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## Ricci v. DeStefano

(Did the Supreme Court just say you can't help minorities without discriminating against Caucasians?)

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**Ricci v. DeStefano**  
**U.S. Supreme Court**

June 29, 2009

**Title VII Case**  
**Reverse Discrimination**

# Title VII says:

**It shall be an unlawful employment practice for an employer. . .to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.**

# Supreme Court Has Decided Four Title VII Reverse Discrimination Cases:

- **1976 McDonald v. Santa Fe Trail Transportation**
- **1979 Steelworkers v. Weber**
- **1987 Johnson v. Transportation Agency**
- **2009 Ricci**

# McDonald v. Santa Fe Trail

## **Facts:**

- 1. Trucking company caught three employees stealing from shipments**
- 2. Fired two white employees, did not fire black employee**
- 3. White employees sued; District Court and Fifth Circuit granted Summary Judgment for employer**
- 4. Supreme Court reversed: (unanimous opinion by Justice Thurgood Marshall)**

**Because of race means  
because of race**

# Ricci Facts

- **In 2003: 118 New Haven firefighters took exams to qualify for promotion to lieutenant or captain.**
- **Promotion process governed by merit process per city charter:**
  - After exam, city civil service board certifies ranked list of applicants who passed test
  - Charter's "rule of three" requires vacancies filled by candidate from top three scorers on list
  - City's contract with firefighter's union specified score composed: 60% written exam, 40% oral exam

# Ricci Facts

## Exam design process

- **City hired IOS, a company specializing in exams for fire and police departments (cost: \$100,000)**
- **IOS did job analysis:**
  - Interviewed incumbent lieutenants, captains
  - Rode with and observed on duty officers
  - Got job analysis questionnaires from lieutenants, captains, battalion chiefs
  - **Deliberately oversampled minority firefighters** at every stage of process

# Ricci Facts

- **IOS took test questions from fire department's training manuals and department procedures– drafted 100 question multiple-choice test in language written below 10<sup>th</sup> grade reading level**
- **IOS also developed the oral exams, in which candidates were presented with hypothetical situations and asked to explain to panel of three assessors how they would handle each hypothetical situation**
- **Assessors:**
  - Fire chiefs, battalion chiefs from departments outside Connecticut, but similar in size to New Haven's
  - 66% of assessor panelists were minority
- **Each three member panel contained two minority members**

# Exam Results

## Lieutenant Exam:

- **Completed by 43 white, 19 blacks, 15 Hispanics**
- **34 of 77 passed: 25 whites (58.1% passed), 6 blacks (31.6% passed), 3 Hispanics (20% passed)**
- **Eight lieutenant positions were vacant**
- **Under rule of three, top 10 candidates were eligible for immediate promotion**
- **All 10 were white**

# Exam Results

## **Captain's Exam:**

- **Completed by 41: 25 whites, 8 blacks, 8 Hispanics**
- **22 of 41 passed: 16 whites (64% passed), 3 blacks (37.5% passed), 3 Hispanics (37.5% passed)**
- **Seven captain positions were vacant**
- **Per rule of three, 9 candidates eligible for immediate promotion**
- **7 whites, 2 Hispanics**

# Exam Results

## **EEOC Selection Rate**

**Minority pass rates were approximately half white pass rate and fell below EEOC's 80% pass rate: (arbitrary rate EEOC says indicates adverse impact)**

# After Test Results Were Known:

- **City's counsel met with IOS VP responsible for test—expressed concern test discriminated against minorities**
- **IOS VP defended test's validity**
- **City's counsel wrote Civil Service Board (CSB) stating: statistical demonstration of disparate impact, standing alone justifies employer initiated voluntary remedies— “**even race conscious remedies.**”**

# Employer's Decision

- **Career Service Board met four times regarding whether to certify test results. (“Certification” meant only stating the scores were reported accurately.)**
  - City HR director told CSB there is significant disparate impact on these exams – distributed lists showing candidates’ race and scores (but not names)
  - City attorney outlined possible grounds for CSB to refuse to certify results
  - Firefighter candidates (who did not know their test scores) spoke for and against certification
  - Black professional firefighters union representative suggested adjusting (race norming) scores to insure certain number of minority promotions

# Employer's Decision

- **IOS VP explained exam development process, insisted exam was neutral with nothing to indicate one group would perform differently than another**
- **Industrial psychologist (Hornick) who ran a testing business which directly competed with IOS testified:**
  - He had not studied the test in detail
  - Had not seen the job analysis data
  - Normally whites outperform minorities on most standard testing procedures
  - Adverse impact on written exam was somewhat high, but generally in the range we've seen professionally
  - Union contracts requiring 60% weight to written test might account for disparity

# Employer's Decision

- IOS exams were “reasonably good tests.”
- CSB’s best option might be to certify the test results and work to change process (including the Civil Service Rules) for future test—suggested his company would like to help write future tests and procedures
- **Fire program specialist for Home and Security Department (and black retired fire captain) testified he had “extensively” reviewed exams and “candidates should know that material.”**
- **College professor who said her “primary area of expertise” was “race and culture as they influence performance on tests and assessment procedures” testified:**
  - She had refused to review the exams
  - No matter what kind of test city had given, black/white result disparity would have happened
- **Local pastor threatened political retaliation if tests were certified**

