EMPLOYMENT DISCRIMINATION — DISPARATE IMPACT — SECOND CIRCUIT DECLINES TO EXTEND *RICCI V. DESTEFANO*. — *Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2011).

Title VII of the Civil Rights Act[1] prohibits public and private employers from discriminating on the basis of "race, color, religion, sex, or national origin."[2] Plaintiffs can challenge employment practices because they evidence disparate treatment,[3] intentional discrimination on the basis of a protected trait, or because they cause a disparate impact,[4] a differential effect on a protected group. In *Ricci v. DeStefano*,[5] the Supreme Court identified a tension between the disparate treatment and disparate impact provisions of Title VII: the prohibition of disparate treatment forbids racial classifications, whereas the simultaneous prohibition of disparate impact sometimes requires recourse to racial classifications.[6] To resolve this tension, the *Ricci* Court held that an "employer must have a strong basis in evidence" that it will face disparate impact liability before it may voluntarily address disparate impact through the use of "intentional discrimination."[7] Recently, in *Briscoe v. City of New Haven*,[8] the Second Circuit revisited the promotion process at issue in *Ricci* and held that *Ricci* did not create a "symmetrical" standard for avoiding disparate impact liability.[9] *Ricci* did not foreclose disparate impact suits where there is a "strong basis in evidence" for disparate treatment liability.[10] The disparate impact claim raised in *Briscoe* posed a choice for the Second Circuit: follow the Supreme Court's dicta and extend *Ricci* to create a new standard for avoiding disparate impact liability, or continue on the course established by Title VII. In allowing a disparate impact suit to proceed, the Second Circuit rightly confined *Ricci* to its holding. The *Briscoe* court's narrow reading of *Ricci* exhibits appropriate judicial deference to Congress and wisely maintains an antisubordination interpretation of Title VII and equal protection.

In 2003, the City of New Haven administered written exams to decide which of the city's firefighters would receive promotions to the

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1 42 U.S.C. § 2000e (2006 & Supp. IV 2011).
2 *Id.* § 2000e-2(a)(1).
3 *Id.*
4 *Id.* § 2000e-2(k).
5 129 S. Ct. 2658 (2009).
6 *Id.* at 2673–74.
7 *Id.* at 2677.
8 654 F.3d 200 (2d Cir. 2011).
9 *Id.* at 206.
10 *Id.* at 209.

rank of lieutenant or captain.[11] The exams had a significant disparate impact on candidates of color. If the city had certified the test results, no black or Latino candidates would have been eligible for immediate promotion to lieutenant.[12] The exam for promotion to captain yielded slightly more diversity: seven whites and two Latinos would have been eligible for immediate promotion.[13] After a contentious public debate regarding certification, the New Haven Civil Service Board declined to certify the results of the test.[14]

Seventeen white firefighters and one Latino firefighter subsequently brought suit against the city. They claimed that the city's failure to certify the exams constituted discrimination on the basis of race under the disparate treatment prong of Title VII.[15] To resolve the firefighters' claims, the Supreme Court in *Ricci* created a new standard for reconciling the tension between disparate impact and disparate treatment: an employer must establish that it has a "strong basis in evidence" that it will be subject to disparate impact liability before it may alter a hiring or promotion process for race-sensitive reasons.[16] Since the city could not meet the new standard, the Court ordered the city to certify the results of the test.[17]

Ricci also presaged the possibility that the city might face another lawsuit for the test's disparate impact on the black and Latino firefighters.[18] The Court proffered a method for resolving the city's future liability by inverting its holding: "[I]n light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."[19]

In 2009, Michael Briscoe, a black firefighter, brought a disparate impact suit against the City of New Haven,[20] converting the *Ricci* hypothetical into reality. Briscoe took the exam for promotion to lieutenant and scored the highest among all the candidates on the oral portion.[21] However, his score on the written portion resulted in an overall ranking of twenty-four, making him ineligible for promotion.[22]

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[11] *Ricci*, 129 S. Ct. at 2664–65. The city also conducted oral exams, weighted forty percent of the total score. The written exam comprised the remaining sixty percent. *Id.* at 2665.

[12] *See id.* at 2666.

