

Such a course of action is undesirable. The provision of legal clarity is welcome and necessary in a system based on rule-of-law values.⁹⁹ Dismissing challenges early in litigation¹⁰⁰ on the ground that a claimed right was not clearly established does little to help parties structure future conduct. Though the Court's concern with constitutional avoidance is admirable, it comes at the expense of the clarification of constitutional doctrine and the creation of legal certainty.

Should the Court not intend to expand immunity, as it briefly suggested in dicta,¹⁰¹ it should take the next opportunity to clarify that point. Regardless of the Court's intentions with respect to the scope of § 1983, however, the Court can and should explain more fully the second step of modern qualified immunity doctrine.

III. FEDERAL STATUTES AND REGULATIONS

A. *Civil Rights Act, Title VII*

Compliance Efforts. — Equal protection theory has long been troubled by the conflict inherent in requiring unequal treatment in order to avoid or remedy unequal result. Until recently, it was believed that the Constitution forbade only disparate treatment, while Congress could legislate against disparate impact.¹ Last Term, in *Ricci v. DeStefano*,² the Supreme Court held that under Title VII of the Civil Rights Act of 1964,³ before an employer can intentionally discriminate

⁹⁹ See generally Scalia, *supra* note 93.

¹⁰⁰ See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (noting that the "driving force" behind the creation of modern qualified immunity doctrine was the desire that "'insubstantial claims' against government officials be resolved prior to discovery and on summary judgment if possible" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

¹⁰¹ See *Pearson*, 129 S. Ct. at 821–22 (suggesting that making the qualified immunity inquiry discretionary, rather than mandatory, will not result in substantial changes to the doctrine, and dismissing potential counterarguments). However, by allowing the officers the ability to rely on the decisions of three other circuits and two state supreme courts, the *Pearson* Court seemed to establish a lower threshold to support claims that an asserted constitutional right is in controversy. Such a move would be consistent with what some commentators understand as the Court's desire to reduce the ambit of § 1983 and expand the immunity of government officials. See David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 25–26 (1989); see also Nancy Leong, *The Saucier Qualified Immunity Experiment: An Empirical Analysis*, 36 PEPP. L. REV. 667, 684–85, 688–94 (2009) (arguing, after a survey of federal district and appeals court cases, that plaintiffs have become steadily more unsuccessful in § 1983 litigation). Though the merits of such a position are surely debatable, few interests are served by expanding immunity silently. Such action is anathema to the judicial process and the values it seeks to embody. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365–72 (1978).

¹ See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495–96 (2003).

² 129 S. Ct. 2658 (2009).

³ 42 U.S.C. § 2000e (2006).

to avoid or remedy “an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate impact liability if it fails to take the . . . discriminatory action.”⁴ *Ricci* entrenches the Court’s colorblind approach to antidiscrimination law, and in so doing, strongly suggests that Title VII’s disparate impact provisions are unconstitutional because they mandate discriminatory compliance efforts unjustified by any compelling state interest. *Ricci* thus leaves the Court with a troubling dilemma it must eventually confront: either retreat from its current colorblind approach to equal protection, or rule disparate impact — a doctrine firmly ensconced in history, precedent, and congressional approval — unconstitutional.

To select the best-qualified firefighters for promotion to lieutenant and captain, the City of New Haven commissioned the design of objective examinations.⁵ The tests were carefully constructed to ensure race neutrality, oversampling minority firefighters throughout the design process.⁶ One hundred and eighteen firefighters took the examinations⁷ — many studying for months at considerable personal and financial cost.⁸ Minority firefighters scored poorly.⁹ Of the nineteen firefighters immediately eligible for promotion, seventeen were white, two were Hispanic, and none were black.¹⁰

Concerned that the tests had discriminated against minority candidates, the City held numerous meetings to determine whether to certify

⁴ *Ricci*, 129 S. Ct. at 2677.