# Employer's Decision

- **The board voted not to certify the examinations**
- **17 white firefighters and one Hispanic firefighter who passed the exam, but were denied promotions, filed suit**
- **Cross Summary Judgment motions in District Court**

# District Court

- **District Court granted city's Summary Judgment motion, holding:**
  - Title VII claim: City's motivation to avoid making promotions based on test with racially disparate impact does not, as matter of law, constitute prohibited discriminatory intent under Title VII
  - Equal Protection Claim: All applicants took the same test, all test results were discarded, no one was promoted, so all were treated equally

# Second Circuit

- **Second Circuit affirmed in one paragraph unpublished summary order, later substituted one paragraph per curiam opinion adopting District Court's order. Denied rehearing en banc 7-6.**

# Supreme Court Held: City Acted Because of Race

- All the evidence demonstrates the City chose not to certify the examination results because of statistical disparity based on race
- The City rejected the test results because too many whites and not enough minorities would be promoted were the lists certified
- Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City **made its employment decision because of race**
- This express, race based decision making violates Title VII absent some valid defense
- The City's **declared purpose to avoid disparate impact liability is not a valid defense**

# Majority Opinion (Justice Kennedy)

- **Rejects employer's arguments:**
  - Title VII “original, foundational prohibition” bars adverse action “because of race.” When Congress codified the disparate impact provision in 1991 it made no exception to “because of race” liability for good faith actions to comply with the new disparate impact provision.
  - Allowing employers to violate disparate treatment provision at the slightest hint of disparate impact could cause employers to discard lawful exam results in favor of a de facto quota system with undue focus on statistics or
  - **Even worse**, to discard test results (or other employment practices), then **select employees by race to attain/maintain the employer's preferred racial balance.**

# Other Arguments Ricci Rejected

(From: Amicus brief of EEOC and DOJ)

- In 1978 four government agencies jointly adopted the Uniform guidelines on Selection Procedures which state that a **selection rate for any race, sex, or ethnic group which is less than 4/5 the rate for the group with the highest rate will be regarded by Federal enforcement agencies as discriminatory unless employer has conducted a validity study to establish job relatedness.** The EEOC has advised employers [29 CFR 1608.4 (b) (1) and (3)] that they do not violate Title VII when they give voluntary preferential treatment in response to possible adverse racial impact. The Court should not cast aside that long standing guidance to employers

# Other Arguments Ricci Rejected

**(From: Amicus brief of EEOC and DOJ)**

- **Compliance with Title VII's disparate impact provisions necessarily requires an employer to consider race (or certainly to be aware of race) in applying its procedures to persons of different races (Source: Amicus brief of EEOC and DOJ)**
- **An employer's permissible – indeed laudable – intent to correct the disparate racial impact of its employment practices cannot constitute unlawful intent to discriminate because of race**

# Other Arguments Ricci Rejected

## (From Amicus brief of Society for Human Resource Management)

- Employers are expected, if not required by the Uniform Guidelines to identify possible racial disparate impact and to take steps to address such disparate impact. **Employers are entitled to immunity** if they act in good faith reliance on interpretations or opinions of the EEOC [citing 42 U.S.C. §2000e-12(b)], thus New Haven's refusal to certify the test results cannot be the basis for finding unlawful discrimination (emphasis added).
- EEOC claims its 1979 guidelines (29 CFR parts 1607 and 1608) are, in their entirety, "interpretations or opinions" 29 CFR §1608.2

# The EEOC is not Neutral About “Because of Race”

- **EEOC’s response to Adavard and Crosson and their holding that all racial classifications are subject to strict scrutiny:**

**Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with title VII, because they took into account race, sex, or national origin. This is the so-called “reverse discrimination” claim. The commission believes that by the enactment of title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement.**

# The EEOC is not Neutral About “Because of Race”

**Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII. Persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII. Correspondingly, title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against title VII liability which the Commission is authorized to provide under section 713(b)(1).**

# The Ricci Test

- **To justify engaging in intentional discrimination (because of fear of impact liability), employer must have a**
  - “strong basis in evidence” to believe it will be subject to disparate impact liability if it fails to take the race conscious discriminatory action, citing, Wygant v. Jackson Bd. of Ed (1986) and Richmond v. J.A. Crosson Co. (1989).

# What's Happening Here?

- Majority opinion decides case under Title VII, without citing either Steelworkers v. Weber or Johnson V. Transportation Agency. (Seemingly ignoring every Title VII reverse discrimination case decided in the 33 years before Ricci.)
- Majority opinion bases it's "strong basis in evidence" standard on Wygant (equal protection case) and City of Richmond v. Crosson, (a government contracting affirmative action case)
- Justice Ginsburg argues in dissent that Johnson v. Transportation Agency should control, characterizing Johnson as a case where the employer's voluntary affirmative action plan was upheld despite allowing consideration of gender as "one of numerous factors."

