Why Justice Scalia’s “Evil Day” of Constitutional Reckoning on Disparate Impact Analysis Need Not Occur

By Susan Carle
American University Washington College of Law

ABSTRACT

In this presentation I address the implicit threat raised in Justice Scalia’s concurrence in 
Ricci v. DeStefano, in which he predicted, with some apparent sarcasm, that the majority’s narrowly crafted decision in that case will merely postpone an “evil day” of constitutional reckoning with regard to disparate impact doctrine. On that day, Scalia suggested, the Court will be forced to squarely confront the question of whether disparate impact analysis conforms to the race-neutrality dictates of the Equal Protection Clause.

I argue that uncovering the history of disparate impact analysis in the work of moderate, pro-business civil rights advocates and regulators of the 1940s, 1950s, and early 1960s helps illuminate the roots of disparate impact doctrine in soft regulatory approaches that strive to balance interests in enhancing employment opportunities for traditionally excluded outsiders, on the one hand, and interests in preserving business flexibility and discretion in employment policy design, on the other. As several generations of pro-business civil rights advocates and regulators recognized as they experimented with disparate impact analysis techniques, this approach has the dual benefits of promoting social goals related to achieving greater employment fairness and enhancing overall business rationality and efficiency by promoting the development and adoption of best practices in hiring and promotion. Uncovering the forgotten history of disparate impact analysis shows why this regulatory approach, much like “soft” forms of affirmative action, passes constitutional muster as the kind of civil rights policy that provides paths for employers to participate in advancing social objectives the Court has continued to recognize as imperative, even in relatively recent cases like Grutter. Disparate impact analysis offers employers a role in advancing such policies through steps far more constructive, and far more protective of business discretion, than the alternative of serving as the “bad guy” defendants in the blame-game of intent-based, disparate treatment litigation.