[13] *Id.*

[14] *Id.* at 2667–71.

[15] *See id.* at 2671.

[16] *Id.* at 2664.

[17] *See id.* at 2681.

[18] *See id.*

[19] *Id.*

[20] *See* Briscoe v. City of New Haven, No. 3:09-cv-1642 (CSH), 2010 WL 2794212, at *1 (D. Conn. July 12, 2010).

[21] *See id.* at *3.

[22] *Id.*

Briscoe argued that the particular weighting of the written and oral exams resulted in a disparate impact on firefighters of color.[23] Briscoe asked the court to grant a promotion, monetary damages, and a future injunction concerning the weighting of the exams.[24]

The district court dismissed Briscoe's claim.[25] Relying on *Ricci*, the court noted that the Supreme Court had already held that there was no strong basis in evidence for a disparate impact claim against the city, effectively "foreclos[ing]" the possibility of Briscoe's disparate impact claim.[26] The district court found Justice Kennedy's closing hypothetical in *Ricci* instructive: the city could avoid a disparate impact suit because *Ricci* itself provided a strong basis in evidence that rectifying the disparate impact would subject the city to a disparate treatment violation.[27] The district court emphasized the *Ricci* Court's unique procedural gesture in reversing the Second Circuit instead of vacating and remanding, the Court's usual procedure when announcing a new standard.[28] The court concluded: "The Supreme Court remanded [*Ricci*] with directions that the 2003 exam results be certified. . . . Briscoe cannot now raise a disparate impact claim with respect to those same exam results."[29]

The Second Circuit vacated and remanded.[30] Writing for a unanimous panel, Chief Judge Jacobs[31] concluded that Briscoe's claim could not be properly dismissed under the district court's reasoning.[32] After rejecting the claim that *Ricci* precluded Briscoe's suit,[33] Chief Judge Jacobs read the district court's dismissal as incorrectly "establishing a symmetrical companion to *Ricci*'s . . . holding."[34]

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[23] *Id.*

[24] *Id.*

[25] *Id.* at *12.

[26] *Id.* at *10.

[27] *See id.* at *8 (citing Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009)).

[28] *Id.* at *10.

[29] *Id.*

[30] *Briscoe*, 654 F.3d at 209. The Second Circuit made clear that Briscoe's claim could still be dismissed if it suffered from other fatal problems, such as the expiration of the statute of limitations. *Id.* at 210.

[31] Judges Winter and Cabranes joined Chief Judge Jacobs's opinion. Notably, Chief Judge Jacobs and Judge Cabranes had dissented from the Second Circuit's denial of a rehearing en banc in *Ricci*. Ricci v. DeStefano, 530 F.3d 88, 93–94 (2d Cir. 2008) (Cabranes, J., dissenting from denial of rehearing en banc). Judge Cabranes's dissent, which Chief Judge Jacobs joined, had stressed that the firefighters' claim revealed "far from well-settled" tensions between disparate impact and equal protection as well as between Title VII's disparate impact and disparate treatment provisions, foreshadowing the Supreme Court's eventual resolution of the case. *Id.* at 94.

[32] *Briscoe*, 654 F.3d at 209.

[33] The Second Circuit held that the district court violated principles of nonparty preclusion by relying on *Ricci*, a case to which Briscoe was not a party. *Id.* Further discussion of the preclusion issue falls outside the scope of this comment.

[34] *Id.* at 205.

While *Ricci* held that an employer could avoid a disparate treatment claim only through a showing of a "strong basis in evidence" of disparate impact liability, the district court had erroneously accepted at face value *Ricci*'s dicta purporting to invert its holding.[35]

Chief Judge Jacobs explained that the district court's extension of the *Ricci* holding to establish a parallel standard for avoiding disparate impact liability was wrong for several reasons. First, Chief Judge Jacobs looked to the reasoning of Justice Kennedy's opinion in *Ricci*. The district court's holding relied not on *Ricci*'s holding, but on Justice Kennedy's closing dicta,[36] which attempted to foreclose future disparate impact suits.[37] Instead, Chief Judge Jacobs selected the narrowest language in the opinion as the articulation of *Ricci*'s holding[38] and found that the parting dicta bore no logical connection to the holding.[39] The fundamental asymmetry between disparate impact and disparate treatment claims also suggested that the court could not invert the holding in *Ricci*. Unlike for disparate treatment, Title VII explicitly outlines defenses for disparate impact.[40] Chief Judge Jacobs reasoned that "[t]here is no need to stretch *Ricci* to muddle that which is already clear."[41]

