the cognitive illiberalism research does not study how groups such as juries interact and make decisions, it does question the judge's role in determining what a "reasonable jury" would decide in a given context.<sup>24</sup> If a substantial minority of the population would see facts in a way that diverges from the way the judge (or a majority of judges on a panel) sees the facts, doesn't that mean that the viewpoint is not unreasonable? And, isn't it odd for the appellate courts to consider a particular factual interpretation unreasonable given that lower court judges and even some members of the appellate court viewed the facts differently from the majority?

With the empirical studies in mind, this article explores the U.S. Supreme Court's grant of summary judgment to the plaintiffs in a high profile "reverse" race discrimination case, *Ricci v. DeStefano*.<sup>25</sup> It considers whether cultural cognition—"the unconscious influence of individuals' group commitments on their perceptions of legally consequential facts"<sup>26</sup>—explains the Supreme Court's decision to grant

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19. Paul Secunda wrote an excellent article applying the theory to labor law and equal protection law in the public employment context. See Paul M. Secunda, *Cultural Cognition at Work*, 38 FLA. ST. U. L. REV. 107 (2010).

20. See Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (demonstrating through an empirical study that black, low-income workers and residents of the Northeast tended to see what happened on the videotape differently from what the Supreme Court and the majority of subjects saw).

21. *Scott v. Harris*, 550 U.S. 372 (2007).

22. See Kahan et al., *supra* note 20, at 841.

23. See *id.* at 859, 879.

24. See, e.g., Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) (arguing that when judges make decisions about what a "reasonable jury" would conclude, they actually decide whether they themselves could find for the plaintiff or think the evidence is sufficient, not whether a reasonable jury could find for the plaintiff or think the evidence is sufficient).

25. See 557 U.S. 557 (2009).

26. Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 851 (2012).

summary judgment to the plaintiffs in *Ricci v. DeStefano*, rather than to remand the case for factual development. It concludes that the Court's analysis of the facts in *Ricci* was likely influenced by cultural cognition, and, as a result, the Court's grant of summary judgment to the plaintiffs in *Ricci* was improper.

In *Ricci*, white firefighters who did well on a 2003 promotional exam sued the City of New Haven for intentional discrimination under Title VII when the City threw out the test results because it allegedly feared a disparate impact cause of action under Title VII by minority firefighters who were unsuccessful on the exam.<sup>27</sup> While the lower courts agreed with the defendants that remedial action that took race into account did not violate Title VII where the test in question clearly had a disparate impact on minority applicants, the U.S. Supreme Court overturned the lower courts. In a 5–4 decision, the Court held that the City and the other defendants had intentionally discriminated against the plaintiffs and had therefore violated Title VII as a matter of law by throwing out the test results. Many scholars have criticized the Court's analysis with reference to the substantive law,<sup>28</sup> but there is scant discussion of the procedural aspects of the case.<sup>29</sup> Because the substance and procedure are inextricably interrelated in the case, this article discusses both, but only for the purpose of considering the Court's procedural ruling. In *Ricci*, unlike any other recent Title VII case, the Supreme Court overturned a lower court's grant of summary judgment to the defendant and granted summary judgment to the plaintiff. Apparently, there was no "anti-plaintiff effect" in this case. But, given the identities of the plaintiffs and defendants in this "reverse discrimination" case, the procedural decision makes the case even more intriguing. It raises the question of whether the views of the Justices joining the majority concerning the importance of colorblind decisionmaking may have consciously or unconsciously affected their decision to grant summary judgment to the petitioners.

Part II of the article analyzes the concepts of cultural cognition and cognitive illiberalism and the Court's summary judgment jurisprudence. It begins with a discussion of *Scott v. Harris* and then discusses an empirical study by Dan Kahan, David Hoffman, and Donald Braman and the normative prescriptions Kahan and his colleagues make. Part III discusses the various opinions in *Ricci*, with an emphasis on the procedural jurisprudence of the case and, in particular, analyzes *Ricci* in light of Kahan's cultural cognition and cognitive illiberalism concepts. Part IV concludes that it appears that the majority's substantive views and cultural affiliations affected

27. See *id.* at 562.

28. See, e.g., Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010); Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197 (2010); Charles A. Sullivan, *Ricci v. DeStefano: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. COLLOQUY 201 (2009); Michael J. Zimmer, *Ricci's "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257 (2010).

29. In a relatively brief description of *Ricci*, Melissa Hart criticized the Court's grant of summary judgment. See Melissa Hart, *Procedural Extremism: The Supreme Court's 2008–2009 Labor and Employment Cases*, 13 EMP. RTS. & EMP. POL'Y J. 253, 257 (2009) (noting that that the majority, Justice Alito's concurrence, and the dissent presented "three very different versions of the facts presented in the record").



its procedural ruling. The *Ricci* majority engaged in unnecessary fact finding, made credibility determinations, and drew inferences in favor of the moving party, the plaintiffs. This decision was unfortunate because it demonstrated disrespect for those subcommunities who would come to a different conclusion in this highly political and controversial case.<sup>30</sup> While the substantive decision in *Ricci* itself would likely be disappointing to certain subcommunities, it is the Court's decision to grant summary judgment that may do the most damage to the democratic legitimacy of the courts because it signals that the courts refuse to hear the voices of those subcommunities who may interpret the facts differently than the majority did.

## II. A PRIMER ON COGNITIVE ILLIBERALISM

*Scott v. Harris* is an infamous case.<sup>31</sup> In *Scott*, the plaintiff, Victor Harris, a nineteen-year-old African American motorist, was clocked speeding at seventy-three miles per hour in a fifty-five mile-per-hour zone.<sup>32</sup> The Georgia county police turned on their flashing lights and pursued Harris at high speed.<sup>33</sup> Unfortunately, instead of stopping, Harris sped up and the police notified other police by radio and continued the high-speed chase.<sup>34</sup> Timothy Scott, a police officer who heard the radio announcement but did not know why the police were pursuing the suspect, joined in the pursuit.<sup>35</sup> At one point, the police had Harris nearly cornered in a shopping center, but Harris turned quickly to evade the police and collided with Scott's car, slightly damaging it.<sup>36</sup> Scott then became the first policeman in pursuit. When he caught up to Harris after approximately six minutes of pursuit, he hit Harris's car with his bumper, which caused Harris to lose control of his car and the car to spin down an embankment. Harris was rendered a paraplegic.<sup>37</sup>

Harris sued, alleging that Scott's decision to bump his car was an unreasonable search and seizure that violated his constitutional rights. Defendant Scott filed a motion for summary judgment based on qualified immunity, but the federal district court denied the motion.<sup>38</sup> The trial court denied summary judgment, holding that

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30. For a discussion demonstrating the political importance of the case, see Ann C. McGinley, Ricci v. DeStefano: *A Masculinities Theory Analysis*, 33 HARV. J.L. & GENDER 581, 610–19 (2010). By “subcommunities” I refer to different identifiable groups that see facts differently. For example, whites versus African Americans, Democrats versus Republicans, egalitarians versus those who believe in hierarchy. For elaboration of this concept, see *infra* notes 51–66 and accompanying text.

31. *Scott v. Harris*, 550 U.S. 372 (2007).

32. *See id.* at 374.

33. *See id.*

34. *See id.* at 375.

35. *See id.*

36. *See id.*

37. *See id.*

38. *See id.* at 375–76.



there were genuine issues of material fact on the issue of qualified immunity<sup>39</sup> and, on appeal, the Eleventh Circuit Court of Appeals affirmed.<sup>40</sup> It held that, taking the facts in the light most favorable to plaintiff Harris, the police officer's action could constitute unnecessary deadly force and, if so, would violate Harris's Fourth Amendment rights. The court of appeals noted that none of the justifications for deadly force was present in this case: "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others."<sup>41</sup> Because the law as it existed at the time was sufficiently clear that ramming a vehicle under these circumstances was unlawful, there would be no qualified immunity for Scott.<sup>42</sup> The case was remanded to the federal district court for trial. In the meantime, the U.S. Supreme Court granted certiorari.<sup>43</sup>

The U.S. Supreme Court disagreed with the Eleventh Circuit. While in most circumstances the lower courts should view the facts on a motion for summary judgment in the light most favorable to the non-moving party, this case, the Court concluded, was an exception because a videotape shot from inside the police officer's car established the facts concerning the chase.<sup>44</sup> The Court stated, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."<sup>45</sup>

Describing the videotape, the Supreme Court stated:

There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.<sup>46</sup>

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39. *Harris v. Coweta Cnty.*, No. 3:01-CV-148-WBH, 2003 U.S. Dist. LEXIS 27348, at \*18–19 (N.D. Ga. Sept. 25, 2003).

40. *Harris v. Coweta Cnty.*, 433 F.3d 807, 821 (11th Cir. 2005) ("[W]e find no reversible error in the denial of qualified immunity to Scott at this stage in the case.>").

41. *Id.* at 815.

42. *Scott*, 550 U.S. at 376.

43. *See Scott v. Harris*, 549 U.S. 991 (2006), *cert. granted*, 550 U.S. 372 (2009).

44. *See Scott*, 550 U.S. at 378–79.

45. *Id.* at 380.

46. *Id.* at 379–80.

Based on the videotape, eight out of nine Justices<sup>47</sup> concluded, “[Harris]’s version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.”<sup>48</sup>

*Scott v. Harris* received significant attention and criticism from procedural scholars.<sup>49</sup> It seems to have taken the summary judgment law and turned it upside down, placing the judge in a fact finding position that is ordinarily reserved for the jury. But were scholars being overly critical? Was it true that the videotape “blatantly contradicts” the plaintiff’s factual allegations and inferences such that no reasonable jury could conclude that Harris’s driving imposed such a danger to others that it justified deadly force? In response, Dan Kahan, David Hoffman, and Donald Braman, as part of the Cultural Cognition Project at Yale Law School,<sup>50</sup> embarked on a study to determine whether it was empirically true that a reasonable jury could reach only one conclusion: that Harris’s flight imposed sufficient danger on the public to justify use of deadly force against him. The study asked more than a thousand people from diverse backgrounds and geographical distributions to view the videotape and to answer questions about: (1) the relative danger of Victor Harris’s and the police’s behavior on the day of the chase; (2) whether Harris’s behavior posed a risk to the police and to the public; (3) whether it was worth the danger to the public for the police to engage in the high-speed chase; (4) whether Harris or the police were at greater relative fault for the risk posed to the public; and, finally, (5) whether the danger Harris’s driving posed to the police and the public justified Scott’s decision to end the chase in a way that threatened Harris’s life.<sup>51</sup>

The results were enlightening. Kahan and his colleagues found that although the majority of their subjects agreed with the Supreme Court’s interpretation of the videotape, a significant minority did not, and there were marked differences in reactions depending on the subgroup to which the subject belonged. For example, African Americans’ views were significantly more pro-plaintiff, as were the views of Democrats

47. *See id.* at 389 (Stevens, J., dissenting). Justice Stevens was the lone dissenter. Interestingly, the majority never explains why Justice Stevens’s view of the facts is unreasonable.

48. *Id.* at 380–81.

49. *See, e.g.,* Schneider, *The Dangers of Summary Judgment*, *supra* note 1; Thomas, *supra* note 24; Michael L. Wells, *Scott v. Harris and the Role of the Jury in Constitutional Litigation*, 29 *REV. LITIG.* 65 (2009).

