

EFFECTS-BASED TESTS IN U.S. EMPLOYMENT ANTI-DISCRIMINATION LAW: THE CURRENT CRISIS FACING DISPARATE IMPACT DOCTRINE

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Effects-based tests for employment discrimination, sometimes also called indirect, unintentional, or disparate impact discrimination, are used in many legal systems with well-developed anti-discrimination laws, including the European Union¹ and many of its member countries, Canada, and South Africa.² In Canada, the Canadian Supreme Court has synthesized the disparate treatment and disparate impact frameworks into a hybrid doctrine that scrutinizes whether employers practices are reasonable in light of the employer=s purposes rationally connected to the performance of the job.³

In the United States, disparate impact analysis first hit national headlines in the U.S. Supreme Court case of *Griggs v. Duke Power Company*.⁴ That case involved the persisting legacy of the race discrimination that is the source of the development of most of the earliest principles of employment anti-discrimination law in the U.S. context. In *Griggs*, an employer had adopted a new educational requirement of a high school diploma, along with new intelligence and general aptitude testing, for employees seeking promotion from the lowest paid jobs previously reserved for minority workers to better but still low-skill mechanical jobs. The employer had implemented these new requirements just as Title VII of the Civil Rights of 1964,⁵ which prohibits employment discrimination on the basis of race and other grounds, was to take effect. The strong suspicion raised by the facts in *Griggs* was that the employer was engaged in intentional discrimination, but some of the facts in the case, such as the employer=s seemingly benevolent policy of paying for employees return to school to gain the educational requirements needed for promotion, suggested that the plaintiffs would lose an intentional discrimination claim.

The U.S. Supreme Court in *Griggs* agreed with the arguments of activist lawyers from the National Association for the Advancement of Colored Persons Legal Defense Fund that the plaintiffs need not show intentional discrimination in order to prevail. Instead, the Court reasoned, the employer=s new educational and testing requirements presented a built-in headwind for minority applicants who had been educated in inferior schools due to the lasting legacy of *de jure* educational segregation. Moreover, the employer=s requirements

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¹ Article 1(2) of Directive 2002/73/ED (defining discrimination as including indirect discrimination, where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary).

² Republic of South Africa, Employment Equity Act, No. 55 of 1998, Chapter 2, ' 6(1) (no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender . . .).

³ B.C. Firefighters [1999], 3 S.C.R. 3, 33-34 (Can.).

⁴ 401 U.S. 424 (1971).

⁵ 42 U.S.C. ' 2000e *et seq.*

were not consistent with any business necessity related to selecting qualified employees to perform the jobs at issue, as shown by the fact that many of the white employees who were successfully working in the better positions lacked the educational requirements the employer was newly imposing and had not been selected on the basis of the employer's new aptitude testing requirements.

Today, the concept of effects-based or disparate impact discrimination⁶ in U.S. employment discrimination law is under assault by the conservative Roberts Court. In its recent decision in *Ricci v. DeStefano*,⁷ a five to four majority of the United States Supreme Court held that the City of New Haven, Connecticut (City), violated Title VII of the Civil Rights Act of 1964⁸ when it administered a written exam to the City's firefighters to determine eligibility rankings for promotion, but then decided not to certify the exam scores because they resulted in a severe disparate impact on the basis of race. Eighteen the top scoring candidates sued the City, alleging that it had violated Title VII by considering race in its decision against certifying and making promotions based on the test results.⁹ Although both the district court and Second Circuit rejected the plaintiffs' theory, the US. Supreme Court agreed with the *Ricci* plaintiffs, holding that the City should not have refused to certify the test results after administering its test absent a strong basis in evidence for the City to conclude that it would face disparate-impact liability if it certified the examination results.¹⁰ The Court further concluded on the summary judgment record before it that such a showing could not be made, and accordingly entered judgment in favor of the plaintiffs.¹¹

Many aspects of the Court's decision in *Ricci* disappointed civil rights supporters. Some critics argued that the Court should have remanded the case for further factual findings on the test's validity, and others noted that many fire departments have abandoned use of pen-and-paper tests to select employees for leadership positions because the qualities most important to successful performance in such jobs, such as good judgment and the ability to remain calm under pressure, are better evaluated through testing procedures such as assessment centers, where candidates' performance in simulated emergency situations can be observed.¹² Still others expressed concern that *Ricci* signals the end of disparate impact analysis by announcing a new burden to third parties defense that will allow employers to easily defeat disparate impact challenges.¹³ Many commentators noted with particular concern the general tone of ambivalence about disparate impact analysis that pervades the majority's opinion.