⁵ *Id.* at 2665. The City hired Industrial/Organizational Solutions, Inc. (IOS) — a company whose specialties included designing promotional examinations for fire departments — at a cost of \$100,000. *Id.* The examinations were designed to follow the requirements set out in the contract between the firefighters’ union and the City, under which the exam had to have both written and oral sections accounting for sixty percent and forty percent, respectively, of the exam score. *Id.*

⁶ *Id.* IOS also went to great effort to ensure the examination was related to job performance. The design process included information gathered from observing on-duty officers, interviewing incumbent officers and their supervisors, administering questionnaires, and consulting numerous training manuals. *Id.* IOS sought and received approval of the question source materials from the New Haven fire chief and assistant fire chief. *Id.* Two independent reviewers — a battalion chief from Georgia and a retired fire chief from outside Connecticut — reviewed the written and oral portions of the exam, respectively. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 147 (D. Conn. 2006). Oral examinations were assessed by panels that were two-thirds minority. *Ricci*, 129 S. Ct. at 2666.

⁷ See *Ricci*, 129 S. Ct. at 2666.

⁸ See *id.* at 2667 (“[Frank] Ricci stated that he had ‘several learning disabilities,’ including dyslexia; that he had spent more than \$1,000 to purchase the materials and pay his neighbor to read them on tape so he could ‘give it [his] best shot’; and that he had studied ‘8 to 13 hours a day to prepare’ for the test.” (second alteration in original)).

⁹ See *id.* at 2678 (“The pass rates of minorities . . . were approximately one-half the pass rates for white candidates . . . ”).

¹⁰ See *id.* at 2666. The City operated under the “rule of three,” which meant that for any vacant position, the new officer would be chosen from the three highest-scoring candidates. *Id.* at 2665.

the test results.¹¹ Several firefighters implored the City to accept the results,¹² with Frank Ricci insisting, “When your life’s on the line, second best may not be good enough.”¹³ In opposition, some City officials and other firefighters argued that the test results should be discarded because they were unfair, irrelevant, and might subject the City to disparate impact liability.¹⁴ At the end of the fifth meeting, the New Haven Civil Service Board resolved to throw out the results.¹⁵ In response, seventeen white firefighters and one Hispanic firefighter — all of whom passed the test but were denied a chance at promotion — brought suit, alleging that the City violated both the Equal Protection Clause and the disparate treatment prohibition of Title VII.¹⁶

The district court granted summary judgment for the City.¹⁷ The court held that Title VII precedent in the Second Circuit was controlling:¹⁸ a “motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent.”¹⁹ Similarly, the court dismissed the equal protection claim, finding that nothing in the record suggested the City acted “because of” racial animus toward nonminority firefighters.²⁰

The Second Circuit affirmed in a brief per curiam opinion, adopting the district court’s reasoning in full.²¹ The firefighters petitioned for a rehearing en banc, but the circuit rejected their request by a 7–6

¹¹ See *id.* at 2667–71.

¹² See *id.* at 2667, 2670–71.

¹³ *Id.* at 2667 (internal quotation mark omitted). Vincent Lewis, a retired black fire captain and fire program specialist for the Department of Homeland Security, argued that the disparate impact likely occurred because more whites took the exam, or because “usually whites outperform some of the minorities on testing.” *Id.* at 2669 (internal quotation marks omitted).

¹⁴ A representative of the International Association of Black Professional Firefighters called the test “‘inherently unfair’ because of the racial distribution of the results.” *Id.* at 2667. Thomas Ude, the City’s counsel, suggested that certifying the exams might place the City in violation of Title VII’s disparate impact provisions. *Id.* at 2669–70. Ude also asserted that it would be the City’s “‘burden to justify the use of the examination’ if a Title VII suit were brought.” *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 150 (D. Conn. 2006).

¹⁵ The Board deadlocked two to two — an insufficient number of votes to allow certification. *Ricci*, 129 S. Ct. at 2671.

¹⁶ See *Ricci*, 554 F. Supp. 2d at 144. Plaintiffs also alleged that their rights were violated under the First Amendment and 42 U.S.C. § 1985 and asserted “a common law claim of intentional infliction of emotional distress.” *Ricci*, 554 F. Supp. 2d at 144.

¹⁷ *Ricci*, 554 F. Supp. 2d at 163.

¹⁸ See *id.* at 157–60.

¹⁹ *Id.* at 160.

²⁰ *Id.* at 162 (internal quotation marks omitted).