# Steelworkers v. Weber

- To understand Johnson, we have to understand Steelworkers v. Weber
- Weber, like Griggs v. Duke Power dealt with a Louisiana employer which had operated an overtly segregated work force for decades before Title VII
- Ten years into Title VII the employer still hired skilled craft workers only if they had prior experience. Blacks were not welcomed into southern craft unions – where apprenticeships provided training and prior experience

# Steelworkers v. Weber

- **As of 1974, only five of the plant's 273 skilled craft workers (1.8%) were black, although the area workforce was 39% black**
- **The employer had agreed to follow an affirmative action plan in its government contract**
- **As of 1974, there was reason to believe OFCCP's contract compliance office might terminate the government contract**

# Steelworkers v. Weber

- In 1974 employer and union entered into collective bargaining agreement which established program to train non-skilled production workers for skilled craft openings. Agreement **reserved 50% of slots in training program for blacks until percentage of black craft workers became commensurate with local labor force**
- (This remedy was the same one ordered by the Court in United States v. Paradise 480 U.S. 149 (1987). One black/one white promotion ratio for Alabama state troopers “for a period of time” Courts may order race conscious affirmative action to dissipate the lingering effects of persistent discrimination where employer or union has engaged in persistent discrimination. Sheet Metal Workers v. EEOC 478 U.S. 421 (1986))

# Steelworkers v. Weber

- **The most senior black selected for program had less seniority than some rejected white employees**
- **White employers sued. District Court held plan violated Title VII and Fifth Circuit Affirmed**
- **Supreme Court reversed**

# *Steelworkers v. Weber* (1979)

**(Seven justices participate)**

**(They write four opinions)**

**Majority (Brennan/Stewart/White/Marshall)**

**I. Title VII does not condemn all private, voluntary, race conscious affirmative action plans.**

**1) Literal interpretation of sections 703(a) and (d) would give result at variance with purpose of statute.**

- (Note: Santa Fe Trail interpreted 703(a) literally)

# *Steelworkers v. Weber* (1979)

## Majority Opinion

### Majority interpretation:

Section 703(j) says Title VII shall not “require” preferential treatment of minorities **but does not say Title VII shall not “Permit or require” preferential treatment.**

**703(j): Preferential treatment not to be granted on account of existing number or percentage imbalance.**

“Nothing contained in this subchapter shall be interpreted to require any employer...to grant preferential treatment to any individual or to any group because of...race, religion, sex or national origin...on account of an imbalance which may exist with respect to the total number or percentage of persons of any race...employed in comparison with the total number of persons of such race...in any community...or in the available work force...”

# *Steelworkers v. Weber* (1979)

## Majority Opinion

### II. Affirmative action plan in case didn't violate Title VII because it:

- 1) Was designed to eliminate traditional patterns of conspicuous racial segregation.
- 2) Was a **temporary measure not intended to maintain racial balance** but simply to eliminate a manifest racial imbalance.
- 3) Plan did not require discharge of white workers to replace with black workers, and did not create absolute bar to advancement of white workers.

# *Steelworkers v. Weber*

## Concurring (Blackmun)

- I. **Majority's expansive interpretation of Title VII disturbs me because (as Rehnquist dissent points out) it seems at odds with the political bargain Congress struck and with the nondiscrimination principle it probably thought it was passing - one applicable to blacks and whites alike.**
- II. **But, Justice Blackmun went along with majority's ruling because:**
  - 1) The preferential apprenticeship program in Weber operated as a temporary tool for remedying past discrimination, had a defined end point, and did not attempt to maintain a previously achieved racial balance.
  - 2) He **believed he saw practical and equitable considerations Congress didn't see or didn't understand:**
    - a) **Literal interpretation of nondiscrimination principle in § 703 puts employers and unions on a "high tightrope without a net":** liable to blacks for past discrimination, but liable to whites if they act to remedy past discrimination.

# *Steelworkers v. Weber*

## Dissent (Burger)

- I. **The majority reaches a result I would vote for if I were a member of Congress considering a proposed amendment to title VII, but that result is contrary to the explicit language of Title VII and I must dissent. The majority's opinion effectively rewrites Title VII to do precisely what Title VII's sponsors and opponents agreed that statute was not intended to do.**
- II. **After long study and searching debate, Congress wrote a statute which unambiguously states in § 703(d): "It shall be an unlawful employment practice for any employer to discriminate against any individual because of his race, color, religion, sex, or national origin.**
- III. **Hard cases tempt judges to exceed their authority and make bad law as the Court does in this case by totally rewriting a crucial part of Title VII to reach a "desirable" result. If private affirmative action programs are to be permitted, it is for Congress, not the Court, to change the law to permit them.**

# *Steelworkers v. Weber*

## Dissent (Rehnquist)

- I. “In a **very real sense the Court’s opinion is ahead of its time: it could more appropriately have been handed down five years from now in 1984**, a year coinciding with the title of a book from which the Court’s opinion borrows, perhaps subconsciously, at least one idea.”
- II. Majority opinion is a dramatic and unexplained reversal of the Court’s prior interpretations of Title VII in *Griggs v. Duke Power Co.* (1971); *McDonald v. Santa Fe Trail Transportation Co.* (1976); and *Furnco Construction Corp. v. Waters* (1978).
- III. To reach the result it desires, the majority:
  - 1) Ignores or distorts the language of Sections 703(a), 703(d) and 703(j). **Rather than applying the words of the statute, the majority calls upon what it divines as the “spirit” of the act.** The fact that Title VII was passed to prevent employment discrimination against Negroes **does not mean Congress intended to allow employers to discriminate against white persons.**