50. The Cultural Cognition Project at Yale Law School is a group of scholars who study how cultural values shape public risk perceptions and related policy beliefs. Cultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact (e.g., whether global warming is a serious threat; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural identities. Project members are using the methods of various disciplines—including social psychology, anthropology, communications, and political science—to chart the impact of this phenomenon and to identify the mechanisms through which it operates.

THE CULTURAL COGNITION PROJECT AT YALE L. SCH., <http://www.culturalcognition.net> (last visited Feb. 22, 2013).

51. Kahan et al., *supra* note 20, at 857–58.

compared to Republicans, liberals compared to conservatives, and egalitarians compared to persons who believed in hierarchy. Communitarians were significantly more pro-plaintiff than individualists.<sup>52</sup> Thus, although the majority of test subjects agreed with the Supreme Court, dissent from this view was not random across the population. “[T]he minority of subjects who disagreed about the appropriateness of deadly force were connected by a core of identity-defining characteristics. Indeed, so too were members of a minority who formed a view of the facts most unequivocally in line with those of the *Scott* majority.”<sup>53</sup>

Kahan and his colleagues explained that “naïve realism” can distort judicial decisionmaking. “Naïve realism” is a term of social psychologists that refers to “an asymmetry in the ability of most people to identify the effects of value-motivated cognition.”<sup>54</sup> That is, people are aware that others’ views are very dependent on their cultural identities—the “realism” part of the term. But, ironically, they are blind to the extent to which their own interpretation of facts depends on their own cultural identities—the “naïve” part of the term. Thus, judges—when determining that no reasonable jury could find a particular set of facts—may be influenced by their own cultural identities without being aware of it. When judges then proclaim that no reasonable jury could disagree with them, the courts appear dismissive and smug, even contemptuous of others, who, in turn, feel resentment and distrust. This dynamic causes “an escalating cycle of recrimination and distrust.”<sup>55</sup> The result is a state of “cognitive illiberalism.”<sup>56</sup>

The authors of the study argue that the tendency to be realistic about others’ blind spots and unrealistic about one’s own, and the resulting cycle of resentment and recriminations, can have “pernicious consequences” in legal and political settings.<sup>57</sup> They state:

In such a climate, challenges to group-dominant beliefs become indistinguishable from indictments of the integrity and competence of the groups’ members. Opposing groups find themselves engaged in relentless, symbolic status competition—*not* over whose partisan view of the good the law will endorse, but over whose culturally partisan view of the *facts* it will credit.<sup>58</sup>

According to Kahan and his colleagues, the *Scott* decision reflects and reinforces these dynamics. While the Court might have recognized that there were groups that would bristle at the Court’s factual conclusions, it may have attributed those criticisms to citizens’ identities and commitment to their own groups. What the Court’s majority members likely did not recognize, however, was how their own perceptions

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52. *Id.* at 867.

53. *Id.* at 879.

54. *Id.* at 895.

55. *Id.* at 896.

56. *Id.*

57. *Id.* at 895.

58. *Id.* at 896 (emphasis added).

when watching the tape were “just as bound up with cultural, ideological, and other commitments that disposed them to see the facts in a particular way.”<sup>59</sup> The Court’s language and disposition likely also called into question the integrity, intelligence, and competence of identifiable subcommunities when it declared that no reasonable juror could disagree with it.<sup>60</sup>

The authors argue that contributing to the dynamic of cognitive illiberalism is not necessary. They recommend that judges and justices practice humility to counteract the impression that they believe that only their values and perceptions are reasonable.<sup>61</sup> One way to exercise this humility is to avoid granting summary judgment in cases where they can imagine that there will be a significant subcommunity that will disagree with the court’s factual findings.

While juries may not be perfect, Kahan and his colleagues argue that a major purpose of jury fact finding is democratic legitimacy. Even if a jury does not adopt the particular view of a case espoused by a member of a subgroup who is on the jury, the process requires others on the jury at least to listen to the member of the cultural minority and to dignify his views and experiences.<sup>62</sup> While there will always be outliers who will disagree with the factual findings of the judge, if an identifiable subcommunity would likely feel alienated and excluded by the process, Kahan suggests, courts should pause before granting summary judgment<sup>63</sup> in order to protect the legitimacy of the legal process in the eyes of those subcommunities who may experience life differently from the judges.

Law professor Jeffrey Stempel would likely agree. He argues that the Supreme Court and lower federal courts have granted summary judgment in an exceedingly aggressive fashion and that *Scott v. Harris*, combined with the Court’s recent decisions in *Twombly* and *Iqbal*,<sup>64</sup> which make it much easier for defendants to have complaints dismissed, permit individual judges to decide cases based on their “gut reaction.”<sup>65</sup> He notes that juries provide a check on the judge’s individual reaction, which may not reflect the community values, and permit deliberations and airings of different views from different subcommunities. There are also important checks on the jury’s

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59. *Id.* at 897.

60. *Id.*

61. *See id.*

62. *See id.* at 901.

63. *See id.* at 884–87.

64. *See* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (concluding that when deciding motions to dismiss judges should look at the allegations of the complaint to determine their plausibility); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (holding that, to state a claim, a plaintiff must provide enough factual matter to suggest the allegation, and that an allegation of parallel conduct and a bare assertion of conspiracy are not sufficient).

65. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 *LOY. U. CHI. L.J.* 627, 630–31 (2012).

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decisionmaking powers that range from voir dire to evidentiary rules to a trial judge's power to grant post-trial motions for judgment as a matter of law, if necessary.<sup>66</sup>

### III. *RICCI v. DESTEFANO*: COGNITIVE ILLIBERALISM AT WORK

*Ricci* is exactly the type of case that should have warranted the Court's judicial humility, a decision to pause, and then move forward. *Ricci* is an example of injudicious judicial fact finding at the highest level. It is an opinion that engendered in its readers such preoccupation in the substance that few paid much attention to the procedure. It serves as a warning of how judges can, perhaps unconsciously, permit their own world views to distort proper procedural protections. *Ricci* was a highly political case that affected different cultural subcommunities very intensely. In a case this controversial, democratic legitimacy concerns are at their height. Different cultural experiences yield different world views that should have encouraged the Court to pause, at least when it came to its procedural decision. Certainly, the Supreme Court case produced a state of cognitive illiberalism that it may well have avoided.

#### A. *Background of the Case*

In *Ricci v. DeStefano*, the City of New Haven created an exam for firefighters who sought promotion to lieutenant and captain positions.<sup>67</sup> Before *Ricci* was decided, employers had to take special care in creating tests used to make employment decisions. Even in the absence of intent to discriminate, Title VII requires that an employer prove that a test that has a negative disparate impact on a protected group be job related and consistent with business necessity.<sup>68</sup> If it is not, the employer is liable for unlawful employment discrimination against the group suffering the disparate impact. Aware of its potential liability to black and Hispanic firefighters, the City of New Haven hired an independent consultant, I/O Solutions (IOS), for \$100,000 to create a fair promotional test.<sup>69</sup> The consultant performed job analyses "to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions."<sup>70</sup> IOS interviewed many lieutenants and captains and their supervisors about their responsibilities, rode with officers on duty, prepared questionnaires and administered them to chiefs, captains, and lieutenants.<sup>71</sup> Throughout this process, IOS intentionally oversampled minority firefighters in an

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66. *Id.* at 664–71.

67. *Ricci v. DeStefano*, 557 U.S. 557, 561 (2009). This description is derived in part from Ann C. McGinley, *Ricci v. DeStefano: Diluting Disparate Impact and Redefining Disparate Treatment*, 12 *NEV. L.J.* 626 (2012), [hereinafter McGinley, *Diluting Disparate Impact*]. See also McGinley, *supra* note 30; Ann C. McGinley, *Discrimination Redefined*, 75 *Mo. L. Rev.* 443 (2010).

68. See Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

69. *Ricci*, 557 U.S. at 564.

70. *Id.*

71. *Id.*

attempt to assure that the test was fair and job related.<sup>72</sup> IOS developed the sources of information for the written test and presented them to the chief and assistant chief for their approval.<sup>73</sup> Once it received approval, IOS created the multiple choice questions for the written test.<sup>74</sup> The City then opened a three-month study period and gave candidates a list of source materials for the questions.<sup>75</sup> IOS also created the questions for the oral portion of the test and trained assessors to assure consistency and accuracy in judging the oral section.<sup>76</sup> Minorities were overrepresented in the group of selected oral assessors, who sat in panels of three.<sup>77</sup> Despite these efforts, the final test results (a combination of written and oral) were surprising and unfortunate.<sup>78</sup> Even though a number of black and Hispanic firefighters took and passed the test, no blacks and only two Hispanic firefighters scored highly enough on the test to be eligible for the first wave of promotions.<sup>79</sup>

This result occurred in part because of two policies the City used in determining how to score the test and how to employ its test results. First, the City considered itself bound by a collective bargaining agreement that weighted the written and oral portions of the test at 60% and 40%, respectively, a weighting that the City did not permit its consultant to change.<sup>80</sup> Second, the city charter required the City to hire from a list that used a “rule of three.” The “rule of three” required the City to hire for an open position from the top three candidates. Before January 2004, the City had interpreted this provision to permit banding (rounding the test scores to the next integer) to comply with the “rule of three.”<sup>81</sup> This was done because it was considered inaccurate to conclude that there was a difference of quality between the minute score differences. According to the banding method, if three persons earned 90.9, 90.8, and 90.7, all would be rounded up to 91 and would be grouped in a single “band.” The “rule of three” would permit consideration of all persons within that

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72. *Id.* at 565.

73. *Id.*

74. *Id.*

75. *Id.*

76. *See id.*

77. *See id.* at 565–66.

78. There was no dispute that the test (combined with the City’s rules regarding its use) had a racially adverse impact. On the captain’s exam, whites passed at a rate of 64%, while blacks and Hispanics passed at a rate of 37.5%. On the lieutenant’s exam, the white pass rate was 58.1% while the black pass rate was 31.6% and the Hispanic pass rate was 20%. These rates easily meet the standard the EEOC has set for determining whether a disparate impact exists. According to the EEOC, a disparate impact exists if the selection rate is less than 80% of the rate for the group with the highest rate. *See id.* at 586–87 (citing 29 C.F.R. § 1607.4(D) (2008)).

79. *See Ricci*, 557 U.S. at 566.

80. *See infra* text accompanying notes 140–42.

81. *See Ricci*, 557 U.S. at 590 (citing *Kelly v. City of New Haven*, No. CV000444614, 2004 Conn. Super. LEXIS 68, at \*2 (Conn. Super. Ct. Jan. 9, 2004)).

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band and the next two highest bands.<sup>82</sup> Using this method yielded more persons of color eligible for promotion. The resulting list would be used for two years and during that time persons earning scores in the top three bands would be considered for each promotion.