²¹ See *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008) (per curiam). The Second Circuit had originally issued a summary order affirming “substantially for the reasons stated” in the district court opinion. *Ricci v. DeStefano*, 264 F. App’x 106, 106 (2d Cir. 2008). This order was withdrawn and a per curiam opinion issued, affirming instead “for the reasons stated” in the district court opinion. *Ricci*, 530 F.3d at 87.

margin.²² In a spirited dissent from the denial of rehearing, Judge Cabranes insisted that the “appeal raise[d] important questions of first impression in our Circuit — and indeed, in the nation.”²³

The Supreme Court reversed. Writing for the Court, Justice Kennedy²⁴ began with the premise that the City’s action presumptively violated Title VII’s disparate treatment prohibition.²⁵ The City’s decision not to certify the test results, Justice Kennedy explained, was expressly race-based.²⁶ Accordingly, he deemed the City’s objective irrelevant: “[H]owever well intentioned or benevolent [its aim] might have seemed[,] the City made its employment decision because of race.”²⁷

The Court next considered whether the purpose of avoiding disparate impact liability “excuses what otherwise would be prohibited disparate-treatment discrimination.”²⁸ The disparate treatment and disparate impact provisions of Title VII were in conflict, Justice Kennedy observed, and it was the Court’s task to provide “a rule to reconcile them.”²⁹ The Court considered multiple options. At one extreme, an employer could never intentionally discriminate to avoid disparate impact liability — even when “the employer kn[ew] its practice violate[d] the disparate impact provision.”³⁰ At the other extreme, an employer could take race-based actions on a mere good faith belief that the action was necessary to avoid disparate impact liability.³¹

The standard that best balanced and gave effect to both provisions, the Court concluded, was the following: an employer may intentionally discriminate to avoid disparate impact liability only if it has a “strong basis in evidence” to believe that remedial action is necessary to avoid

²² See *Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008).

²³ *Id.* at 93 (Cabranes, J., dissenting).

²⁴ Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.

²⁵ *Ricci*, 129 S. Ct. at 2673.

²⁶ *Id.* The Court explained that the results were rejected “solely because the higher scoring candidates were white.” *Id.* at 2674. Such action, “[w]ithout some other justification . . . violates Title VII’s command that employers cannot take adverse employment actions because of an individual’s race.” *Id.* at 2673.

²⁷ *Id.* at 2674.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* The Court also considered a standard that would allow race-based adverse employment actions only when necessary to remedy an actual violation of the disparate impact provision. *Id.* But this approach, the Court concluded, would be “overly simplistic” and “would run counter to what we have recognized as Congress’s intent that ‘voluntary compliance’ be ‘the preferred means of achieving the objectives of Title VII.’” *Id.* (quoting Local No. 93, Int’l Ass’n of Fire-fighters v. City of Cleveland, 478 U.S. 501, 515 (1986)).

³¹ *Id.* at 2674–75. The Court dismissed this approach, explaining that it “would encourage race-based action at the slightest hint of disparate impact,” and thus “would amount to a *de facto* quota system.” *Id.* at 2675.

such liability.³² Justice Kennedy stressed that employers may still consider how to design a test “to provide a fair opportunity to all individuals,” but employers cannot, once a test is established, invalidate its results and “thus upset[] an employee’s legitimate expectation not to be judged on the basis of race.”³³

Applying the strong-basis-in-evidence standard, the Court found that there was “no evidence — let alone the required strong basis in evidence”³⁴ — that the tests were not job-related or that equally useful, less discriminatory alternatives were available.³⁵ Consequently, reiterating that “[f]ear of litigation alone” cannot justify race-based measures like those used by the City, the Court granted summary judgment for the firefighters on their Title VII disparate treatment claim.³⁶ Because this statutory holding resolved the case, Justice Kennedy did not address “whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.”³⁷

Justice Scalia concurred, cautioning that a time would come when the conflict between Title VII’s disparate impact provisions and equal protection guarantees would need to be resolved.³⁸ He explained that in some instances, complying with Title VII’s disparate impact provisions might require employers to racially discriminate in violation of the Equal Protection Clause.³⁹ And because a law that mandates unconstitutional conduct is presumably itself unconstitutional, Justice Scalia forewarned, the constitutionality of Title VII’s disparate impact provisions is in doubt.⁴⁰

Justice Alito concurred,⁴¹ writing separately to argue that even if the Court adopted the legal standard advocated by the dissent, the case would require remanding to determine whether fear of disparate

³² *Id.* at 2676. Justice Kennedy drew this standard from equal protection jurisprudence. There, certain race-based government actions are constitutional only when there is a “strong basis in evidence” that the actions are necessary to remedy past discrimination. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)) (internal quotation mark omitted).

³³ *Ricci*, 129 S. Ct. at 2677.