# *Steelworkers v. Weber*

## Dissent (Rehnquist)

**IV. The legislative history proves Congress meant what it said--Title VII permits no racial discrimination in employment--not even preferential treatment of minorities to correct racial imbalance.**

- 1) As Title VII was debated in Congress, its opponents argued that it would force employers to hire by race to racially balance all job classifications. The bill's opponents argued that the EEOC would have power to prevent a business from employing and promoting the people it wished, and that federal bureaucrats would have power to order hiring and promotion only of employees of certain races or religious groups.

# *Steelworkers v. Weber*

## Dissent (Rehnquist)

- 2) Title VII's supporters in both the House and Senate gave repeated assurances, including an analytical memorandum from the Justice Department, that:
  - a) Title VII prohibits all quotas, special seniority rights, and preferential treatment in favor of minorities and
  - b) Preserves all established seniority rights of existing employees.
  - c) The bill's supporters also represented that Title VII would tolerate no voluntary racial preferences, whether in favor of blacks or whites.
  - d) § 703(d) was added to the bill to write these assurances into law. § 703(j) is specifically addressed to Federal courts and agencies charged with interpreting the law. It directs them not to try to require affirmative preferences.

# Johnson v. Transportation Agency Facts:

- **Twelve applied for promotion to skilled craft workers job; seven scored above 70 and were rated qualified**
- **Top score was male employee at 75; second was female at 73**
- **Employer had 238 skilled craft worker jobs – none had ever been held by a woman**
- **Employer had voluntary affirmative action plan which declared intent to achieve statistically measurable yearly improvement for women and minorities with long term aspiration of that about 36% of skilled craft positions would be held by women**
- **Employer selected female applicant. Unsuccessful male applicant sued, alleging reverse discrimination**

# *Johnson v. Transportation Agency*

## Plurality (Brennan/Marshall/Blackmun Powell)

### I. This case is governed by our decision in *Weber v. Steelworkers*. It raises two issues:

- Issue No. 1 Whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a manifest imbalance reflecting under-representation of women in traditionally segregated job categories.
- The manifest imbalance need not be such that it would establish a *prima facie* case against the employer--under *Weber* the appropriate focus is on statistical imbalance.
- It was appropriate for the employer to take affirmative action considerations into account in making its promotion decision because the plan emphasized that long-term goals were not to be taken as guides for actual hiring decisions and required consideration of a host of practical factors including specifically the qualifications of applicants for particular jobs.

# *Johnson v. Transportation Agency* (Plurality Opinion)

- Issue No. 2 Whether the affirmative action plan unnecessarily trammelled the rights of male employees or created an absolute bar to their advancement.
- Unlike *Weber*, the plan sets aside no positions for women but merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants.
- Under the *Bakke* decision (1978), race or ethnic background may be deemed a plus under an affirmative action plan as long as the plan does not insulate the individual from comparison with all other candidates.
- The male employee had no absolute entitlement to the promotion at issue. Seven applicants were classified as qualified and eligible for promotion and the employer's director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the employer.
- The plan was intended to attain a balanced workforce, not to maintain one.

# *Johnson v. Transportation Agency*

## Concurring in Judgment Only (Stevens)

- If the court had adhered to its pre-1978 construction of Title VII, the male employee would unquestionably win this case, but the court has not adhered to that interpretation of Title VII.
- In *Bakke* in 1978 and again in *Steelworkers v. Weber* in 1979, a majority of the court interpreted the antidiscriminatory strategy of Title VII in a fundamentally different way.
- The **problem for me is whether to adhere to an authoritative construction by the court of Title VII that is at odds with my understanding of what Congress intended.** I conclude without hesitation that I must answer that question in the affirmative. *Bakke* and *Weber* have been decided and are now an important part of the fabric of our law.
- The preference granted to the female employee in this case does not violate Title VII as construed in *Weber* and *Bakke*.

# Johnson v. Transportation Agency O'Connor – Concurring in Judgment Only

- **Plurality's expansive interpretation disregards both statutory language and constitutional limitations**
- **In my view, proper standard to evaluate legality of affirmative action plan for a public employer is same under Title VII and Equal Protection Clause:  
Employer must have a firm basis for believing remedial action was required**

# Johnson v. Transportation Agency

## O'Connor – Concurring in Judgment Only

- **Employer must point to a statistical disparity sufficient to support prima facie Title VII claim (against itself).**
  - Weber permits affirmative action “only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.”
  - Same standard was recently adopted to judge public employer affirmative action under Equal Protection Clause in Wygant (1986)
  - Under Wygant standard, **societal discrimination without more will not justify a “racially classified” remedy.**
  - In this case, I’m satisfied employer was acting to remedy statistical disparity sufficient to establish a prima facie Title VII case

# *Johnson v. Transportation Agency*

## Dissenting (White)

- I. **I would overrule *Weber*.**  
**(Justice White was part of *Weber*'s majority)**
  - I believe affirmative action can only be justified under Title VII where it is used to remedy intentional and systematic exclusion of minorities by employers and unions from certain job categories. This is and was my understanding of what was decided in *Weber*.
  - In this case, the court now interprets *Weber* to require nothing more than a manifest imbalance between one identifiable group and another in the employer's labor force in order to justify affirmative action.