In January 2004, however, a Connecticut state court issued an injunction that prohibited the City from using this method. Instead of banding, each candidate would be listed individually by score, no matter how minute and statistically insignificant the differences among the scores, and only the three top-scoring candidates—rather than all candidates within the top three bands—would be considered for the open position.<sup>83</sup> At the time the 2003 test results were announced, there were eight open lieutenant positions and seven open captain positions. For the lieutenant jobs, ten candidates were eligible for promotion to fill the eight open positions: all were white. For the captain jobs, nine candidates were eligible for promotion to fill the seven open positions: seven were white and two were Hispanics. In total, no blacks and only two Hispanics were eligible out of the twenty-seven blacks and twenty-three Hispanics who took the test.<sup>84</sup> Insofar as diversity of candidates for promotions was concerned, these results were significantly worse than those attained in earlier years.<sup>85</sup>

These test results exacerbated the New Haven Fire Department's history of unequal treatment of minorities. In 1972 the Civil Rights Act was amended to ban discrimination in public employment.<sup>86</sup> At the time, approximately 4% of New Haven firefighters were black and none was Hispanic, even though minorities represented approximately 30% of the City's population.<sup>87</sup> Groups of minorities sued the New Haven Fire Department, alleging illegal race discrimination in hiring.<sup>88</sup>

The percentages of minority men in the fire department have improved significantly since 1973, but there is still considerable underrepresentation of blacks

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82. See *Ricci*, 557 U.S. at 590.

83. See *Kelly*, 2004 Conn. Super. LEXIS 68, at \*2–4. For a description of this process, see Respondents' Brief on the Merits at 4–5, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328), 2009 U.S. S. Ct. Briefs LEXIS 232, at \*12–14.

84. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

85. In the lieutenant test given in 1996, African Americans scored in rank #3, and Hispanics scored in rank #4. In 1999, African Americans appeared in rank #5, and Hispanics in rank #1. In contrast, in 2003, on the lieutenant's exam that was in question in *Ricci*, the highest ranking for African Americans was #13, and the highest ranking for Hispanics was #26. See Joint Appendix at 21–23, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328), 2009 U.S. S. Ct. Briefs LEXIS 222, at \*9–10. For the captain's exam, in 1999, the highest African Americans appeared in rank #5, and the highest Hispanic in rank #4. In 2003, in contrast, the highest African American ranked #15 in the captain's test, and the highest Hispanic ranked #6. *Id.* at 23.

86. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2006)).

87. Nicole Allen & Emily Bazelon, *The Ladder: Part 4: Is There a Better Way to Decide Who Gets Promoted?*, SLATE (June 25, 2009, 7:17 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/features/2009/the\\_ladder/part\\_4\\_is\\_there\\_a\\_better\\_way\\_to\\_decide\\_who\\_gets\\_promoted.html](http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_4_is_there_a_better_way_to_decide_who_gets_promoted.html).

88. See *Firebird Soc'y of New Haven, Inc. v. New Haven Bd. of Fire Comm'rs*, 66 F.R.D. 457 (D. Conn. 1975).



at the higher ranks and of Hispanics in both firefighter and upper level positions. As of late 2009, while 37% of New Haven's population is black, approximately 30% of the firefighters, 22% of the lieutenants, and 4% of the captains are black.<sup>89</sup> Twenty-six percent of the New Haven population is Hispanic; 13% of firefighters, 14% of lieutenants, and 16% of captains are Hispanic.<sup>90</sup> These numbers demonstrate the difficulties the City has had in promoting blacks and in hiring and promoting Hispanics proportional to their representation in the City itself.

When the 2003 test results were released, city leaders and Corporation Counsel Thomas Ude expressed concern that the test had an illegal disparate impact on blacks and Hispanics.<sup>91</sup> The city charter gives the Civil Service Board (CSB) responsibility to certify the exam results. Without certification, the results cannot be used. Upon receipt of the exam results, the CSB held five public hearings<sup>92</sup> and took testimony from various sources, but it ultimately failed to certify the results.<sup>93</sup>

Seventeen non-Hispanic white firefighters and one Hispanic firefighter who sat for the promotional exams sued, alleging that the City violated Title VII of the 1964 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution when it threw out the exam results.<sup>94</sup> The plaintiffs alleged that because the City's decision to throw out the test results was based on the race of the test-takers who were most successful (white),<sup>95</sup> the City had engaged in intentional race discrimination against the white candidates who did well on the exam.<sup>96</sup>

The plaintiffs argued that it is always impermissible under Title VII's prohibition of disparate treatment to make race-based decisions to avoid disparate impact liability even when the employer knows the practices violate Title VII's disparate impact clause.<sup>97</sup> In the alternative, the plaintiffs argued that an employer is liable for disparate treatment when it uses race-conscious remedies unless it proves that it would be liable for a disparate impact violation if it did not use the remedy of discarding the test results.<sup>98</sup> In contrast, defendants argued that an employer's good faith belief that its

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89. See Chart provided by Victor Bolden, Corp. Counsel, City of New Haven (Dec. 9, 2009) (on file with author).

90. *Id.*

91. See *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006).

92. *Id.* at 145–50.

93. See *id.* at 150. The vote was actually a tie, resulting in non-certification. *Id.*

94. *Id.* at 144. The plaintiffs also alleged that the City violated the First Amendment to the U.S. Constitution, engaged in conspiracy to interfere with civil rights under 42 U.S.C. § 1985, and sought damages for intentional infliction of emotional distress. *Id.* Those claims, however, will not be addressed in this paper.

95. See *id.*

96. See *id.* at 151.

97. See *Ricci v. DeStefano*, 557 U.S. 557, 579–80 (2009).

98. See *id.* The plaintiffs also argued a more nefarious motive on the City's part. It argued that the City was pressured by a black minister who used significant political power to influence the City to throw out the results. While this second version of the events leading to the rejection of the results is not credited by the majority opinion, Justice Alito's concurrence takes it as fact. See *id.* at 598 (Alito, J., concurring).

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remedial actions are necessary to avoid disparate impact liability justifies race-conscious conduct.<sup>99</sup> The federal district court disagreed with the plaintiffs' arguments and granted the City's motion for summary judgment,<sup>100</sup> and the Second Circuit panel affirmed summarily.<sup>101</sup> The Supreme Court granted certiorari.

In a 5–4 decision, the Supreme Court reversed, holding that a good faith belief that the testing created an illegal disparate impact on racial minorities is insufficient as a defense to a disparate treatment claim that arose as a result of the City's overt use of race to throw out the test results.<sup>102</sup> Instead, over a strong dissent,<sup>103</sup> a majority of the Court concluded that the City must have “a strong basis in evidence that, had it” certified the results, “it would have been liable under [Title VII] disparate-impact” theory.<sup>104</sup> Moreover, the majority concluded as a matter of law that the defendants did not meet the necessary threshold standard.<sup>105</sup>

Never before had the Supreme Court held that disparate treatment was more important than disparate impact under Title VII. In *Ricci*, however, the majority appeared to view individual, intentional discrimination as the principle evil that Congress sought to prevent.<sup>106</sup> This position ignored Congress's passage of the 1991 Amendments to the Civil Rights Act, specifically to codify a disparate impact cause

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99. *See id.* at 581.

100. 554 F. Supp. 2d at 145.

101. *See Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008). In a per curiam opinion, the Second Circuit panel stated in part:

In this case, the Civil Service Board found itself in the unfortunate position of having no good alternatives. We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated. But it simply does not follow that he has a viable Title VII claim. To the contrary, because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected.

*Id.* at 87. Ultimately, the Second Circuit voted not to hear the case en banc. *See Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008).

102. *Ricci*, 557 U.S. at 560. Justice Anthony Kennedy wrote the majority opinion with Chief Justice Roberts and Justices Scalia, Thomas, and Alito joining the decision. There were also two concurrences; Justice Scalia wrote one concurrence in which Justice Alito joined and Justice Alito filed a concurrence in which Justices Scalia and Thomas joined. *See id.*

103. Justice Ruth Bader Ginsburg wrote the dissent with Justices Stevens, Souter, and Breyer joining the opinion. *See id.*

104. *Id.* at 563.

105. *See id.* at 586. The Court did not reach the question of whether the disparate impact provision violates the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 563. Nonetheless, Justice Scalia argued in his concurrence, joined by Justice Alito, that the disparate impact provision of Title VII violates the Equal Protection Clause. *See id.* at 594–96 (Scalia, J., concurring). For an interesting discussion of this issue, see generally Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

106. *See Ricci*, 557 U.S. at 577.

of action to give the provision a broader reading than was recognized at the time by the Supreme Court.<sup>107</sup>

But the Supreme Court also relied on a provision of the 1991 Act to reach its desired result in *Ricci*. The provision, section 703(l), makes it unlawful to adjust scoring or to alter test results on the basis of race.<sup>108</sup> It prohibits “race-norming,” or using different cut-off scores based on race; it says nothing about prohibiting an employer from throwing out a test altogether that produces a disparate result. The plaintiffs never raised the issue of race-norming before the federal district court; the court of appeals never discussed the issue, and lower courts had never discussed this possible interpretation of the provision.<sup>109</sup> Nonetheless, with virtually no analysis, the majority concluded that this section governed and prohibited the defendant from throwing out the test results, from using a weighting system other than the sixty/fifty system for written and oral exams, and from using banding, an alternative to the “rule of three” that would have allowed for the promotion of a number of blacks and Hispanics.<sup>110</sup> In essence, the majority used the anti-race-norming provision to severely restrict or eliminate the less discriminatory alternatives that otherwise would have been available to the defendants. This was an odd interpretation given that the anti-race-norming provision barred the use of different cutoffs by race in scoring a particular test. It did not deal at all with what the City of New Haven did here: throw out the test for everyone because of its belief that it created an illegal disparate impact on blacks and Hispanics.

The majority decision significantly restricted the disparate impact cause of action in *Ricci*. More important for purposes of this article, the Court achieved this change in the law by openly distorting the summary judgment rules. *Ricci* displays a majority of the Supreme Court reaching out to grant summary judgment to the petitioners and, in apparent contravention of Rule 56 of the Federal Rules of Civil Procedure, weighing the credibility of witnesses and drawing inferences in favor of the moving party. In granting summary judgment to petitioners in *Ricci* rather than remanding the case for fact finding, the Supreme Court majority openly relied on *Scott v. Harris* and concluded, using language from *Scott v. Harris*, that the “City’s assertions . . . are ‘blatantly contradicted by the record.’”<sup>111</sup> This language is particularly startling not only because four Justices and a number of judges below did not agree, but also because it signaled that *Scott* would not be limited to cases where a videotape existed in the record to give the judges a bird’s-eye view of the facts.

In *Ricci*, although there was uncontested evidence that the test was not created with intent to discriminate, that showing is irrelevant in a disparate impact cause of

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107. See McGinley, *Diluting Disparate Impact*, *supra* note 67, at 630–31.

108. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 106, § 703(l), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(l) (2006)).

109. See Brief for United States as Amicus Curiae Supporting Vacatur and Remand at 20, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (No. 07-1428), 2009 U.S. S. Ct. Briefs LEXIS 153, at \*35.

110. *Ricci*, 557 U.S. at 589–90.