³⁴ *Id.* at 2681.

³⁵ *Id.* at 2679.

³⁶ *Id.* at 2681.

³⁷ *Id.* at 2676.

³⁸ *Id.* at 2681–83 (Scalia, J., concurring).

³⁹ See *id.* at 2682. This problem might occur if, for example, disparate impact law required the City to throw out a flawed and discriminatory test, even though the City proved it had implemented the test with no racial motivations whatever (indicating that the test itself did not violate equal protection).

⁴⁰ See *id.* (“[I]f the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties . . . discriminate on the basis of race.” (citation omitted)).

⁴¹ Justice Alito was joined by Justices Scalia and Thomas.

impact liability was merely a pretext for the City's "illegitimate . . . desire to placate a politically important racial constituency."⁴²

Justice Ginsburg dissented.⁴³ She began by reciting the historical background of racial discrimination and disparity among firefighters, especially in the New Haven community.⁴⁴ Viewing Title VII in this context, she rejected the Court's position that the disparate impact and disparate treatment provisions were in conflict, explaining that the two provisions work to "end[] workplace discrimination and promot[e] genuinely equal opportunity."⁴⁵ Consequently, Justice Ginsburg declared that reasonable efforts to comply with Title VII could not be seen as discrimination "because of" race.⁴⁶ For Justice Ginsburg, an employer could permissibly discard test results if the employer had "good cause to believe the device would not withstand examination for business necessity."⁴⁷ Applying this standard to the facts of the case, she maintained "that New Haven had ample cause to believe its selection process was flawed and not justified by business necessity."⁴⁸

A colorblind Constitution, highly suspicious of any race-based action, is in severe tension with a law *requiring* race-based action to remedy mere disparate impact. Importantly, *Ricci* entrenches the Court's colorblind approach to antidiscrimination law, applying a mode of analysis based on an individual right to be free from judgment based solely on race — regardless of the decisionmaker's ultimate aim. In so doing, *Ricci* strongly suggests that discriminatory efforts to comply with Title VII's disparate impact provisions should be subject to strict scrutiny. And under current precedent, it is hard to discern what compelling state interest could justify such efforts. Recognizing compliance with Title VII's disparate impact provisions as a compelling interest would be circular, potentially allowing self-justifying racial quotas. Nor can the requisite compelling interest easily be drawn from prior case law permitting racial preferences that further vital institutional goals; the racial composition of a fire department has little bearing on its ability to protect the public from fire. *Ricci* thus leaves the Court with a troubling dilemma: retreat from its current colorblind approach to equal protection, or rule disparate impact — a doctrine firmly established in history, precedent, and congressional approval — unconstitutional.

⁴² *Ricci*, 129 S. Ct. at 2684 (Alito, J., concurring); *see also id.* at 2683–89.

⁴³ Justice Ginsburg was joined by Justices Stevens, Souter, and Breyer.

⁴⁴ *See Ricci*, 129 S. Ct. at 2690–91 (Ginsburg, J., dissenting).

⁴⁵ *Id.* at 2699.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 2703. The City had such cause, Justice Ginsburg argued, because the entire scheme of using examinations in order to make promotion decisions was questionable, and the exam may have tested things other than the necessary knowledge. *Id.* at 2703–07.

Justice Scalia, in his concurrence, set forth the intriguing question: “Whether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution’s guarantee of equal protection?”⁴⁹ To survive constitutional review, the provisions presumably cannot mandate compliance efforts that violate equal protection. But the Court has never squarely addressed the extent to which compliance efforts, particularly when facially neutral but race-conscious, are suspect.⁵⁰ To be sure, racial animus is clearly forbidden, while mere awareness of racial consequences is not.⁵¹ Beyond that, the type and degree of race-consciousness that are permissible turn largely on how the Court conceptualizes equal protection.⁵²

On the view that equal protection forbids only racial animus or conduct that subordinates minorities,⁵³ even the most direct race-based compliance efforts are likely permissible. After all, genuine attempts to comply with a disparate impact statute involve no racial animus. As the district court concluded, “[T]he intent to remedy the disparate impact of the [tests] is not equivalent to an intent to discriminate against non-minority applicants.”⁵⁴ Nor did the City’s discarding the test results subordinate any minority⁵⁵ — arguably, the City merely used “race-conscious criteria to achieve positive race-related goals.”⁵⁶

By contrast, on the “colorblind Constitution” view — that the state may not impose distinctions or classifications based on race alone, no matter its motives — the tension between equal protection and disparate impact is severe.⁵⁷ Sometimes equal treatment produces unequal

⁴⁹ *Id.* at 2682 (Scalia, J., concurring).