# *Johnson v. Transportation Agency*

## Dissenting (Scalia/Rehnquist)

- The majority's decision converts Title VII's clear language from a guarantee that race or sex will not be the basis for employment determinations to a guarantee that it often will.
- This plan did not seek to replicate what a lack of discrimination would produce, but instead, imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined "proper" proportion of each job category.

# *Johnson v. Transportation Agency*

## Dissenting (Scalia/Rehnquist)

- **The majority's decision has converted a statute designed to establish a color blind and gender blind work place into a powerful engine of racism and sexism, not merely permitting intentional race and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.**
- **It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and government employers for whom the cost of hiring less qualified workers is often substantially less--and infinitely more predictable--than the cost of litigating Title VII cases.**

# *Weber and Johnson*

## Key Points and My Synthesis

- Interpreting “because of race” literally would mean blacks in Weber and the woman in Johnson stay where discrimination put them
- Neither case says the employer is remedying its own past discrimination. (But both employers had much past discrimination to remedy)
- Cases allowed preferential treatment because the apprenticeship program in Weber and the affirmative action plan in Johnson were designed to attain a balanced workforce, not to maintain one. (Both plans would expire upon attainment)

# *Weber and Johnson*

## Key Points and My Synthesis

- **Both cases had concurring opinions by Justices who admit they know they are not applying the text of the statute.**
  - Blackman concurring in Weber: **I see practical and equitable considerations Congress didn't see or didn't understand: literal interpretation of "because of" race puts employers on a "high tight rope without a net"** – liable to blacks for past discrimination, but liable to whites if they act to remedy it.
  - Stevens and O'Connor concurring in Johnson: judgment only (and thus deciding who won the case): **Weber misinterprets Title VII, but we have to adhere to Weber's interpretation**

# *Weber and Johnson*

## Key Points and My Synthesis

- **Both cases have strongly worded dissents**
- **Race conscious employment decisions have always had a perilous legal foundation**

# What about Wygant (1986)?

- Ricci majority cites it.
- Justice O'Connor wanted Wygant to control in Johnson
- In Wygant
  - School district tried to match percentage of minority teachers to percentage of minority students
  - District's contract with teachers' union specified layoffs by seniority – as long as percentage of minority teachers did not drop
  - To protect percentage of minority teachers, district laid off more senior non-minority teachers
  - White teachers sued alleging equal protection violation

# Wygant (cont.)

- **Nine justices write five opinions – no opinion of the Court – judgment for the laid off white teachers**
- **Justice Powell wrote plurality opinion (joined by Burger and Rehnquist)**
- **O'Connor joins in judgment – separate opinion – joins Powell opinion in part**
- **White joins in judgment – separate opinion**
- **Powell opinion rejects district's proffered government interests:**
  - Curing effects of societal discrimination
  - Providing role models for minority students

# Wygant and Crosson

- **What do Wygant and Crosson have in Common?**
  - Strict scrutiny
  - Groups can't claim constitutional rights – individual rights only
  - All preferential classifications based on race (or other minority designation) are suspect
- **So does Ricci import this analysis into Title VII? (Justice O'Connor would like that)**

# Ricci Majority

- So how does Ricci deal with all this history?
- Ignores or silently overrules Weber and Johnson (there was no opinion of the Court in Johnson, so perhaps there was nothing to overrule – but there was no opinion of the Court in Wygant)
- Adopts what seems to be an even stricter version of the standard Justice O'Connor suggested in her Johnson opinion. (On Ricci's facts, the city met Justice O'Connor's standard – a prima facie case)
- Ricci's test seems to come from *Parents Involved* – but that 180 page opinion is not cited as the source

# Ricci Result

- **So, employers are now on an impossible tight rope, right?**
- **That depends on the risk of disparate impact suits**
- **No individual pattern – or – practice suits, Semsroth v. City of Wichita, 10<sup>th</sup> Cir 2008**
- **Disparate impact case must be based on statistical analysis**

# Ricci Result

- **Must identify a specific employment practice**
- **No valid statistical analysis possible with small samples, Pieteras v Bd. of Fire Commissioner, 180 F.3<sup>rd</sup> 468, 475 (2d Cir. 1999)**
- **Disparate impact case based on one plaintiff self destructs immediately**
- **Proving disparate impact is complex and expensive! See U.S. v City of New York, 106 FEP Cases 1561 (E.D.N.Y. July 22, 2009)**
- **Looks more sidewalk than tightrope to me (unless you have a government contract)**

# The OFCCP Problem

*Provo Daily Herald, October 16, 2009*

Orem – Orem lightweight furniture maker Mity-Lite Inc. agreed to pay \$157,228 to settle charges that it violated federal labor laws when it discriminated against 685 non-Pacific Islanders who had applied for jobs as production laborers, government officials announced Thursday.