111. *Id.* at 587–88 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

action where intent is not at issue. There was, however, in *Ricci* conflicting testimony of firefighters who took the test regarding its applicability to the New Haven Fire Department's procedures and evidence that the study materials were more available to some firefighters than others. Most importantly, there was also testimony from an expert with twenty-five years of experience in designing tests that the City should have used an internal review process to assure the validity of the test and that there were alternatives that would have created less of a disparate impact. All of this testimony created questions of fact as to whether there was a strong basis in evidence that the City's test was job related and consistent with business necessity, and whether less discriminatory alternatives were available. In this context, the majority's decision that the plaintiffs merited summary judgment plays havoc with the understanding that summary judgment should be granted only where no reasonable person can conclude, given the evidence, that the non-moving party should prevail. It would have been reasonable for a jury to conclude that the City had proved that there was a strong basis in evidence that it would be liable for disparate impact if it had not thrown out the test results. Given the controversial and extremely political nature of the underlying case in *Ricci*, the Supreme Court's decision not to permit the process to work makes one wonder what was occurring behind the scenes. Giving the Justices the benefit of the doubt concerning their motives, there is still a serious question as to whether the Court's grant of summary judgment to the firefighters resulted from an unconscious influence of their cultural groups on their perceptions of legally consequential facts. The next subpart discusses in detail the procedural problems with the *Ricci* decision.

### *B. Ricci's Long Trail of Procedural Mishaps*

#### *1. Procedural Background and Substantive Disparate Impact Law*

As noted above, the federal district court had granted summary judgment to the City and city officials as defendants in the case alleging discrimination based on a disparate treatment theory. The lower courts rejected the plaintiffs' theory that taking the race of successful candidates into account in determining whether to certify the test itself is a form of discrimination.<sup>112</sup> Given that there was undisputed evidence that the test created a disparate impact on racial minorities in the fire department, and that the remedy itself was race-neutral, the trial court concluded that the plaintiffs' evidence was insufficient to create a question of fact. The trial court reached this result despite the plaintiffs' arguments that the defendants were motivated by political pressure imposed on the mayor by a powerful African American preacher.<sup>113</sup> The trial court noted that the firefighters had no legal right to the promotion because the CSB had not yet voted to certify the results, and even once certified, the "rule of three" would affect the order in which promotions would be granted.<sup>114</sup> The trial court

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112. *See Ricci v. DeStefano*, 554 F. Supp. 2d 142, 160 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008).

113. *See Ricci*, 554 F. Supp. 2d. at 150–51.

114. *See id.* at 159–60.

stated, “Defendants’ motivation to avoid making promotions based on a test with a racially disparate impact, even in a political context, does not, as a matter of law, constitute discriminatory intent, and therefore such evidence is insufficient for plaintiffs to prevail on their Title VII claim.”<sup>115</sup>

The U.S. Court of Appeals for the Second Circuit summarily affirmed the lower court’s holding and eventually adopted the reasoning of the trial court. One of the judges on the Second Circuit asked for an en banc hearing. While the case did not receive sufficient votes for an en banc rehearing, a number of judges wrote dissenting opinions on the refusal to grant the rehearing. The dissent of Judge José Cabranes argued that there were questions of fact concerning the motivation of the defendant, the City, when it threw out the tests. Putting the factual questions aside, Judge Cabranes, with five other judges joining his opinion, also raised questions about the proper tests under the Equal Protection Clause and Title VII to determine when it is permissible to throw out test results based on the success of a particular racial group.<sup>116</sup>

The U.S. Supreme Court granted certiorari. First, the Supreme Court agreed with the plaintiffs that a defendant can be liable for race discrimination under disparate treatment theory even though the defendant intended to prevent a disparate impact lawsuit. Second, the Court rejected the standards that the plaintiffs and the defendants argued should apply in determining whether an employer may take race into account in order to avoid disparate impact liability. Instead, it established a new test—the “strong basis in evidence” test, drawn from Equal Protection doctrine—to determine whether a defendant employer should be liable in throwing out test results.<sup>117</sup>

Ordinarily when the Supreme Court announces a new standard to evaluate the evidence, it remands the case to the lower court to consider the evidence in light of the new standard.<sup>118</sup> Rather than remanding the case for the lower court to apply the new legal standard, however, the majority of the Court overturned the lower court’s grant of summary judgment to the defendants and *granted summary judgment to the plaintiffs*.

The substantive and procedural law is so inextricably intertwined in *Ricci* that understanding the importance of the procedure the Supreme Court employed requires a review of substantive disparate impact law. In a disparate impact case, the plaintiff has the burden of proving that the defendant’s policy or practice created a disparate impact on a protected group. This proof shifts the burden to the defendant to prove by a preponderance of the evidence that the policy is job related and consistent with business necessity. If the defendant cannot meet this proof requirement, the plaintiff wins the case. If the defendant establishes that the policy is job related and consistent with business necessity, the burden of persuasion shifts

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115. *Id.* at 160 (footnote omitted).

116. *Ricci*, 530 F.3d at 93 (Cabranes, J., dissenting).

117. *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009).

118. *See id.* at 631 (Ginsburg, J., dissenting) (citing *Johnson v. California*, 543 U.S. 499, 515 (2005)); *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982)); *see also* *Briscoe v. City of New Haven*, 654 F.3d 200, 201 (2d Cir. 2011) (“Unusually, the Court reversed the challenged judgment rather than vacating it, which prevented the city from adducing evidence to satisfy the newly imposed ‘strong basis’ standard.”).

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back to the plaintiff to prove that there is a less discriminatory alternative practice that the defendant refuses to adopt.<sup>119</sup> If the plaintiff meets this proof, the plaintiff wins the case.

In *Ricci*, however, because the defendants were defending a decision to throw out test results, the majority decision placed the burden of persuasion of all of the elements on the defendants, in essence requiring the defendants to speak for the absent minority plaintiffs who presumably would have sued the City had it certified the results. This test comes close to asking the defendants to prove their own culpability.<sup>120</sup> Under the “strong basis in evidence” test, the defendants have to prove: (1) the existence of a disparate impact caused by the defendants’ policy;<sup>121</sup> (2) that there was a strong basis in evidence to conclude that the promotional process was *not* job related and consistent with business necessity; or, in the alternative, (3) that there was insufficient evidence to dispute that the test was job related and consistent with business necessity, or that there was a strong basis in the evidence to conclude that there was a less discriminatory and equally valid alternative that the employer refused to adopt. Because the plaintiffs did not dispute that the test caused a disparate impact on black and Hispanic firefighters, the discussion focused on proof of job relatedness and less discriminatory alternative practices.

For purposes of this discussion, I will accept without criticism<sup>122</sup> that the majority’s conclusion that the employer’s use of a race-conscious remedy can violate Title VII and that “strong basis in evidence” is the proper test in determining whether

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119. See 42 U.S.C. § 2000e-2(k)(1) (2006).

(A) An unlawful employment practice based on disparate impact is established under this title only if —

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

*Id.* Subparagraph (C) states: “The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice.’” *Id.* § 2000e-2(k)(1)(C).

120. In a comparable situation, where the employer asserts that it has considered race in hiring or promotion pursuant to a valid affirmative action plan, the burden is on the plaintiff to prove that the affirmative action plan is not valid. See *Johnson v. Transp. Agency*, 480 U.S. 616, 626 (1987). It remains unclear whether *Ricci* will be interpreted to overturn the affirmative action cases.

121. Because it was undisputed in *Ricci* that there was a disparate impact caused by the test, see *Ricci*, 557 U.S. at 586–87, it is somewhat unclear whether the defendant would have to prove that there is a strong basis in evidence that there was a disparate impact and that the defendant’s test caused it or whether the defendant would have to prove that the test caused a disparate impact by a preponderance of the evidence. The Court did not discuss this issue.

122. For a critique of these decisions, see *supra* note 28, and McGinley, *Diluting Disparate Impact*, *supra* note 67. See also *Ricci*, 557 U.S. at 627 (Ginsburg, J., dissenting) (describing the majority’s “strong basis in evidence” standard as an erroneous application of equal protection precedents).



a violation occurs. Given this caveat, the Court properly overturned the grant of summary judgment in favor of the defendants. Because a reasonable jury, based on the evidence in this case, could conclude either that the test was job related or not, or that there were or were not less discriminatory alternatives, especially in light of the defendants' burden of persuasion on all elements, the majority of the Court voted properly to overturn the lower court's grant of summary judgment to the defendant.<sup>123</sup>

It is the Court's next step with which I take issue. The majority granted summary judgment in favor of the plaintiffs, the moving party. Given the evidence in the record, this summary judgment grant is improvident. This ruling determines that, as a matter of law, there was insufficient evidence from which a reasonable fact finder could have concluded that: (1) there was strong evidence that the test was not job related or consistent with business necessity; and (2) there was strong evidence that alternative less discriminatory testing mechanisms existed.

Given the substantial evidence showing that black and Hispanic plaintiffs could have prevailed on a disparate impact claim against the City if it had certified the test, this ruling seems to defy both disparate impact law and Rule 56 of the Federal Rules of Civil Procedure. *Ricci* at once revised disparate impact law and summary judgment law, at least when applied in the Title VII disparate impact context. The next subsection analyzes the evidence that was before the Supreme Court when it granted summary judgment to the plaintiffs.

## 2. *The Court's Analysis of the Evidence in Ricci*

Had the Supreme Court remanded the case to the lower court because of the new legal standard, in all likelihood the parties would have requested more time for discovery so that they could develop their evidence in preparation for a renewed motion for summary judgment by the plaintiffs and/or for trial. It is likely that the

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123. While it supported the defendants' position in the litigation, the U.S. Solicitor General agreed that the lower court's grant of summary judgment should be overturned and the case remanded. Employing the well-known construct of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the United States argued that evidence that a test creates a disparate impact is a legitimate non-discriminatory reason for the employer's action of refusing to use the test. This proof would shift the burden of persuasion back to the plaintiff to prove that the employer's reason is pretextual. The plaintiff could prove pretext by demonstrating that the employer's "proffered motive of compliance is unreasonable." See Brief for the United States as Amicus Curiae Supporting Vacatur and Remand, *supra* note 109, at 17–18. Use of the *McDonnell Douglas* test would be a bit odd, however, because that test is ordinarily used when the plaintiff seeks to prove by inference that he or she suffered a discriminatory employment action. It does not ordinarily apply where the defendant agrees that it has made an employment decision on the basis of race. See, e.g., *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."); Angela Anwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 65 (1999) ("In other words, the sole purpose of the *McDonnell Douglas* test is to answer one simple question: can unlawful discrimination against a plaintiff be inferred from the circumstances?"); McGinley, *supra* note 1, at 212 ("Where direct evidence is lacking, the courts employ a burden-shifting approach first recognized in *McDonnell Douglas Corp. v. Green*"). Here, the plaintiffs argued that refusal to use the test results was racial discrimination on its face.



firefighter-plaintiffs would have sought to depose a number of the witnesses whose testimony before the CSB was favorable to the defendants. The City defendants may have wished to hire Dr. Christopher Hornick, an assessment expert with twenty-five years of experience, who criticized the test at the CSB hearing. Dr. Hornick would have served as the City's expert witness who would evaluate whether the test created by IOS was job related and consistent with business necessity, and whether there existed less discriminatory alternatives. The plaintiffs and defendants would likely have deposed the firefighters who testified before the CSB about various problems concerning the exams. None of this happened because of the majority's failure to remand the case.

