A Wolf in Sheep’s Clothing?  
Disparate Impact and Equal Protection after *Ricci v. DeStefano*  

Abstract  

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In its 2009 term, the Supreme Court decided one of the most important discrimination cases in years, *Ricci v. DeStefano*. At issue was whether a city government’s rejection of promotional test results that caused a disparate impact on firefighters of color was disparate treatment, and if so, whether the city could defend its actions on the grounds that it was avoiding liability for the disparate impact. The majority, dissent, and one concurring opinion debated those issues, but in the mix was a concurrence by Justice Scalia, focused on a separate issue. Because the employer was a government, the constitution applied to its actions, and the plaintiffs had alleged that the city’s decision violated the Equal Protection clause. The majority held that the decision violated Title VII and so did not address the equal protection claim. Justice Scalia, however, would have.

Justice Scalia posited that Title VII’s disparate impact provisions might violate the equal protection guarantee that is part of the Fifth Amendment. His logic was this: by prohibiting disparate impact discrimination, Congress required private employers to take race, and presumably the other statuses protected, into account, to be motivated to act in a particular way because of that status; taking an action because of someone’s race would be a violation of equal protection if done by Congress directly; because Congress could not discriminate this way, the Fifth Amendment bars it from passing a statute that requires discrimination by private parties.

The constitutional issues surrounding the disparate impact theory of discrimination have evolved significantly over time. First the question was whether the constitution’s equal protection guarantee embodied disparate impact. Most people assumed yes, but the Supreme Court said no in 1976 in *Washington v. Davis*. Second, the source of Congress’ power to prohibit disparate impact discrimination was called into question with the so-called federalism revolution. Only if it was within Congress’ power under Section 5 of the Fourteenth Amendment could disparate impact legislation be applied to the states consistent with the Eleventh Amendment. The question in *Ricci* goes one step further: to the extent that the prohibition on disparate impact discrimination requires employers to take race conscious action, can Congress enact it consistent with the Fifth Amendment’s guarantee of due process?

This talk will highlight the tensions in the view of employment discrimination, tensions that grow as the civil rights era gets more distant in time. For example, is disparate impact race conscious in the sense Justice Scalia and the majority seem to think? How can this be reconciled with prior Supreme Court opinions upholding voluntary affirmative action by employers? As we get further in time from the civil rights era and
highly visible public displays of race discrimination, does that mean there is less validity for Congress to mandate that employers avoid disparate impacts?

In the end, much in this area seems to be about framing the issues—a task that is harder for supporters of Title VII with the passage of time because even if at one time we had consensus, we no longer do fundamental issues like what discrimination is and what form of equality is embodied by the concept of equal protection; whether disparate impact actually is discrimination – or at least discrimination that should be prohibited by law; whether disparate impact is affirmative action; whether affirmative action is insurance against discrimination, a remedy for past discrimination, or a remedy for social discrimination; and whether there is a tension between group-based harms and individual harms.