Next, Chief Judge Jacobs examined the implications of inverting *Ricci*'s holding, noting that doing so would lead to illogical results. First, because disparate treatment claims center on an intent inquiry, the court concluded that "it is hard to see how one can adduce a 'strong basis in evidence' that oneself will later act with 'discriminatory intent or motive.'"[42] Second, Chief Judge Jacobs explained that *Ricci* derived its holding by analogizing a standard from equal protection's prohibition on racial classifications to disparate treatment claims under Title VII.[43] Equal protection, however, does not prohibit disparate impact.[44] As a result, *Ricci*'s holding could not "apply symmetrically to two doctrines that by nature are asymmetrical."[45] Finally, interpreting *Ricci* to create a defense to disparate impact liability

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[35] *See id.* at 205–06.

[36] Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

[37] *See Briscoe*, 654 F.3d at 206.

[38] *See id.* ("We hold *only* that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability." (quoting *Ricci*, 129 S. Ct. at 2677 (emphasis added))).

[39] *See id.* at 206–07 ("[T]he Court's precise formulation of its holding . . . supersedes any dicta arguably to the contrary.").

[40] *Id.* at 207 (citing 42 U.S.C. § 2000e-2(k)(1) (2006)).

[41] *Id.*

[42] *Id.* at 208 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)).

[43] *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989)).

[44] *Id.*; *see also* Washington v. Davis, 426 U.S. 229, 238–39 (1976).

[45] *Briscoe*, 654 F.3d at 208.

based upon a "strong basis in evidence" of disparate treatment would effect a transformation in employment discrimination law.[46] Such an outcome, the court concluded, could not have been intended by the "single sentence of dicta" relied upon by the district court.[47]

Briscoe created a double bind for the Second Circuit: follow the Supreme Court's dicta and uproot a forty-year-old disparate impact doctrine or decline to follow the Supreme Court, relying instead on Title VII itself.[48] The *Briscoe* court wisely chose the latter option, declining to extend *Ricci* to create a new defense to disparate impact liability. In so doing, the Second Circuit evinced deference to Congress's continued support for an antisubordination view of antidiscrimination law, which uses disparate impact liability as a remedial tool. *Briscoe*'s judicial restraint breathes continued vitality into disparate impact doctrine against the backdrop of persistent social inequality.

By raising a disparate impact claim after the *Ricci* Court's dicta had foreclosed it, Briscoe forced the court to resolve an ongoing "feud" between Congress's view of disparate impact as embodied in Title VII and the Court's attempts to eviscerate disparate impact.[49] After reading the doctrine of disparate impact into Title VII in *Griggs v. Duke Power Co.*,[50] the Court slowly retreated from its strong articulation of the doctrine.[51] This contraction culminated in a near repudiation in *Wards Cove Packing Co. v. Atonio*.[52] Congress rejected the resulting "weakened . . . scope and effectiveness of Federal civil rights protections"[53] by codifying disparate impact in the 1991 Amendments to Title VII, an unequivocal rebuke aimed at correcting the Court's doctrinal turn away from disparate impact.[54] *Briscoe* very much appears at the intersection of these competing visions of disparate impact liability.

The Second Circuit resolved this judicial double bind by reading *Ricci* through statutory interpretation techniques aimed at deference to Congress — textualism and purposivism.[55] In assessing whether *Ricci* created a new standard for avoiding disparate impact liability,

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[46] *Id.* at 208–09.

[47] *Id.* at 209.

[48] *Cf. id.* ("[W]e cannot reconcile all of the indications from the . . . Court in *Ricci*.").

[49] Charles A. Sullivan, Ricci v. DeStefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U. L. REV. 411, 411 (2010). The *Briscoe* court displayed awareness of this ongoing struggle and its own role in the debate. *See id.* at 207–08 & nn.11–12.