A Routine audit of the 250-worker company's hiring practices by the U.S. Department of Labor's Office of Federal Contract Compliance Programs **found the Orem manufacturer had an inordinately high percentage of Pacific Islander workers** at its plant, and appears to have discriminated against non-Pacific Islander applicants from April 2005 to December 2006.

According to the labor department, Caucasians made up 53 percent of the rejected workers, Hispanics made up 30 percent, and the remaining 17 percent were Native Americans, Asians, blacks and others.

“The question the Labor Department had was whether we have fair hiring practices for all races other than Pacific Islanders. **We had a lot of Pacific Islander workers because some of our very good long-term Pacific Islander employees were recommending their friends and family members join the company,**” said Randy Hales, chief executive of Mity-Lite.

# The OFCCP Problem

<b>Fiscal Year</b>	<b>Financial Remedies Obtained</b>	<b>Workers Recompensed by OFCCP Agreement</b>	<b>Compliance Evaluations</b>
2008	\$67,518,982	24,508	4,333
2007	\$51,680,950	22,251	4,923
2006	\$51,525,235	15,273	3,975
2005	\$45,156,462	14,761	2,730

- **OFCCP FY10 budget request: \$109M (33% increase from FY09)**
- **As of 2002 192,500 establishments employing 22% of the total civilian workforce were subject to OFCCP jurisdiction**

# What Comes With a Government Contract?

**Coverage threshold: \$50T contract/50 or more employees Contractor must:**

- **Agree to both nondiscrimination and affirmative action provisions (Executive Order 11246)**
- **Agree to affirmative action for disabled**
- **Agree to veteran preferences**
- **Agree to develop written Affirmative Action Plan**
- **File annual EEO-1 report**
- **Maintain records of all personnel actions**
- **Permit DOL access to all books and records**

# The Affirmative Action Plan

- **Self analysis:**  
“The contractor must evaluate its workforce, by organizational unit and job group, to determine whether there are issues concerning minority or female utilization or distribution.”
- **AA must include detailed statistical data using government designated minority subcategories (Hispanic or Latino, White, Black, Asian, Native Hawaiian, Pacific Islander, American Indian, Alaska Native, and Two or More Races).**
- **Applicant flow:**  
Must keep records on each individual who expresses interest in employment – including those who use the internet

**Must solicit race, gender and ethnicity from each person** expressing interest

(AAP data subject to disclosure via FOIA)

# OFCCP Enforcement

- **Contractor's statistical data entered into Federal Contractor Selection System which compares each contractor's minority statistics to other contractors – and rand orders contractors for investigation based on their comparative minority statistics**
- **“Desk audit” Reviews AAP in detail. Determines how many minority or female placement goals were achieved or missed. Compares contractors placement rate to its percentage goal. Checks whether contractor terminated minority or female employees.**
- **Statistical analysis of selection rates: hiring, promotion, transfer**

# A Smother Brothers History of Affirmative Action

- **Executive Order 8802, June 25, 1941 (President Roosevelt) prohibited defense contractors from discriminating because of race, creed, color, national origin. Imposed duty to treat workers equally – no affirmative action obligations.**
- **Executive Order 11246 (1965 – President Johnson) Prohibited government contractors from discriminating because of race, creed, color, national origin – also required affirmative action (not defined) to insure non-discrimination.**
- **Executive Order 11375 (Oct 17, 1967 – President Johnson) added women to protected categories.**

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- **1969: Labor Department (Nixon administration) issued “Philadelphia Plan” required all bidders for federal assistance construction contracts in Philadelphia area to establish and meet numerical goals and timetables for utilizing minority workers**
- **1970-1971: OFCCP Order No 4 extended “Philadelphia Plan” provisions to government contractors generally. OFCCP started enforcement programs and issued regulations pushing private employers to use numerical goals and timetables.**
- **1972: Congress amended Title VII empowering EEOC to bring discrimination suits in federal court and providing federal courts with additional remedial authority (42 U.S.C. § 2000e–5a)**

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- **1972: Justice Department started seeking affirmative action remedies including numerical goals and timetables in employment discrimination:**

**United States v. N.L. Indus., Inc., 479 F.2d 354, 380 (8<sup>th</sup> Cir. 1973)(ordering a one to one hiring ratio until fifteen African-Americans hold foremen positions); United States v. Hayes Int'l Corp., 456 F.2d 112, 121 (5<sup>th</sup> Cir. 1972)(modifying plan that permitted black employees to automatically transfer to any entry-level job and remanding for evaluation of back pay issue); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9<sup>th</sup> Cir. 1971)(affirming lower court's order to offer immediate job referrals to discriminatees, apprenticeships with a ceiling requirement, and training committees to permit sufficient black applicants to overcome past discrimination).**