Earlier, when the case was originally brought and the defendants filed a motion for summary judgment before the trial court, defendants attempted to use the testimony of Dr. Hornick before the CSB to support their defense that they were acting in good faith to prevent disparate impact liability. The plaintiffs objected that Dr. Hornick's CSB testimony was inadmissible hearsay that could not be used to support defendants' case. The trial court judge concluded that because the defendants were using the testimony merely to show the defendants' good faith in throwing out the test results, and not for the purpose of proving the truth of the matters asserted, defendants could rely on the testimony.<sup>124</sup> But once the majority of the Supreme Court had announced a new legal standard, the defendants needed to use that testimony to meet their new burden of proving that there was a strong basis in evidence to conclude that, had they not thrown out the test results, the City would have been liable for a disparate impact claim brought by minority candidates. The majority of the Court did not rest its conclusion that defendants could not meet this burden on the argument that Dr. Hornick's CSB testimony was unsworn hearsay. This would have been a thin reed because the Court concluded twenty-five years ago, in *Celotex*, that if the supportive facts were presented and could be converted into an affidavit or other non-hearsay testimony, they were sufficient on a motion for summary judgment.<sup>125</sup>

Instead of attacking the testimony as hearsay, which would have raised protests that the defendants had been given no opportunity to convert the testimony into deposition testimony or affidavits, the majority opinion simply ridiculed the testimony as thin and insufficient to support defendants' burden of proof. In doing so, the Court drew inferences in favor of the plaintiffs, the moving party, and even speculated about Dr. Hornick's motives for testifying.

At the CSB hearings, there was testimony from a number of witnesses. First, the vice president of IOS, the consulting firm, testified about the manner in which his company created the multiple choice exams and the oral panels. This testimony, which was not controverted, appeared to raise no question that IOS took care to avoid racial bias when it created its tests.<sup>126</sup> There was also testimony before the CSB

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124. *Ricci v. Destefano*, 554 F. Supp. 2d 142, 148 n.4 (D. Conn. 2006).

125. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

126. For a description of IOS's preparation of the test, see *supra* text accompanying notes 70–80.

by Dr. Hornick and by firefighters from the department and another nearby department that, in my view, created issues of fact as to whether the test was job related and consistent with business necessity and whether there were equally valid, less discriminatory alternatives.

The firefighters' testimony alone was mixed and, standing alone, may have created questions of fact. A number of firefighters supported the test, testifying that it was fair and the questions were relevant. In fact, the firefighters' union supported certification of the test results. Other firefighters, however, testified that many of the questions were not relevant to how the fire department in New Haven operated. They also testified that the test contained outdated materials.<sup>127</sup> They stated that many of the study materials contained contradictory information,<sup>128</sup> and that some of the information came from the New York Fire Department, not the New Haven Fire Department.<sup>129</sup> They also raised questions about the information that some firefighters had that others did not possess. A number stated that some firefighters had copies of study materials even before the syllabus came out, but that others had no access to those materials because they did not have relatives or friends who preceded them in the fire department.<sup>130</sup> A few stated that once they received notice of the availability of the materials they needed, they ordered the materials, which took a significant amount of time to arrive. One firefighter testified that he waited one and one-half months for the books to arrive.<sup>131</sup> Some testified that the books comprised 1200 pages of reading and that they were expensive.<sup>132</sup> Some suggested that some firefighters seemed to have inside information about what was or was not going to be on the test. Evidently, a book entitled *The Essentials of Fire Fighting* was at the fire department, but some members of the department announced that they were told that the *Essentials* materials were not on the test.<sup>133</sup>

The allegations of differential access to materials are particularly important to the issue of race because of the history of the New Haven Fire Department. The New Haven Fire Department was historically white and ethnic, mostly Irish and Italian.<sup>134</sup> As in most fire departments across the country, selection for firefighting jobs depended in large part on nepotism and cronyism.<sup>135</sup> If it is true that the fire

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127. See Joint Appendix, *supra* note 85, at 44, 50.

128. *Id.* at 44.

129. *Id.* at 49.

130. *Id.* at 43, 49, 51, 68–69, 71.

131. *Id.* at 69.

132. *Id.* at 49, 51.

133. *Id.* at 69.

134. See ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* 41 (2d ed. 2005); JAMES S. OLSON & HEATHER OLSON BEAL, *THE ETHNIC DIMENSION IN AMERICAN HISTORY* 128 (2010); Samuel Koenig, *Ethnic Factors in the Economic Life of Urban Connecticut*, 8 AM. SOC. REV. 193, 195 (1943); McGinley, *supra* note 30, at 588–89.

135. See Jay Lowry, *Does Nepotism Hurt the Fire Service?*, 156 FIRE ENGINEERING 186, 186 (Oct. 2003) (“It is the family business’ . . . or so goes the saying for many firefighters. Since the dawn of the American fire

## COGNITIVE ILLIBERALISM, SUMMARY JUDGMENT, AND TITLE VII

department members who had fathers or other relatives in the department had earlier and/or better access to materials (because their relatives owned some of the source books that were difficult and/or expensive for others to obtain), this improved access would disproportionately benefit white firefighters whose families had histories in the department. Blacks and Hispanics, in contrast to many of the white firefighters, were relative newcomers to the department.

An African American firefighter who represented the African American firefighters' union explained that the City of Bridgeport, which is located near New Haven and has a similar population, has a much higher percentage of African Americans and Hispanics in lieutenant and captain positions in its fire department. He attributed the diversity in the Bridgeport department to a change in the weighting system between the written and oral tests,<sup>136</sup> a change that weighted the oral tests significantly more than the written tests. This weighting contrasts with the greater, sixty/fifty weight given to the written/oral portions of the test by the City of New Haven.

A former Michigan firefighter and fire program specialist from the Department of Homeland Security, Vincent Lewis, testified that he believed that generally the candidates should know the materials and that "the questions were relevant."<sup>137</sup> But even he commented that firefighters who had experience driving a fire truck would have a significant advantage on the lieutenant test. He agreed that the test appeared to be a good test, but he conditioned his testimony on proof (that he did not have) that the candidates would have had equal training and access to study materials.<sup>138</sup>

But it was Dr. Hornick's testimony that was key to the defense and, in my view—combined with the firefighters' testimony—created genuine issues of fact. Dr. Hornick demonstrated considerable expertise because of his twenty-five years of experience in the very type of testing at issue in *Ricci* and because he had served as an expert witness in litigation on both sides of the issue. He explained that he had testified on behalf of cities defending tests and on behalf of the U.S. Department of Justice when it brought suits against cities and counties alleging that their assessments were discriminatory.<sup>139</sup> Acknowledging that most tests have some disparate impact on minorities, Dr. Hornick noted that the 2003 New Haven test had a surprising and relatively high adverse impact that was worse than the typical adverse impact found in most tests. Explaining that he had not had time to study the test extensively, Dr. Hornick focused on the procedures used to assure that the test was job related. He explained that because the City had decided not to have anyone who worked for

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service, families have played a tremendous role in staffing fire stations around the country."); Girardeau A. Spann, *Postracial Discrimination*, THE MODERN AM., Spring 2009, at 26, 31 ("Firefighting in general was associated with a long legacy of racial discrimination . . . . Employment decisions often abandoned merit in favor of nepotism or political patronage, thereby entrenching preexisting racial hierarchies. New Haven illustrated the problem.")

136. See Joint Appendix, *supra* note 85, at 66.

137. *Ricci v. DeStefano*, 557 U.S. 557, 571 (2009) (internal quotation marks omitted).

138. See Joint Appendix, *supra* note 85, at 113, 115.

139. *Id.* at 90. The remaining Hornick testimony appears in the Joint Appendix. *Id.* at 88–108.

the City see the test beforehand, the test lacked the internal check necessary to assure that all of the questions were relevant. In contrast with the method used by IOS, he testified that he ordinarily hires a panel of subject matter experts from within the department, who are sworn to confidentiality, to review the questions before the test is used. This procedure assures that the test questions are relevant to the department and avoids the problems that were identified by various New Haven firefighters—that many of the questions were confusing and not relevant to firefighting in New Haven. The New Haven test never underwent an internal review before being used. Instead, IOS merely used someone from Atlanta, Georgia, who was not familiar with New Haven procedures, to review the test.

Dr. Hornick also testified that the sixty/forty weighting could be responsible for some of the adverse effects and that a multiple choice test was not the best way to select the most qualified persons for promotions to the relevant positions. A multiple choice test, according to Dr. Hornick, merely measures whether a candidate can memorize answers, but does not assess whether he or she can apply knowledge to a situation. He mentioned that assessment centers and situational judgment tests, on the other hand, demonstrate how a candidate is able to apply knowledge to a particular situation.<sup>140</sup> For the lieutenant and captain jobs, he identified five key sets of skills that should be tested and that assessment centers can test accurately: leadership, command presence, interpersonal skills, management skills, and technical skills. He concluded that there are much better ways to test these skill sets than a short oral panel and a multiple choice test.

Chad Legal, the vice president of IOS, testified that the City hired his company to create a written multiple choice test and tests for the oral panels. He testified that he was bound by the sixty/forty percent weighting and never discussed the weighting with the City; the City did not ask him to consider an assessment center. Nor did he create a test that could evaluate “command presence,” a quality that an assessment center would measure more effectively than written and oral tests.<sup>141</sup> While this testimony may have demonstrated IOS’s lack of culpability for producing an ineffective test, it actually could be read by a reasonable jury to support Dr. Hornick’s testimony because it demonstrates that the consultant, whose expertise was used to create the test, had his hands tied to a certain extent when it came to creating the assessment. It also creates a question of fact concerning the importance of “command presence” as a quality that is related to the jobs in question and whether a test that does not measure command presence is job related and consistent with business necessity.

Dr. Hornick’s testimony creates three major issues of fact concerning the test. First, he questioned the validity and accuracy of a test that had no internal review before the test was given to candidates. Second, he testified that a different weighting of the written and oral tests would have allowed the City to consider two black candidates for the lieutenant positions and another for the captain positions. Third, he stated that an assessment center process is a better method to select the best

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140. *See id.* at 102–03.

141. *See Ricci*, 557 U.S. at 637 (Ginsburg, J., dissenting).

candidates for these types of positions. The majority of the Court treated Dr. Hornick's testimony with not-so-veiled disdain. As to the first issue, the majority ignored Dr. Hornick's criticism that the test had no internal checks to assure the validity of the subject matter. It acknowledged that some firefighters testified that the materials were contradictory and that some of the questions did not specifically apply to firefighting practices in New Haven, but it credited the testimony of IOS Vice President Legal that IOS had addressed a "handful" of those concerns, and that it had thrown out at least one question as a result of the criticisms.<sup>142</sup> But Mr. Legal's testimony was not directly responsive to the many criticisms launched by firefighters and reinforced by Dr. Hornick's assessment of the proper procedures to establish internal controls. The Court chose to credit Mr. Legal's testimony over that of the firefighters and Dr. Hornick—a choice that should be left to the fact finder.

Regarding the second issue, as to the weighting of the written and oral scores, the Court merely noted that the City had not demonstrated that the formula was "arbitrary." In fact, the Court continued, because the formula resulted from an agreement negotiated with the union, it "presume[d]" that the negotiation existed for a rational reason.<sup>143</sup> This is a very odd discussion. First, nowhere in the majority opinion does it say that, in order to find that a test is not job related or consistent with business necessity, the defendant has to prove that it is "arbitrary." Perhaps even more important, even if a showing of arbitrariness is necessary to demonstrate that it is "not job related," that is not the proper test for determining whether a less discriminatory alternative exists. Even without a showing of arbitrariness, the testimony about the differential weighting is important to establish a less discriminatory and equally valid alternative. Dr. Hornick's testimony, moreover, was bolstered by the testimony of Donald Day of the International Association of Black Professional Firefighters, who testified about the experience of the City of Bridgeport, Connecticut. This testimony revealed that Bridgeport, a nearby city with similar demographics to New Haven's, had adopted a different weighting system that had led to the selection of a more diverse group of officers in its fire department.