[50] 401 U.S. 424 (1971); *see id.* at 429–31.

[51] *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 703 (2006).

[52] 490 U.S. 642 (1989); *see id.* at 652–61; *see also* Sullivan, *supra* note 49, at 412–13.

[53] Civil Rights Act of 1991, Pub. L. No. 102-166, § 2(2), 105 Stat. 1071, 1071.

[54] *See* Barry Goldstein & Patrick O. Patterson, Ricci v. DeStefano*: Does It Herald an "Evil Day," or Does It Lack "Staying Power"?*, 40 U. MEM. L. REV. 705, 739 (2010).

[55] Textually constrained purposivism has become increasingly common in statutory interpretation. *See generally* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. (forthcoming).

the *Briscoe* court turned to the statute. Title VII instructs that for disparate impact claims, processes that are "job related" and "consistent with business necessity" are permissible even despite a differential effect on a protected group.[56] Given the statutory nature of the disparate impact defenses, the court explained that it would have "expect[ed]" that the *Ricci* Court would have "cite[d] and quote[d] the statute" if it had intended to create a new defense.[57] Self-consciously concluding its textual analysis, the court noted that judge-made law is unnecessary when the statute is clear.[58] To buttress its textual approach, *Briscoe* then intimated that applying *Ricci*'s dicta would effect an outcome contrary to Congress's purposes in Title VII.[59] As the court explained, extending *Ricci* would conflict with "long-standing, fundamental principles of Title VII law."[60] *Briscoe* thus follows other circuits in remaining faithful to Title VII's text and engaging in a broad, purposivist interpretation of the statute.[61]

Given the Court's perennial role as assailant of disparate impact and Congress's role as its defender, *Briscoe*'s deference to Congress has significant implications for a larger debate about the proper place of antidiscrimination law in society. Legal scholars have long viewed disparate impact as a significant tool in achieving the remedial aims associated with an antisubordination view of antidiscrimination law.[62] The antisubordination thesis holds that to realize the "guarantees of equal citizenship" legal regimes must address the continued subordination of disadvantaged groups in society.[63] The prohibition on disparate impact in employment law, with its aim of "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor . . . white employees over other employees,"[64] grew out of this antisubordination tradition.[65] Antidiscrimination jurisprudence, however, has undergone a sea change over the past forty years, abandoning an antisubordination interpretation of antidiscrimination

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[56] 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[57] *Briscoe*, 654 F.3d at 207.

[58] *Id.*

[59] *See id.* at 209.

[60] *Id.* at 206.

[61] *See, e.g.*, Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 & n.3 (5th Cir. 1970).

[62] *See* Selmi, *supra* note 51, at 703 & nn.7–9.

[63] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003); *see also* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

[64] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[65] *See generally* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) ("Fair employment laws confer benefits upon a class of persons, namely, the actual and likely victims of discrimination." *Id.* at 236.).

and equal protection in favor of a colorblind interpretation.[66] The colorblind vision, in contrast to the antisubordination thesis, prohibits classification by race for both malign and benign, remedial reasons.[67] Thus, while disparate treatment also began in the antisubordination tradition,[68] the rise of the colorblind interpretation of equal protection has inflected disparate treatment doctrine with an anticlassification rationale in both the equal protection[69] and Title VII contexts.[70] This sea change from the antisubordination to the colorblind view has set disparate impact and the new colorblind requirements of the Constitution on a collision course.[71]

Ricci was radical precisely because it named these lurking tensions[72] and assumed that voluntarily addressing disparate impact was itself intentional discrimination.[73] The broadest reading of *Ricci* — that disparate impact fundamentally conflicts with the colorblind requirements of the American legal system — would represent a significant victory for the colorblind view.[74] Addressing a disparate impact, like the one in *Briscoe*, after its manifestation in the hiring or promo-

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[66] *See* Balkin & Siegel, *supra* note 63, at 29 ("Beginning in the 1970s the federal courts applied existing doctrines in ways that slowed the project of disestablishing racial hierarchy . . . ."); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 502–05 (2003). Before *Ricci*, this transformation was most evident in school desegregation. *Compare* Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973) (holding that intentional discrimination in one part of the district created a presumption of deliberate discrimination in the entire district), *with* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (holding that diversity was not a sufficiently compelling interest to justify the use of racial classification in voluntary school desegregation).