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- **1978: EEOC issued guidelines designed to assist private employers develop their own AAPs**
- **1995: Adarand Constructors v. Peña 515 U.S. 200 (1995) Held: All government race-conscious programs are inherently suspect, and subject to strict scrutiny and must be narrowly tailored to serve a compelling government interest. General finding of past societal discrimination against a protected class or employer's "good intentions" insufficient to establish compelling interest**

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- **1995: Clinton administration directed all federal agencies to evaluate their affirmative action programs to comply with Adarand cautioning that the only recognized compelling government interest was remedying identifiable past-discrimination**
- **1995: OFCCP declares Adarand does not apply to its regulations enforcing EO11246 because its regulations involve “goals” rather than quotas. (But OFCCP set nationwide goal of 6.9% female employees for entire construction industry.)**

# A Smother Brothers History of Affirmative Action

- **2004: Recognizing the conflict between Title VII's prohibition of discrimination and EO11246's affirmative action obligations, EEOC created separate process for investigating discrimination complaints involving government approved affirmative action plans.**

**“The commission will investigate whether the AAP was adopted pursuant to (EO11246) and whether adherence to the program was the basis of the complaint.”**

**If so, the EEOC will issue a “no reasonable cause” determination on the Title VII charge. 29 CFR §1608.5(a)(1).**

- **But (in fine print): This protection is only available to employers having a **written, dated AA plan** complete with a self analysis (29 CFR § 1608.4)**

# What Did Tests Have to do with Ricci?

- **Showed publicly who won under the rules**
  - Written, public, previously agreed rules
  - Single factor, objective, numerical score basis for selection
- **Racial profile of who won under the rules became public**
- **Triggered hearings and public debate about whether city should accept the demographics of those who qualified for promotion under its rules**
- **And Ricci held that debate proved the employer unlawfully discriminated because of race – no issue of disputed material fact**

# What Did Racial Politics Have to do with Ricci?

- **Majority opinion never mentions this issue**
- **Dissent (J. Ginsburg) accuses majority of leaving out “important parts of the story”, declaring that “racial discrimination casts an especially long shadow” in the firefighting profession**

# Ricci Racial Politics (cont.)

- **Justice Ginsburg cites:**
  - In early years of Title VII Blacks and Hispanics were 30 percent of New Haven population, but only 3.6% of firefighters
  - Of 107 New Haven fire officers, only one was black—holding lowest officer rank
  - As of 2003, 30 percent of New Haven firefighters were black, with 16% Hispanic
  - As of 2003, senior officer ranks (captain and higher) are 9% black; 9% Hispanic
- **Justice Ginsburg characterizes this as a “backdrop of entrenched inequality”**

# Ricci Racial Politics (cont.)

- **Justice Alito (responds by accusing Justice Ginsburg of leaving out part of the story, pointing out that during the certification hearings, Reverend Boise Kimber (described by Justice Alito as a politically powerful New Haven pastor and “self-professed Kingmaker”) testified against certification, complained that three of five board members were white, and threatened “political ramification that may come back upon you” if test results were certified.**

# Ricci Racial Politics (cont.)

- **Justice Alito's concurring opinion reviews evidence of the long standing political relationship between Reverend Kimber and mayor DeStefano concluding:**
  - "...a jury could rationally infer that city officials worked behind the scenes to sabotage the professional examinations because they knew that, were the exams certified, the Mayor would incur the wrath of [Reverend Boise] Kimber and other influential leaders of New Haven's African-American community."

# ...and What's This about Justice Scalia Inviting Another Law Suit?

- **Majority decided Ricci under Title VII, declined to reach Equal Protection Claim**
- **J. Scalia insists that “merely postpones the evil day” when the court will have to decide whether Title VII’s disparate impact provisions violate equal protection**

# Justice Scalia's Reasoning

- Today the Court holds that Title VII's disparate treatment provisions forbid "remedial" race based actions when a disparate impact violation would not otherwise result
- Even so, Title VII not only permits, but affirmatively **requires** such actions when a disparate impact violation would otherwise result

# Justice Scalia's Reasoning (cont.)

- If the Federal Government is prohibited from discriminating because of race
- Then surely it is also **prohibited from enacting laws mandating that third party employers discriminate on the basis of race**
- Title VII's disparate impact provisions place a racial thumb on the scales
- The Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class

# A Reaction to Justice Scalia's Concurring Opinion

- **From the American Association for Affirmative Action's website:**  
**"In just three pages, he signals the future, if the court's majority remains the same."**

**Justice Alito's "individual, not as simply components of a racial, religious, sexual or national class" argument is a subterfuge for eventually eliminating consideration of a broad field of discrimination cases. One would generally have to prove intentional discrimination on an individual-by-individual basis."**

# What's Ricci's Key Holding?

- **Employer acted because not enough minorities would be promoted**
- **Whatever the employer's ultimate aim – however well intentioned or benevolent it might have seemed – the employer made its employment decision because of race.**

# Some Ricci Puzzles

- **Why no remand to see if city could meet Ricci's "strong basis in evidence" test?**
- **What's the law now about cases like Hayden v. County of Nassau 180 F.3d 42 (2d Cir. 1999): race conscious design of police department exam did not violate Title VII or Equal Protection**
- **Did the Court invalidate the 4/5 selection rule – or just ignore it?**
- **Why so little legal discussion? (Did the Justices exhaust everything they had to say to each other in Parents Involved?)**