⁶ Disparate impact doctrine is now codified in the statutory language of Title VII, and requires an employer to avoid using employment practices that disproportionately disadvantage persons on the basis of race or other protected characteristics where the employer cannot demonstrate that the practice is job related for the position in question and consistent with business necessity, or where an alternative practice with less adverse effect exists. 42 U.S.C. § 2000e-2(k)(1)(A)(i). This language was added to Title VII by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), which rejected a Supreme Court decision that Congress viewed as imposing an unduly restrictive interpretation of disparate impact analysis.

⁷ 129 S. Ct. 2658 (2009).

⁸ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁹ *Id.* at 2667, 2671.

¹⁰ *Id.* at 2677.

¹¹ *Id.* at 2681.

¹² Lani Guinier & Susan Sturm, *Trial by Firefighters*, N.Y. TIMES, available at www.nytimes.com/2009/07/11/opinion/11guinier.html (last visited July 14, 2009) (observing that pen and paper tests are not good predictors of later performance in emergency services jobs).

¹³ Excellent discussions of the issues raised by *Ricci* include Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: White(ning) Discrimination, Racial Test Fairness* (available at <http://ssrn.com/abstract=1507344>); and Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. * (forthcoming 2010);

Perhaps the most troubling of all for supporters of disparate impact law are the hints in *Ricci* of possible constitutional trouble ahead for disparate impact analysis. Although Justice Kennedy, in writing for the majority, took pains to point out that we need not reach the question whether respondents' actions may have violated the Equal Protection Clause,¹⁴ Justice Scalia in his concurrence exhibited no such restraint in explaining the ticking time bomb issue Kennedy's opinion narrowly avoided detonating. Justice Scalia observed that the Court's resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal protection?¹⁵

Thus, while in other legal systems concepts supporting effects-based theories of discrimination are being further developed, in the United States this concept is facing retrenchment and possibly even outright constitutional invalidation. Supporters of disparate impact analysis are hard at work developing arguments to demonstrate the importance of this doctrine to fair employment opportunity for all. Arguments supporting retention of disparate impact law in the U.S. context include the difficulty of proving hidden prejudice and the problems of subtle and subconscious bias.¹⁶ Another important rationale focuses on the arguments Susan Sturm and others influenced by democratic experimentalism have made about the benefits of designing law to promote voluntary problem solving. As Sturm has argued in the employment discrimination context generally, the design of legal rules should be undertaken with an eye towards promoting creative problem solving by relevantly situated actors located within American workplaces, rather than encouraging bitter, expensive and ultimately unproductive litigation in overburdened American courthouses.¹⁷ Applying this perspective on legal regulation to disparate impact analysis, I propose in my longer paper¹⁸ that an important part of the rationale for disparate impact analysis lies in the incentives it creates for employers to avoid liability exposure by attending voluntarily to the effects and rationality of traditional employment practices that may in fact not offer the best employee selection devices.

Although disparate impact analysis does call for a certain measure of race consciousness, in that employers are called on to evaluate statistics and group identity characteristics, it is not despite occasional ill-informed or perhaps inflammatory claims to the contrary a quota requirement. Disparate impact analysis merely requires employers to consider whether their traditional practices could be improved in ways that open up more employment opportunities for persons of non-majority racial identity status. As Lani Guinier and Susan Sturm point out, for example, if the pen and paper tests do not measure the key aspects of job performance required for leaders of fire fighting crews such as good judgment under pressure then it would be best, in terms of rationality and efficacy alone, to design new procedures that better assess this key qualification.¹⁹ Reevaluation of workplace practices

¹⁴ *Ricci*, 129 S. Ct. at 2658, 2664.

¹⁵ *Id.* at 2682. (Scalia, J., concurring).

¹⁶ *See, e.g.*, Primus, *supra* note 13, at 518-36 (examining various rationales for disparate impact doctrine); Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination*, 42 BRANDEIS L.J. 597, 607-13 (2004) (portraying disparate impact doctrine as a Amighty mouse@ that can rescue meritorious cases that would fail under an intentional discrimination test).

¹⁷ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001). (applying an experimentalist analysis to explain the Court's creation of an affirmative defense against employers' vicarious liability for Title VII sexual harassment).