Perhaps most important, the Court's presumption that the weighting negotiated by the union in the mid-1980s was rational is surprisingly naïve. There are numerous cases where both employers and unions were sued for reaching agreements that discriminated against applicants and employees because of race. Thus, to presume that the agreement was not discriminatory or that there was no less discriminatory weighting system because of the union's involvement seems nonsensical. This presumption is particularly problematic because of the procedural posture of the case. By engaging in the presumption, the majority of the Court drew an inference directly in favor of the plaintiffs, the moving party on the motion for summary judgment.

Further, the majority of the Court supported its conclusion about weighting by resorting to section 2000e-2(1), the race-norming prohibition, and stated that

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142. *See id.* at 588.

143. *Id.*

changing the weighting formula “could well have”<sup>144</sup> violated the statute. Once again, this is an odd use of Title VII. Race-norming is prohibited because it is a practice of grading people of different races according to different standards. Thus, with race-norming, a black candidate might pass an exam with a score of sixty-five whereas a white candidate might need a seventy in order to pass the exam. The suggested weighting in *Ricci*, however, applies the same standard to all candidates of all races, but places more emphasis on one form of testing over another. Moreover, the evidence about the weighting formula did not suggest that the City was considering changing the weighting on this particular test. Rather, the evidence was presented to demonstrate that a less discriminatory alternative to this particular test existed and that the defendants could have used this alternative in designing the test.

Third, the Court breezed lightly by Dr. Hornick’s testimony about assessment centers. It concluded that Dr. Hornick’s “brief mention of alternative testing methods, standing alone, does not raise a genuine issue of material fact that assessment centers were available to the City at the time of the examinations and that they would have produced less adverse impact.”<sup>145</sup> It referred to other “statements” to the CSB indicating that the City could not have used an assessment center process for the 2003 examinations.<sup>146</sup> But the “statements” the majority opinion cites to is one comment by plaintiff Frank Ricci, who admitted in his testimony that assessment centers show less adverse impact in some cases, but argued that an assessment center was not available in New Haven because it would have taken years to develop a protocol and training to go with it.<sup>147</sup> There is no evidence that Ricci is an expert on the use of assessment centers or the development of training and protocols. Moreover, countering Ricci’s testimony, a reasonable person could interpret Dr. Hornick’s testimony as asserting that assessment centers are already in use in other cities across the country and that there is no reason to believe that the creation of these centers would have taken more time than the creation of the test by IOS. In fact, Justice Ginsburg’s dissent, joined by Justices Stevens, Breyer, and Souter, explained that a 1996 study found that nearly two-thirds of municipalities surveyed used assessment centers as part of the promotion processes.<sup>148</sup> This fact strongly suggests that assessment centers were available as test methods to the City of New Haven. But as to the question of availability, the Court was vague, and had the case been remanded for more factual development, enlightenment on this subject would have been useful. Defendants originally used Dr. Hornick’s testimony to demonstrate their subjective good faith belief that they would lose a disparate impact cause of action if they used the test. However, the Court faulted them for not developing the evidence under a stricter standard. Given that the procedural posture is the plaintiffs’ motion for

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144. *Id.*

145. *Id.* at 591.

146. *Id.*

147. *See id.* at 572–74.

148. *See id.* at 634–35 (Ginsburg, J., dissenting).



summary judgment, the Court’s refusal to draw inferences created by the testimony before the CSB in favor of the non-moving party—the defendant City—is troubling.

The majority opinion is particularly dismissive of Dr. Hornick. Drawing an inference in favor of the plaintiffs, the Court pointed out that Dr. Hornick was a direct competitor of IOS, implying that Dr. Hornick testified as he did because he wanted to get the City of New Haven’s business. The Court stated:

The remainder of his remarks showed that Hornick’s primary concern—somewhat to the frustration of CSB members—was marketing his services for the future, not commenting on the results of the tests the City had already administered . . . . Hornick’s hinting had its intended effect: the City has since hired him as a consultant.<sup>149</sup>

This disrespect for Dr. Hornick and his testimony is particularly stark when compared with the treatment of the testimony of Mr. Legal from IOS, which designed the test for \$100,000. The majority consistently credited Mr. Legal’s testimony, making credibility determinations and drawing inferences that should have been left to the fact finder, while raising questions about Dr. Hornick’s motivations. Mr. Legal, however, had just as much (if not more) of an interest in convincing the Court of the validity of the tests as Dr. Hornick had in demonstrating their invalidity, but the Court never acknowledged that Mr. Legal had a vested interest in the test’s validity.

In addition, the majority concluded that “the essence of Hornick’s remarks supported . . . certifying the test results.”<sup>150</sup> This characterization is strange, given the character assessment that the Court engaged in with reference to Dr. Hornick. If Dr. Hornick’s motivation was to gain favor with the City in order to market his business, one would ask why the “essence” of his remarks should be credited at all. Moreover, and perhaps more importantly, while Dr. Hornick did not outright condemn IOS’s test, a reasonable jury could conclude that he attempted not to slander IOS precisely because it is his competitor. He revealed early on in his testimony that IOS is a direct competitor and he noted that he did not want to “accuse” or “attack” IOS.<sup>151</sup> But it certainly appears that a reasonable fact finder could view his testimony as critical of important aspects of the test and supportive of a finding that less discriminatory alternatives existed. He openly criticized the failure to have the test customized to the New Haven Fire Department (through the internal review process),<sup>152</sup> the sixty/forty weighting system, the use of multiple choice questions and short oral questions, and the failure to use an assessment process that permits test takers to apply their knowledge to assess key qualities in a real-life situation.

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149. *Id.* at 591–92.

150. *Id.* at 591.

151. Joint Appendix, *supra* note 85, at 93.

152. *See id.* at 96–99.



Throughout the interview, the members of the CSB asked Dr. Hornick directly whether they should certify the test results. When pressed, Dr. Hornick seemed to make a political/legal assessment:

You're darned if you do and you're darned if you don't. . . . I think you need to weigh what your values are and go with the best possible decision. . . . [P]erhaps the only choice you will have in the end is to certify the list as it exists . . .<sup>153</sup>

A reasonable jury can conclude that this statement does not bear on the subject of his expertise—whether the test itself is job related and whether there are less discriminatory alternatives—but is a response related to the difficult political and legal situation in which the City found itself, an area about which he had no expertise to opine. While fact finders would be free to interpret these statements as they like, it seems dishonest for the Court to conclude as a matter of law that Dr. Hornick's testimony did not support the defendants' position.

Finally, the majority opinion did not take seriously the defendants' argument that another alternative was to employ banding in interpreting the "rule of three." The Court noted that the City did not use banding because the state court had enjoined it from doing so, and the Court did not dispute the defendants' claim that using banding would have made four black candidates and one Hispanic candidate eligible for lieutenant and captain positions.<sup>154</sup> It even acknowledged that the state court's prohibition of banding under municipal law "may not eliminate banding as a valid alternative under Title VII."<sup>155</sup> But it once again relied upon section 2000e-2(l), the anti-race-norming provision, concluding that the statute's prohibition against race-norming would have prohibited the City from adopting banding after reviewing the exam results to make minority scores appear higher.<sup>156</sup> Banding, however, is a process whereby the scores are grouped to eliminate slight mathematical differences that do not reflect a difference in quality. It can operate to the advantage of both whites and persons of color because all scores are banded in the same manner. Banding does not depend on the race of the test taker; it merely allows the City to consider more candidates for promotions—candidates who effectively have achieved the same scores. Therefore, it does not appear to be prohibited by the race-norming provision of the statute.<sup>157</sup>

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153. *Id.* at 103.

154. *See Ricci*, 557 U.S. at 590.

155. *Id.*

156. *See id.*

157. In fact, the dissent points out that the Brief of Industrial-Organizational Psychologists as Amici Curiae in Support of Respondents, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328), 2009 U.S. S. Ct. Briefs LEXIS 260, argues that the exams were not shown to be suitably precise to allow for strict rank-ordering of the candidates. *See Ricci*, 557 U.S. at 637 n.16 (Ginsburg, J., dissenting). A difference of one or two percentage points on this type of test has little meaning and bears little relationship to the candidate's qualifications. *Id.*

*C. Cultural Cognition and the Ricci Majority*

Given the evidence discussed here, and the evidence that could have been developed on remand once the parties were aware of the correct standard, it seems odd that the Court would grant summary judgment to the plaintiffs, concluding that the City's assertions were "blatantly contradicted by the record." This test was applied in *Scott v. Harris* in a situation where the Justices believed that their view of the facts was inevitable. They saw the videotape and reacted to it. Since eight of the Justices had the same reaction (and the ninth was Justice Stevens, who apparently linked his reaction to his age), their conclusion about what facts occurred was mutually reinforced. They likely had no knowledge of the cultural cognition research and were unaware that scholars would subsequently find that a significant minority would judge the facts in the case differently. To some extent, then, one can understand why the Justices decided *Scott v. Harris* as they did. To the eight Justices in the majority, the lower court's recitation of the facts—taken in the light most favorable to the plaintiff—made no sense. They could see what happened with their own eyes by viewing the tape. Viewing the facts in the light most favorable to the plaintiff was a "visible fiction."<sup>158</sup> One would expect the Court to limit the ruling in *Scott v. Harris*, however, to situations where there was little or almost no doubt about the facts. The "blatantly contradicted" standard should, even in the absence of understanding cultural cognition, be almost impossible to meet.

Not so. Even though *Ricci* is a different case with no videotape or other "easy" way to judge the facts, the majority of the Court applied the *Scott v. Harris* test. Moreover, in *Ricci*, there was significant evidence in the record that the test was not job related or consistent with business necessity. A number of firefighters testified that there were many questions on the test that were confusing, not relevant at all, and/or relevant only to other cities' fire departments, but not to the New Haven Fire Department. Others testified that the materials were not readily available to certain groups (i.e., minorities) who did not have family in the department. Others claimed that some of the firefighters appeared to have more information about what was going to be on the test than did others. Dr. Hornick testified that the test should have had an internal review process to avoid problems of inconsistency with New Haven Fire Department procedures. He also testified that a multiple choice test and the oral panel do not test key skills for lieutenant and captain positions. This evidence seems to be sufficient for a reasonable jury to find that there was a strong basis in evidence that the test was not job related or consistent with business necessity.

Even if the jury were to find that there is not a strong basis in the evidence refuting job relatedness and business necessity, there was additional evidence that provided a strong basis in the evidence that there were equally valid, less discriminatory alternatives. Dr. Hornick testified that an assessment center would be a better way to test the skills in question, and that the sixty/forty weighting likely was responsible for at least some of the disparate impact. Donald Day, of the International Association of Black Professional Firefighters, testified that in Bridgeport there was much more

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158. *Scott v. Harris*, 550 U.S. 372, 381 (2007).

diversity at the higher ranks because of a change in the weighting of the oral and written portions of the tests used. Finally, there was testimony in the record that when the City of New Haven had used banding to interpret the “rule of three,” the results had produced less of an adverse impact on minorities. Indeed, the evidence demonstrated that if the City had banded the scores of the 2003 test, a number of blacks and Hispanics would have been eligible for promotion.