⁵⁰ See Posting of Ilya Somin to The Volokh Conspiracy, http://www.volokh.com/archives/archive_2009_01_04-2009_01_10.shtml (Jan. 10, 2009, 05:22) (“Previous Supreme Court cases addressing challenges to facially neutral policies all involved claims that they were pretexts for traditional discrimination against blacks or other minority groups.”).

⁵¹ See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (distinguishing discriminatory intent from “intent as volition” and “intent as awareness of consequences”).

⁵² Cf., e.g., *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion) (“[A] more searching inquiry is necessary before strict scrutiny can be found applicable in [facially race-neutral] redistricting cases than in cases of ‘classifications based explicitly on race.’” (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213 (1995))).

⁵³ As stated by Justice Breyer, “the Equal Protection Clause outlaws invidious discrimination, but does not similarly forbid all use of race-conscious criteria.” *Parents Involved in Cmtv. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2834 (2007) (Breyer, J., dissenting).

⁵⁴ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 162 (D. Conn. 2006) (first alteration in original) (quoting *Hayden v. County of Nassau*, 180 F.3d 42, 51 (2d Cir. 1999)) (internal quotation mark omitted).

⁵⁵ But see *Parents Involved*, 127 S. Ct. at 2775 (Thomas, J., concurring) (arguing that even a purportedly benign and inclusive racial classification “pits the races against one another [and] exacerbates racial tension”).

⁵⁶ *Id.* at 2811 (Breyer, J., dissenting).

⁵⁷ As propounded by Justice Harlan, dissenting in *Plessy v. Ferguson*, 163 U.S. 537 (1896), “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Id.* at 559 (Harlan, J., dissenting); see also *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) (intimating

results, and if compliance with disparate impact statutes requires unequal treatment, which is itself barred by equal protection, employers are put in the impossible position of choosing between violating a statute and violating the Constitution.

The Court's conception of equal protection turns largely on its swing voter, Justice Kennedy, who appears to support a moderate version of the colorblind Constitution. He would allow facially neutral but race-conscious behavior so long as its goals are not invidious and the problem is addressed in a general way, without subjecting individuals to different treatment "solely on the basis of a systematic, individual typing by race."⁵⁸ Thus, in the educational context, Justice Kennedy would allow schools to pursue student body diversity by means including "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."⁵⁹

Crucially, in *Ricci* a majority of the Court endorsed what was previously Justice Kennedy's dictum: facially neutral race-conscious behavior is impermissible when it too directly subjects individuals to different treatment solely because of race.⁶⁰ For the Court, it was irrelevant that the City's motive was purportedly benign and that no minority group was adversely affected.⁶¹ Rather, what mattered was that the City subjected individual firefighters to different treatment solely because they were white.⁶² This concern for the individual right

that the colorblind Constitution might forbid employers from "evaluat[ing] the racial outcomes of their policies" and then "mak[ing] decisions based on (because of) those racial outcomes").

⁵⁸ *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁹ *Id.*

⁶⁰ To be clear, *Ricci*'s holding was technically statutory, not constitutional. But its implications for constitutional reasoning are unavoidable. Whereas Title VII forbids "discriminat[ion] against any individual . . . because of such individual's race," 42 U.S.C. § 2000e-2(a)(1) (2006), equal protection doctrine states that "[discriminatory purpose] implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979). Moreover, in his concurrence Justice Scalia clearly equated discrimination in the context of Title VII and discrimination in the context of equal protection. See *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring).

⁶¹ See *Ricci*, 129 S. Ct. at 2673–74 (majority opinion).