¹⁸ *See supra* note *.

¹⁹ Guinier & Sturm, *supra* note 11.

with an eye to who is excluded and who is included can lead to many overall benefits, such as a better fit between employee evaluation procedures and job performance and a more rational consideration of a wider variety of the skill sets most valuable for particular jobs.²⁰ Cheryl Harris and Kimberly West-Faulcon demonstrate this point in analyzing the facts of *Ricci*: the use of an invalid test dis-served far more whites than minorities in that very case.²¹ On this view, disparate impact analysis does not require employers to forgo business benefits in the interests of racial diversity, but uses racial impact as a warning sign that should trigger scrutiny of the rationality or fit between means and objectives with respect to the employment practice in question.²²

Popular perception sometimes conflates disparate impact analysis with affirmative action.²³ Disparate impact analysis and affirmative action are similar insofar as both devices require some measure of race consciousness, but they also differ in significant respects. Ideally, disparate impact analysis leads employers to proactively design their employment practices to avoid disparate impact, thus obviating the need for the kinds of Aback end@ adjustments to the results of selection processes that are sometimes made in the name of affirmative action.²⁴

The popular media has tended to improperly conflate these two doctrines as well.²⁵ This confusion is in large part due to the *Ricci* Court's approach, which more resembles its typical affirmative action analysis than the prescribed test for disparate impact. In focusing on the burden the City=s action placed on innocent third parties who studied for the exam, the Court deploys its analytic technique of Aburden balancing which it typically uses in affirmative action cases, rather than Congress=s rules for disparate impact analysis, which require searching inquiry into the validity of a test once adverse impact has been shown.²⁶

Read narrowly, *Ricci* squarely stands only for the proposition that an employer may not *first* put employees or job applicants to the expense, trouble and sacrifice of preparing for a high-stakes test or other employment process, and *then* rescind the results on race-based grounds (at least not unless the evidence of the test=s illegality is extremely strong).²⁷ Thus, as Justice Ginsburg notes in her dissent, it is possible that *Ricci* Awill not have staying

²⁰ This important point is well presented in Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 258 (2003) (arguing that Adisparate impact . . . foster[s] the creation and implementation of personnel practice which will insure that business accurately evaluates its applicants and employees@); cf. Martha Minnow, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990) (noting that policies of inclusion have many collateral policy benefits).

²¹ Harris & West-Faulcon, *supra* note 13 (presenting in-depth analyses of the results produced by the test used in *Ricci*).

²² Cf. LANI GUINIER & GERALD TORRES, *THE MINER=S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 11-12 (2002) (using the metaphor of the miner=s canary to highlight the way in which attention to issues of racial injustice can highlight policy deficiencies that threaten all citizens).

²³ See, e.g., Juan Williams, *Affirmative Action=s Untimely Obituary*, WASH. POST, July 26, 2009 (characterizing *Ricci* as signaling the death of affirmative action).

²⁴ Cf. *Grutter v. Bolinger*, 539 U.S. at 349, 361-62 (2003) (Thomas, J., concurring in part and dissenting in part) (noting with anger the cynical use of affirmative action adjustments to tests scores when an alternative would be to avoid using tests that produce disparate impact in the first place).

²⁵ See, e.g., Williams, *supra* note 22 (describing *Ricci* as an affirmative action case).

²⁶ See, e.g., *Ricci*, 129 S. Ct. at 2658 (discussing burden balancing); see also Primus, *supra* note 13, at [38] (discussing Avisible victim reading of *Ricci*).

²⁷ In other words, the majority holds that race consciousness in deciding to rescind high stakes employment testing results *after* test takers have endured the burden of going through an onerous testing process goes too far, but this holding does not address an employer=s duty to *avoid* disparate impact in designing selection procedures in the first place. See Primus, *supra* note 13, at [42] (asserting that typical court-ordered remedies in disparate impact cases would not rescind the results of prior tests).

power.²⁸ But it is also possible that Justice Scalia's evil day.²⁹ of constitutional reckoning will soon be at hand, and if so, all arguments seeking to explain the basis of disparate impact law in fair employment opportunity for all, and not in strongly race-conscious affirmative action or Quota concerns, will very much be needed.

²⁸ *Ricci*, 129 S. Ct. at 2689, 2690 (Ginsberg, J., dissenting).

²⁹ *Id.* at 2682.