Given this evidence, it is puzzling that the majority did not remand the case to the lower court to allow the parties to develop the facts in discovery and to present their evidence in motions for summary judgment and/or to a fact finder at trial. Solving this puzzle is particularly tricky. There is the likelihood that my own interpretation of the facts is affected by cultural cognition, and that I will naturally engage in naïve realism. As I attempt to avoid naïve realism, the answer seems to be that, as a scholar, I, too, must practice humility about the enterprise before me. With this caveat in mind, I must disclose that I have a different world view than that of the Justices in the majority in *Ricci*. I believe, and I have written, that the *Ricci* majority privileges the regulation of intentional discrimination—discriminatory treatment—over the regulation of disparate impact. That privileging, I have argued, ignores history and context, and makes it easier for white men than minorities and women of all races to sue for discrimination.<sup>159</sup> In essence, my criticism has been that the majority allowed its view of the world to infect its decision in the case. But isn't that what courts always do? And, isn't it true that the majority's world view has merit? This was a difficult case, and throwing out the test was no simple matter. There were definitely going to be winners and losers; and deciding to throw out the results would have an impact on individuals, like Frank Ricci, who were not necessarily powerful or oppressive.

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159. In another article, I state:

*Ricci* emphasizes an ahistorical view of discrimination. It views the only wrong as the defendants' overt and conscious use of race to overturn the test results. It ignores, however, the defendants' reason for doing so and the history of racial discrimination in the country that has led to practices and structures causing a disparate impact on persons of color. At the same time, the Court narrowed the definition of disparate impact. . . .

The Court's emphasis on overt discrimination in disparate treatment cases and its failure to take seriously the disparate impact of the test and the possibility of less discriminatory alternatives make it significantly easier for whites than racial minorities to bring race discrimination cases. This is because racial minorities have historically been harmed by structural discrimination that is better addressed by disparate impact cases. Because many of the structures challenged were designed with white men in mind, they tend to favor whites, even if the benefit may not be intentional. A limitation on disparate impact cases will, therefore, harm persons of color. Where a race-conscious remedy is considered intentional discrimination as it was in *Ricci*, white men are benefited, and persons of color lose. This result fosters a narrow definition of discrimination that embodies overt conscious acts, a definition that ignores the most recent social science research demonstrating the prevalence of subconsciously held negative attitudes by whites towards members of racial minorities. Besides minorities, women of all races will also lose from a redefinition of discrimination that disregards historical discrimination and that ignores implicit bias in favor of men.

McGinley, *Diluting Disparate Impact*, *supra* note 67, at 638 (footnotes omitted).

While I do not agree with it, I recognize the appeal and simplicity of the colorblind approach: it apparently treats all equally and gives instructions to decisionmakers that are easier to follow. Moreover, as law professor Reva Siegel has argued, even without confirming a colorblind approach, the opinion may reflect an anti-balkanization theory.<sup>160</sup> She argues that Justice Kennedy, the fifth vote for the majority and the author of the opinion, joined the majority not out of allegiance to a colorblind approach, but because of a more moderate fear of public balkanization that would result from upholding the lower courts' orders.<sup>161</sup> There is no question that *Ricci* is an important, emotional case for many white blue-collar workers who have seen the reduction of job security and earning power.

My concern with *Ricci*, however, is that the Justices in the majority of the Court appear to have allowed their views about the substantive law of the case to affect their view of the facts. The majority should have followed its normal course when it announces a new standard: it should have remanded the case to the lower court. While it is true that a remand might have resulted in the lower court's grant of summary judgment for the plaintiffs, the Supreme Court should have allowed the process to work. Even assuming that the majority of the Supreme Court decided to consider the evidence absent a remand, the majority should have exercised judicial humility. It should have recognized the role of the fact finder below and given deference to the roles of judges and juries. Anti-balkanization might support the substantive decision—that the defendant would have to prove its defense with a strong basis in the evidence when it uses the race of successful candidates to throw out the test results; as a matter of procedure, however, the Court should have remanded the case. If it had, the lower court could have, in its discretion, permitted more discovery so that the parties could meet their burdens of proof under the new standard. A remand may well have resulted in motions for summary judgment by both parties, and the trial court may have granted the plaintiffs' motion given the new standard, but it, too, should act with judicial humility in deciding whether the grant of summary judgment is appropriate. It is likely that, upon remand, the case would have gone to a jury. The majority's decision not to remand prevented the possibility of more discovery and of a jury trial to decide the facts of the case. Even if the lower court were to decide to grant summary judgment to the plaintiffs upon remand, the court of appeals and even the Supreme Court may have the opportunity to review the decision with a full record and briefings directed at the specific test announced by the Supreme Court majority.

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160. According to Professor Siegel, "antibalkanization" is an emerging rationale used by moderate Supreme Court Justices when voting to uphold and limit affirmative action policies. The rationale is focused on promoting social cohesion, rather than advocating for American institutions to strive for colorblindness in their admissions and employment procedures. Colorblindness, in contrast, is a rationale used by more conservative Justices to argue against affirmative action; it advocates for American institutions to ignore race as a determinative factor because they believe that it will "protect individuals from the harm of categorization by race." Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281–82, 1287 (2011).

161. *See id.* at 1332–48.

There are a number of familiar reasons for deference to the jury.<sup>162</sup> One is competence. Juries are more able than courts of appeals to decide the credibility of the witnesses and to decide the factual issues before them. Courts of appeals look at records, not witnesses. Cold facts come to life through cross-examination. Another reason is the diversity of the jury pool, which should lead to more accurate results, and to acceptance of the resolution. A third is jury deliberation, which requires a give-and-take of jurors to reach a result. This give-and-take differs from that of the Supreme Court or the courts of appeals because of the diversity of the jurors, who, as one-time players, bring their views to the decisionmaking process.

Finally, and overlapping the above reasons, as Kahan and his colleagues emphasized, juries grant the process democratic legitimacy. This is perhaps the most important role of the jury—guaranteeing to the litigants that their peers, and not a group of wealthy, educated lawyers, will decide their cases. It is here where Kahan's theory and Siegel's anti-balkanization principle may intersect and, to some extent, contradict one another. Anti-balkanization, as a justification for the decision in *Ricci*, defers to the views of the majority to assure peace, while paying little attention to the views of the minority who may feel harmed by the decision. Kahan's concept of judicial humility, in light of naïve realism, encourages judges and justices to recognize that their own views of the facts are grounded in cultural connections, which may differ significantly from those of a significant minority of the population who have had different experiences. These theories, however, do not necessarily conflict if we see anti-balkanization as referring to substantive decisionmaking and Kahan's call for judicial humility as referring to process. In other words, in *Ricci*, anti-balkanization may explain Justice Kennedy's decision to join the majority in the substantive decision to overturn the lower court's decision and create the strong basis in evidence defense. But it was perhaps an exercise in naïve realism that led the five-Justice majority in *Ricci* to make the procedural decision to grant summary judgment to the plaintiffs. It is here where judicial humility should be exercised because, even in light of a more rigid standard applied to the defendants, the process acknowledges the role that citizen fact finders play. As Kahan and his colleagues note, those holding the minority view of the facts can attempt to influence those holding the majority view during jury deliberations. And, even if the majority view of the facts prevails, those holding the minority view will at least feel that others have listened to them and dignified their views.<sup>163</sup> This dignity accorded to a significant minority of citizens should lead to greater trust that the system represents the interests of all persons bound by it.

But how do I know that the Justices in the majority in *Ricci* allowed their views of the substance to infect their factual findings? I don't, necessarily; however, there are a number of clues from the decision and from these Justices' views in other cases upon which I can rely. First, the four Justices in the majority who are considered the conservative bloc on the Court—Chief Justice Roberts and Justices Scalia, Thomas,

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162. For a complete discussion of the reasons why jury deliberations in *Scott v. Harris* would have been preferable, see Stempel, *supra* note 65, at 663–72.

163. See Kahan et al., *supra* note 20, at 901.

and Alito—are all on record in other cases as believing in the colorblind approach to racial decision making.<sup>164</sup> This approach focuses on the anti-classification principle: the wrong is the racial classification itself. The fifth member of the *Ricci* majority, Justice Kennedy, has refused to adopt a pure anti-classification approach,<sup>165</sup> but may have joined the majority because of his interest in avoiding balkanization.<sup>166</sup> These strongly professed views, combined with the significant evidence in *Ricci*, may be sufficient for us to conclude that the Justices’ procedural holding (or, in other words, their view of the facts) was influenced by their views on substance and by their cultural affiliations.

But *Ricci* offers more. Besides the majority opinion, there are two concurrences—by Justices Scalia and Alito—that may help explain why the majority decided to grant summary judgment to the plaintiffs. These concurrences demonstrate that at least three members of the five-member majority—Justices Scalia, Thomas, and Alito—had a hostile attitude toward the defendants’ position. While this was not a case about affirmative action, these Justices saw *Ricci* as a case of racial preferences, rather than a situation where the defendants sought to avoid illegal disparate impact.<sup>167</sup> Their approach seems to question the validity of disparate impact as a cause of action, and to suspect the good will and honesty of the defendants.

Justice Scalia’s concurrence, which Justice Alito joined, predicts that the disparate impact provision of Title VII will soon be subject to a serious, non-frivolous equal protection challenge<sup>168</sup> because it permits racially based decision making that would likely otherwise violate the Equal Protection Clause of the Fourteenth Amendment. The concurrence demonstrated discomfort with disparate impact and glee that the “evil day” is coming when the Court will be required to confront the question of whether, and to what extent, the disparate impact provision is consistent with the Equal Protection Clause of the Fourteenth Amendment.<sup>169</sup> Justice Scalia argues that the disparate impact provision may be unconstitutional because it places “a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decision making is, as the Court explains, discriminatory.”<sup>170</sup>

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164. *See, e.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion written by Chief Justice Roberts and joined by Justices Scalia, Thomas, and Alito) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (“In the eyes of government, we are just one race here. It is American.”).

165. *See Siegel, supra* note 160, at 1303, 1305.

166. *See id.* at 1333–37.

167. There is a good argument that the entire majority saw this case as an affirmative action case in that they adopted the strong basis in evidence test, a test ordinarily used in the equal protection affirmative action cases. *See Ricci v. DeStefano*, 557 U.S. 557, 582–83 (2009).

168. *See id.* at 594–96 (Scalia, J., concurring).

169. *See id.* at 592–93.

170. *Id.* at 594.