⁶² See *id.* By comparison, while race-conscious drawing of school attendance zones treats individuals differently because of race, the connection between race-based factors and any particular student's attendance zone is cloudy. Notably, the strength of this connection seems more important to the Court than the degree to which race was the motive behind adopting a particular plan. But cf. *Primus*, *supra* note 1, at 544–49 (hypothesizing that strict scrutiny applies when race is the predominant motive behind a decision).

to be judged exclusively “on the basis of socially relevant or meritocratic criteria”⁶³ is a hallmark of the colorblind Constitution.⁶⁴

With colorblind Constitution principles thus entrenched, one implication is clear: the Court will very likely subject some range of disparate impact compliance efforts to strict scrutiny.⁶⁵ Accordingly, for disparate impact doctrine to pass constitutional review, actions like the City’s must be justified by a compelling state interest.⁶⁶

Yet the sole compelling interest advanced by the City in briefing — compliance with Title VII’s disparate impact provisions⁶⁷ — is problematic at best. To find that such an interest justified discriminatory compliance efforts would surely beg the question whether Title VII disparate impact is constitutional to begin with.⁶⁸ The Court could conclude that Title VII disparate impact is constitutional as a matter of stare decisis; previous cases have repeatedly applied the doctrine.⁶⁹ But again, if discriminatory actions would be unconstitutional were it not for a compelling interest in Title VII compliance, then how can Title VII mandate those actions and not be unconstitutional itself?⁷⁰ In

⁶³ Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 92 (2000).

⁶⁴ See *id.* at 92–93.

⁶⁵ See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (explaining that under strict scrutiny, racial classifications “are constitutional only if they are narrowly tailored measures that further compelling government interests”).

⁶⁶ If compliance efforts cannot pass strict scrutiny, it follows that Title VII’s disparate impact provisions — to the extent they mandate discriminatory compliance efforts — are unconstitutional. See *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring). Of course, this analysis could be avoided by casting the disparate impact provisions as an “evidentiary dragnet” — a mechanism designed solely to uncover hidden discrimination. See generally Primus, *supra* note 1, at 520–23. But while such an interpretation may be tempting, it is without basis in text or judicial precedent. See *Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring); Primus, *supra* note 1, at 523.

⁶⁷ See Brief for Respondents at 49–55, *Ricci*, 129 S. Ct. 2685 (2009) (Nos. 07-1428, 08-328), 2009 WL 740763.

⁶⁸ Cf. *Biondo v. City of Chi.*, 382 F.3d 680, 684 (7th Cir. 2004) (Easterbrook, J.) (“[T]he premise of the City’s argument is that regulations supply a compelling governmental interest in making decisions based on race. How can that be? Then Congress or any federal agency could direct employers to adopt racial quotas, and the direction would be self-justifying: the need to comply with the law (or regulation) would be the compelling interest. Such a circular process would drain the equal protection clause of meaning.”).

⁶⁹ See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988) (“This Court has repeatedly reaffirmed the principle that some facially neutral employment practices may violate Title VII even in the absence of a demonstrated discriminatory intent.”).

⁷⁰ The City supported its argument by noting that in *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006), “eight Justices concluded that compliance with Section 5 of the Voting Rights Act was a compelling interest.” Brief for Respondents, *supra* note 67, at 52. But that provision has been expressly upheld “as a proper exercise of Congress’s authority under . . . the Fifteenth Amendment.” *LULAC*, 126 S. Ct. at 2667 (Scalia, J., concurring in the judgment in part and dissenting in part). The compelling interest found in *LULAC* thus let the protections guaranteed by the Fourteenth Amendment bend to the legislative authority granted by the Fifteenth. Equal protection cannot so bend to statutory disparate impact. Moreover, as Ricci noted, section 5 was enacted with the purpose of remedying identified past dis-

any event, the Court would not likely assert an unreasoned acceptance of disparate impact based on stare decisis — not in the face of *Brown v. Board of Education*'s⁷¹ rejection of *Plessy v. Ferguson*⁷² and the need for a coherent equal protection jurisprudence. In short, Title VII needs to stand on its own constitutional footing.

However, this footing cannot comfortably be found in prior cases. “[O]utright racial balancing . . . is patently unconstitutional,”⁷³ so avoiding disparate impact cannot be a compelling state interest itself.⁷⁴ Similarly, mere “societal discrimination” has been held not to justify race-conscious classifications.⁷⁵ Though there is a well-recognized interest in remedying specific instances of past unlawful discrimination,⁷⁶ Title VII is not narrowly tailored to that end.