[67] For a complete exposition of the colorblind interpretation of equal protection, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992). The ascendancy of the colorblind interpretation means that equal protection under the Fourteenth Amendment and disparate treatment under Title VII substantively prohibit the same conduct in the realm of employment practices — intentional discrimination based on race. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354–56 (2010).

[68] *See* Fiss, *supra* note 65, at 236; *see also* United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979) ("Congress' primary concern in enacting the prohibition against racial discrimination in Title VII . . . was with 'the plight of the Negro in our economy.'" (citation omitted)).

[69] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.").

[70] *Ricci* is the best example of this anticlassification interpretation of disparate treatment by the Court. *See* Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 198 (2010). The increasing number of "reverse discrimination" suits also illustrates the building pressure toward a colorblind view. *See, e.g.*, Hayden v. Cnty. of Nassau, 180 F.3d 42, 46–47 (2d Cir. 1999).

[71] *See* Primus, *supra* note 67, at 1385–86.

[72] *See id.* at 1353.

[73] Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense.").

[74] *See* Primus, *supra* note 67, at 1363. *But cf.* George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 83 ("[O]nly a sweeping decision could reshape the law of affirmative action. *Ricci* does not.").

tion process[75] requires employers to discern differential impact by referencing racial classifications. Thus, if *Ricci* means that racial classifications are themselves an impermissible disparate treatment, then this broad reading could spell the demise of disparate impact claims as a tool to address racial stratification.[76] The Second Circuit, however, in allowing the claim to proceed, rejected this broad reading of *Ricci* in favor of the antisubordination thesis long advocated by Congress.

Briscoe's restraint thus keeps the court open to plaintiffs with disparate impact claims and allows Title VII to have a continued role in ending the subordination of disadvantaged groups in American society. Evidence suggests that disparate impact law has had a substantial effect on public employment practices: its advent coincided with an increase in the use of assessment centers and other practices that tend to produce more racially diverse hiring and promotion.[77] Yet inequalities persist. *Briscoe*'s facts illustrate why an antisubordination reading of Title VII is still necessary: in New Haven, the city's procedures would have resulted in the promotion of only two candidates of color[78] in a city that is forty percent black and twenty percent Latino.[79] *Briscoe* kept the antisubordination legacy alive by allowing a black firefighter to challenge the disparate impact of an exam against a "backdrop of entrenched inequality."[80]

While *Briscoe* could have represented another step in the dismantling of an antisubordination vision of antidiscrimination law by the courts, the Second Circuit's decision suggests that at least some lower courts are reluctant to be foot soldiers in the Court's march toward a colorblind legal system.[81] By deferring to Congress, the *Briscoe* court placed the future of disparate impact back in the Supreme Court's hands. As Justice Scalia prophesied, "the war between disparate impact and equal protection will be waged sooner or later."[82] It appears, at least for now, that only the Court can bring about that "evil day."[83]

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[75] The *Ricci* majority, however, did not decide whether employers could consider disparate impact ex ante, "before administering a test or practice." *Ricci*, 129 S. Ct. at 2677.

[76] *See* Primus, *supra* note 67, at 1363.

[77] *See* Goldstein & Patterson, *supra* note 54, at 762–63; *see also* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 671–72 (2001).

[78] *See Ricci*, 129 S. Ct. at 2666.

[79] *Id.* at 2691 (Ginsburg, J., dissenting).

[80] *Id.* Justice Ginsburg explained the inequality in social and cultural capital: "While many Caucasian applicants could obtain materials and assistance from relatives . . . the overwhelming majority of minority applicants were 'first-generation firefighters' without such support networks." *Id.* at 2693.

[81] *Cf.* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011) (holding that the University of Texas affirmative action program does not violate equal protection), *cert. granted*, No. 11-345, 2012 WL 538328 (U.S. Feb. 21, 2012).

[82] *Ricci*, 129 S. Ct. at 2683 (Scalia, J., concurring).

[83] *Id.* at 2682.