# What are Federal Courts Seeing in Ricci?

- Humphries v. Pulaski County Special School District 580 F.3d 688 (8<sup>th</sup> Cir. Sept. 3, 2009):

“We now join our sister circuits in concluding that **evidence that an employer followed an affirmative action plan** in taking a challenged adverse employment action **may constitute direct evidence of unlawful discrimination.**”

Citing Ricci and Frank v. Xerox Corp., 347 F.3d 130, 137 (5<sup>th</sup> Cir.2003); Bass v. Bd. Of County Comm’rs, 256 F.3d 1095, 1110 (11<sup>th</sup> Cir.2001); McGarry v. Bd. Of County Comm’rs, 175 F.3d 1193, 1200 (10<sup>th</sup> Cir.1999); Brown v. McLean, 159 F.3d 898, 904 (4<sup>th</sup> Cir. 1998); Cerrato v. S.F. Cmty. Coll. Dist., 26 F.3d 968, 976 (9<sup>th</sup> Cir.1994)

# *McGarry v. Board of County Commissioners* *Pitkin County (10th Cir. 1999)*

- Unsuccessful white male applicant for County job sued under Title VII alleging reverse discrimination by hiring Hispanic and African American applicants over him.
- Plaintiff testified County personnel director told him the successful Hispanic and African American applicants “**were minorities, affirmative action hirings**, two blacks and one Hispanic.”
- District Court granted summary judgment for employer;
- Tenth Circuit reversed, holding that **supervisor’s reference to affirmative action hirings constituted direct evidence of reverse discriminatory intent**, raising disputed material fact issue.

# Tenth Circuit: Cunico v. Pueblo School District No. 60 917 F.2d 431 (1990)

- **Found reverse discrimination violation where employer chose to retain black administrator based on an affirmative action plan whose goals include:**
  - Attaining a diverse multi-racial faculty and staff and
  - Equity for all individuals through equal opportunity policies and practices
- **Tenth Circuit held these goals did not justify race conscious decisions under either Title VII or Fourteen Amendment; noting: “the purpose of race conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination.” 917 F.2d 431 at 437**

# *Bass v. Orange County*

## (11th Cir. 2001)

- Public Employment reverse discrimination case with claims under Title VII and 1981.
- Holds county's **affirmative action plan, when coupled with circumstantial evidence indicating County was acting pursuant to its plan** in selecting minority applicants over white plaintiff for promotion, constituted **direct evidence of reverse racial discrimination** unless the plan is "valid."
- Fascinating discussion of which party has burden of proof regarding the validity of an affirmative action plan.
- Title VII claim: In 1987, *Johnson* put burden on plaintiff to show affirmative action plan is invalid.

# *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003)

- Xerox balanced workforce program held direct evidence of racial discrimination.
- Xerox BWF program identified explicit racial goals for each job and grade level and measured whether blacks or whites were underrepresented.
- Under Xerox's program, **blacks were overrepresented in certain jobs in certain locations.**
- Plaintiffs were black employees alleging race discrimination.

# *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003)

- Plaintiffs were black employees alleging race discrimination.
- Black plaintiff's allegations concerned positions where Xerox had determined blacks were "over represented."
- District Court granted Xerox's motion for summary judgment.
- Fifth Circuit **reversed holding balanced workforce program constituted direct evidence of discriminatory intent** raising material fact issue. (In other words, **evidence of intent to discriminate against blacks seeking promotion to jobs where blacks were "over represented."**)

# Alexander v. City of Milwaukee

## 474 F.d 437 (7<sup>th</sup> Cir. 2007)

### Facts:

- 17 White police lieutenants alleged race discrimination under 42 USC 1981, 1983 and Title VII.
- At issue: 41 captain promotions 1997-2003.
- Chief followed no written procedures, kept no records of basis for nominations.
- Board did keep records of police force racial and gender diversity.
- **Board evaluated Chief on his ability to foster diversity** – wrote it was the part of his job he did best. Held: evidence of discriminatory intent

# What Would the Ricci Court Say about This?

**“We are terminating a firm right now strictly because of their inability to grasp our diversity expectations.”**

(June 13, 2005 letter from Wal-Mart General Counsel to outside counsel)

**...and if your numbers don't add up  
you're history**

(a corporate general counsel quoted in May 13, 2005,  
*New York Law Journal*)

# The Burger Court

- **Weber (1979):**

**It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long, constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.**

**Bakke (1978)**

**“In order to get beyond racism, we must first take account of race. There is no other way.” 438 U.S. 265 at 407**

# The Roberts Court

- Parents Involved in Community Schools v. Seattle School District (June 28, 2007):

Opinion of Roberts, Chief Justice:

**“Allowing racial balancing as a compelling end in itself would effectively assure that race will always be relevant in American life and that the ultimate goal of eliminating entirely from governmental decision making such irrelevant factors as a human being’s race will never be achieved.”**

**“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”**