More availing perhaps is the compelling interest in diversity in higher education upheld in *Grutter v. Bollinger*.⁷⁷ Additionally, some circuits have recognized a compelling interest in a diverse police department⁷⁸ and in having persons of different races in the corrections environment.⁷⁹ However, the rationales behind recognizing a compelling interest in those contexts do not easily transfer to first responder firefighting.⁸⁰ In *Grutter*, the Court viewed “attaining a diverse student body [a]s at the heart of the Law School’s proper institutional mission,”⁸¹ emphasizing “the educational benefits that flow from student body diversity.”⁸² Similarly, a diverse police force arguably in-

crimination — a well-established compelling state interest. Reply Brief for Petitioners at 10 n.9, *Ricci*, 129 S. Ct. 2685 (2009) (Nos. 07-1428, 08-328), 2009 WL 952214.

⁷¹ 347 U.S. 483 (1954).

⁷² 163 U.S. 537 (1896).

⁷³ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).

⁷⁴ See *Biondo v. City of Chi.*, 382 F.3d 680, 684 (7th Cir. 2004) (Easterbrook, J.) (“If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm, and as a practical matter *Washington v. Davis*, 426 U.S. 229 (1976), would be undone.”).

⁷⁵ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”).

⁷⁶ See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

⁷⁷ 539 U.S. 306; see *id.* at 328.

⁷⁸ See, e.g., *Petit v. City of Chi.*, 352 F.3d 1111, 1115 (7th Cir. 2003); *Patrolmen’s Benevolent Ass’n of N.Y. v. City of N.Y.*, 310 F.3d 43, 52 (2d Cir. 2002); *Talbert v. City of Richmond*, 648 F.2d 925, 931–32 (4th Cir. 1981).

⁷⁹ See, e.g., *Wittmer v. Peters*, 87 F.3d 916, 919–21 (7th Cir. 1996).

⁸⁰ See *Lomack v. City of Newark*, 463 F.3d 303, 310 (3d Cir. 2006) (holding *Grutter*’s “compelling interest in the educational benefits of diversity” inappropriate to firefighting because the fire department’s mission was to fight fires, not educate).

⁸¹ *Grutter*, 539 U.S. at 329.

⁸² *Id.* at 330.

creases police effectiveness by earning the community's trust.⁸³ By contrast, the racial composition of a fire department is largely irrelevant to its ability to protect the public from fire. Instead, a compelling interest would seemingly need to be found in something more abstract, such as developing role models for aspiring firefighters. A Court supportive of the colorblind Constitution is unlikely to expand its recognition of compelling interests to that degree.⁸⁴

Ricci thus leaves the Court in a difficult position. To find Title VII's disparate impact provisions unconstitutional would be a bold step indeed — both the Supreme Court and Congress "have approved of disparate-impact liability, cementing its legitimacy over almost forty years."⁸⁵ Indeed, critics could easily declare an opinion that struck down Title VII's disparate impact provisions to be a modern incarnation of *Lochner v. New York*,⁸⁶ "in which the Court overrode democratic judgments in favor of a dubious understanding of the Constitution."⁸⁷ And yet to rule otherwise would seriously compromise the Court's colorblind equal protection jurisprudence. The Court cannot be eager to confront either alternative. In the end, only one thing seems clear: the day on which "the war between disparate impact and equal protection [is] waged"⁸⁸ will be bloody.

B. Foreign Sovereign Immunities Act

Iraqi Sovereign Immunity. — As amended in 1996, the Foreign Sovereign Immunities Act of 1976¹ (FSIA) limited the sovereign immunity from suit in United States courts of nations designated as state sponsors of terrorism. In April 2003, Congress enacted the Emergency Wartime Supplemental Appropriations Act² (EWSAA), which in part authorized the President to "make inapplicable with respect to Iraq [any] provision of law that applies to countries that have supported terrorism."³ President Bush exercised that authority to its fullest extent in May 2003.⁴ In 2004, then-Judge Roberts disagreed with a hold-

⁸³ See *Petit*, 352 F.3d at 1115 (recognizing diversity among police sergeants as compelling "in order to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city").

⁸⁴ Indeed, the Court has already rejected such a "role model" theory as too indefinite. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986) (plurality opinion).

⁸⁵ Brief for Respondents, *supra* note 67, at 50.

⁸⁶ 198 U.S. 45 (1905) (holding that "liberty of contract" was implicit in the Due Process Clause of the Fourteenth Amendment).

⁸⁷ Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 247 (2008).

⁸⁸ *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

¹ Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602–1611 (2006)).

² Pub. L. No. 108-011, 117 Stat. 559 (2003).

³ *Id.* § 1503, 117 Stat. at 579.

⁴ Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 16, 2003).