This is the first time that any member of the Court has raised the constitutionality of the disparate impact provision. The question of the constitutionality of the disparate impact provision is remarkable because it was the Supreme Court in *Griggs v. Duke Power Co.* in 1971 that originally interpreted Title VII to prohibit neutral policies and practices that have a disparate impact on a protected group.<sup>171</sup> Clearly, the Supreme Court did not consider this interpretation to run afoul of the Fourteenth Amendment when it decided *Griggs*. A number of Supreme Court cases followed that further developed the disparate impact cause of action.<sup>172</sup> Years later, in 1989, after the composition of the Court had changed, the Court decided *Wards Cove Packing Co. v. Atonio*, which cut back on the disparate impact cause of action.<sup>173</sup> Congress responded by passing the 1991 Civil Rights Act, in large part to restore the disparate impact cause of action that was considered an important component of Title VII since the *Griggs* decision.<sup>174</sup>

Justice Alito's concurrence, which is joined by Justices Scalia and Thomas, may be even more instructive. It begins by joining the opinion of the majority of the Court.<sup>175</sup> It states that there are two questions to consider. First is the objective question of whether the reason given by the employer for refusing to promote the plaintiffs is a legitimate one. Even considering a legitimate reason, the second question is whether the legitimate reason given by the employer is pretextual.<sup>176</sup> Because the employer could not meet its burden of proving that its reason was legitimate (that is, that there was a strong basis in evidence that the plaintiffs had a successful disparate impact claim if the test were not thrown out), Justice Alito stated, the plaintiffs won the case. But the concurrence appears to say that even if the employer can prove that it has a legitimate reason, it could still be liable for disparate treatment if the plaintiffs prove that the defendants' purported reason for throwing out the test is a pretext for discrimination.<sup>177</sup>

Justice Alito's concurrence concludes that facts in the record could lead a reasonable fact finder to conclude that the real reason for the decision to throw out the test results was political pressure on the mayor of New Haven, John DeStefano, by a politically connected African American preacher.<sup>178</sup> This is an odd, intemperate opinion. For six pages, Justice Alito expounds an alternative narrative of the facts that is not even hinted at in the majority opinion. The purpose of the narrative, evidently, is to impugn the honesty of the City's decision to throw out the test results,

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171. 401 U.S. 424 (1971).

172. For a history of the disparate impact cause of action in Title VII, see *Ricci*, 557 U.S. at 620–26 (Ginsburg, J., dissenting).

173. 490 U.S. 642 (1989).

174. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e (2006)).

175. See *Ricci*, 557 U.S. at 596 (Alito, J., concurring).

176. See *id.*

177. See *id.*

178. See *id.* at 604–05.



and to demonstrate that, because of political pressure applied by a powerful black citizen and community leader, Mayor DeStefano influenced the results of the CSB vote, resulting in CSB's failure to certify the test. Justice Alito references Reverend Boise Kimber, a politically powerful African American pastor in New Haven who had personal ties to Mayor John DeStefano. He notes that the mayor testified for Rev. Kimber in 1996, then the manager of a funeral home, when the pastor was prosecuted for and convicted of stealing prepaid funeral expenses from an elderly woman.<sup>179</sup> He also explains that the mayor selected Rev. Kimber to serve as chairman of the New Haven Board of Fire Commissioners until Rev. Kimber had to step down after making slurs about Italian American firefighters.<sup>180</sup> According to the concurrence, soon after the test results were published in early 2004, Rev. Kimber met with the City's chief administrative officer to give his opinion and to influence the City's response.<sup>181</sup>

The narrative in the concurrence suggests that the mayor's office prevented the fire chief and assistant fire chief from testifying before the CSB because they favored certification,<sup>182</sup> that when Mr. Legal, the IOS consultant, spoke to the City's chief administrative officer, Karen Dubois-Walton, she was dismissive of Mr. Legal's defense of the test, and that she and others discussed the potential political and racial effects on the City of certifying the test results.<sup>183</sup> The narrative also suggests that Dr. Hornick's testimony was influenced by the mayor's secretary, who sent him news articles about the certification decision. It baldly states that Ms. Dubois-Walton admitted that the City rewarded Dr. Hornick for his testimony by giving him business.<sup>184</sup> In her dissent, Justice Ginsburg points out that at least some of the facts presented by Justice Alito have no support in the record, while others are drawn primarily from the petitioners' statement of uncontested facts. She also claims that the concurrence exaggerates the facts, draws inferences, and creates suggestions.<sup>185</sup>

In tone and content, Justice Alito's concurring opinion is odd. The opinion takes no issue with anything in the majority opinion, but it differs from the majority opinion. It concludes that even if the dissent is legally correct in adopting the standard it recommends (good cause for throwing out the test results), it would be "untenable" to affirm the decision below. This is because, Justice Alito argues, the intent of the City is relevant to the ultimate outcome of the case and there are genuine issues of fact concerning the intent of the City. Nothing in the majority, however, seems to support the proposition that intent is important in this type of case. It never acknowledges that if the defendants were to make out their defense that they could

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179. *Id.* at 598–99.

180. *See id.* at 599.

181. *See id.*

182. *See id.* at 599–600.

183. *See id.* at 600.

184. *Id.* at 603.

185. *See id.* at 638–44 (Ginsburg, J., dissenting).

still be liable if the plaintiffs were to prove that the asserted reason for throwing out the test results was pretextual.<sup>186</sup>

It is surprising that the concurrence did not acknowledge that it set a different legal test than that established by the majority. But even odder than the legal description of the test is the description of the facts in which Justice Alito engaged. The opinion drips with emotion, anger, and hurt. One gets the feeling that the story resonated with Justices Alito, Scalia, and Thomas and that they believed that a politically powerful African American preacher who was prejudiced against Italian American firefighters used his relationship with the mayor of New Haven to assure that the test would not be certified.<sup>187</sup>

As a procedural matter, the concurrence is curious. Assuming that the majority adopted the concurrence's view of the law, the concurrence, combined with Justice Ginsburg's dissent, or even standing alone, clearly creates issues of fact for the fact finder. Justice Alito and Justice Ginsburg battle over suggestions and insinuations—clearly the realm of the jury.<sup>188</sup> Justice Alito does not, however, appear to be arguing

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186. Justice Alito is clearly following the proof structure originally established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). But there is a question as to whether the *McDonnell Douglas* proof construct makes sense in this case. First, *McDonnell Douglas* is ordinarily used to establish discriminatory intent through inference in the absence of direct evidence. In other words, it allows the plaintiffs to create an inference that the employee's race made a difference in the decision. Here, the plaintiffs argued that there was no question that the defendants made the decision to throw out the test results because of the race of the successful test takers. And, while the defendants did not admit that their behavior was illegal, intentional discrimination, they admitted that they threw out the test results because no African Americans and only two Hispanics would be immediately promotable if they used the test results. There would be no need to employ the *McDonnell Douglas* test in this situation because of this admission. But even if the *McDonnell Douglas* test were employed, the defendant's burden would merely be to articulate a legitimate non-discriminatory reason for the employment decision. Here, the majority imposed on the defendant the burden of persuasion that it had a strong basis in evidence. This is a much heavier burden than the burden of articulation in *McDonnell Douglas*. For a number of reasons, then, this case is an uncomfortable fit with the traditional *McDonnell Douglas* proof construct. Its required proof, that there be a "strong basis in evidence," is a Court-created affirmative defense, essentially similar to the bona fide occupational qualification (BFOQ) defense. A BFOQ defense is an affirmative defense in which the employer admits that gender, religion, or national origin motivated the employer's employment decision, but at the same time attempts to prove by a preponderance of the evidence that the protected characteristic is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e) (2006). The Second Circuit has interpreted the *Ricci* Court's test to be an objective test measured at the time the public entity made the decision. It did not delve into the intent of the decision makers as Justice Alito seems to sanction. *See, e.g., United States v. Brennan*, 650 F.3d 65 (2d Cir. 2011).

187. Justice Ginsburg's dissent, joined by Justices Stevens, Souter, and Breyer, gives counterexamples to those mentioned in Justice Alito's concurrence. *Ricci*, 557 U.S. at 608–44 (Ginsburg, J., dissenting). Justice Ginsburg demonstrates that there was also pressure on the CSB to certify the results. The dissent refers to threats made by the petitioners' lawyer and statements made by firefighters who believed the test results should have been certified. *Id.* at 641. Both the concurrence and the dissent convey a very volatile, racially and politically charged atmosphere at the CSB hearings; but the dissent argues that it was not inconsistent for the defendant to have made a decision based on disparate impact while also under pressure to act. *Id.* at 641–42. Thus, the dissent sees a false dichotomy created by the concurrence. *See id.* at 642.

188. *Id.* at 639 n.17.

that the case should go to a jury. Instead, he recounts the “facts” from the plaintiffs about the pressure on the City, it appears, to give credence to the decision to grant summary judgment to the plaintiffs on the question of whether the defendants proved as a matter of law that they had a strong basis in evidence for throwing out the test results.

While not explicit, these concurrences, in light of the evidence in the record, support the conclusion that at least these three Justices may have voted for summary judgment because of their discomfort with disparate impact law in general or because of their conviction that the defendants had acted improperly in this case.

Kahan and colleagues suggest that there are situations when it may be appropriate for the Court to engage in fact finding. The most similar example to *Ricci* is the Court’s decision to engage in constitutional fact finding. As Kahan notes, the Court often reviews constitutional facts de novo.<sup>189</sup> The reasons justifying this practice are the guarantee to minorities of the protection of constitutional rights to which the majority may be hostile and the importance of uniformity and predictability in constitutional rules.<sup>190</sup> These justifications are particularly apt in the Fourth Amendment setting, where the Court’s constitutional fact finding gives law enforcement the tools to know what behavior is permissible and what behavior is not. In *Ricci*, unlike these cases, the Court was deciding Title VII doctrine, not constitutional doctrine. Although liability under Title VII and the Equal Protection Clause of the Fourteenth Amendment may overlap in this context, the Court avoided deciding the constitutional issue in the case.

Nonetheless, one can argue that the Court in *Ricci* engaged in fact finding in order to illuminate the limits of the strong basis in evidence test and the type of evidence necessary to prove job relatedness and less discriminatory alternatives in the disparate impact context. If this was the Court’s intent, it could have used examples to explain its position and remand the case to the lower court rather than deprive the defendants in *Ricci* of a jury trial. It seems more likely that the response to the Court’s opinion will be to deter government bodies from throwing out test results even where there is a fairly clear-cut case of disparate impact.<sup>191</sup> Government employers who use consultants to create their tests and who attempt to create race-neutral questions will likely be shielded by the decision in *Ricci*. Unfortunately, this result shields government employers from liability for disparate impact and holds them liable only for intentional disparate treatment. Furthermore, the Court sent a message to those subcommunities that would see a different version of the facts. That message conveys disrespect to the subcommunities that would potentially see the facts through a different lens from that used by the majority of the Supreme Court.

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189. Kahan et al., *supra* note 20, at 888 (citing Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 261–62 (1985)).

190. *See id.*

191. *But see Brennan*, 650 F.3d 65.

**IV. CONCLUSION: AN UNFORTUNATE STATE OF COGNITIVE ILLIBERALISM**

The Supreme Court in *Ricci* engaged in unnecessary fact finding when it concluded that the record blatantly contradicted the defendants' arguments that the test used was not job related and that there were less discriminatory alternatives to the test. This factual finding occurred even though the Court announced a new test and did not provide the defendants the opportunity to develop the evidence to support its position given the newly announced test. This decision was unfortunate because it demonstrated disrespect for those subcommunities who would come to a different conclusion after hearing the defendants' evidence. While the substantive decision in *Ricci* itself would likely be disappointing to certain subcommunities, it is the Court's decision to grant summary judgment that may do the most damage. This decision deprives the defendants of the right to have a jury hear the case and deprives potential jurors, whose views of the facts might differ from those of the majority, of the ability to have their points of reference heard and considered by other jurors. In essence, the decision contributes to the state of cognitive illiberalism.