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Detecting the Stealth Erosion of Precedent: Affirmative Action After Ricci

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This paper presents a method for detecting stealth precedent erosion, i.e., when an appellate court majority deliberately writes the opinion in case y to reduce the scope of its precedent x, but does not expressly refer to precedent x in the opinion. Applying this method, the paper provides a strong basis for concluding that in Ricci v. DeStefano (2009), a United States Supreme Court case decided under Title VII of the Civil Rights Act of 1964, the Court majority eroded by stealth United Steelworkers of America v. Weber (1979), and Johnson v. Transportation Agency (1987), both cases that read Title VII to permit employers to consider race or sex in employment decisions pursuant to affirmative action plans. In so doing, the paper contributes to research on the stare-decisis norm, fills a gap in the growing literature on the Ricci case, and identifies a critical development in the judicial treatment of employer affirmative action plans in the United States.

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INTRODUCTION

Suppose that, in deciding case *y*, some judges on a court want to remove the constraint posed by one of its prior cases (precedent *x*) but those judges lack enough desire or votes to overrule it. A vast repertoire of strategies remains, such as "distinguishing" precedent *x* or separating its "holding" from its "dicta." Another is stealth precedent erosion: Write the opinion in case *y* in a way contrary to what precedent *x implies*, but *do not expressly refer* to precedent *x*. Then, in later cases, rely on *y* as precedent and ignore *x*, or disclaim the force of *x* by pointing to a "tension" between *x* and *y*. It is an old idea that appellate judges sometimes do this.[1] Yet, we know little about when, how often, or why they do, because it is hard to observe just by reading a court opinion.

This paper makes two contributions. First, it offers a method for detecting stealth precedent erosion, *i.e.*, six criteria for judging whether it is more likely than not that stealth precedent erosion occurred in a particular case. Most researchers estimate stare decisis' influence by looking at when, how, or how often a court's opinions *expressly* refer to and rely on precedent to justify its rulings.[2] For this reason, if stealth precedent erosion

1. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 85 (1960). "Stealth precedent erosion" here does *not* refer to a court that expressly refers to a precedent and does not say that it has been overruled, even though, by some measure, the court effectively did so. See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L. J. 1 (2010).

2. See, *e.g.*, THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT OF THE U.S. SUPREME COURT 43-50 (2006); HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 25-33 (1999); James H. Fowler & Sangick Jeon, *The Authority of Supreme Court Precedent*, 30 SOC. NETWORKS 16 (2008); James H. Fowler et al., *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANALYSIS 324 (2007); Jeffery T. Renz, *Stare Decisis in Montana*,

happens often, that research design misses many negative treatments of precedent. The method presented here therefore contributes to research on judicial behavior.

Second, applying this method, the paper concludes that in *Ricci v. DeStefano* (2009), the U.S. Supreme Court likely wrote the majority opinion in a way to erode by stealth the scope of *United Steelworkers of America v. Weber* (1979) and *Johnson v. Transportation Agency* (1987).[3] *Weber* and *Johnson* are the critical Supreme Court precedent for reading Title VII of the Civil Rights Act of 1964 to permit employers making training, promotion, or other employment decisions to consider race or sex pursuant to valid affirmative action plans. Some have already argued how *Ricci* could or should be read.[4] A few more have argued that, after *Ricci*, judges could, should, or will read *Weber* and *Johnson* less favorably to employers.[5] Yet no one has shown that the Court likely wrote *Ricci* in the way it did to deliberately erode *Weber* and *Johnson* so as to make it easier to later read Title VII to permit affirmative action plans only to remedy an employer's own actual or arguable past discrimination.

The paper proceeds as follows. Part I presents the method for detecting stealth precedent erosion. Part II partially applies that method to assess the claim that *Ricci* should be treated as an instance of stealth erosion of *Weber* and *Johnson*. The Conclusion briefly discusses possible motives for using a strategy of stealth precedent erosion.

I.
THE METHOD

This Part presents six criteria that, taken together, are a facially valid basis for inferring whether case *y* is an instance of stealth erosion of precedent *x*. Each of the first three criteria must be satisfied. The other three criteria concern only the strength of the inference. The method

65 MONT. L. REV. 41 (2004); William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976).

3. *See* Ricci v. DeStefano, 129 S. Ct. 2658 (2009); United Steelworkers of America v. Weber, 443 U.S. 193 (1979); Johnson v. Transp. Agency, 480 U.S. 616 (1987). On *Weber* and *Johnson*, see Deborah C. Malamud, *The Story of United Steelworkers of America v. Brian Weber*, *in* EMPLOYMENT DISCRIMINATION STORIES 173 (Joel Wm. Friedman ed., 2006); and MELVIN I. UROFSKY, AFFIRMATIVE ACTION ON TRIAL: SEX DISCRIMINATION IN *JOHNSON V. SANTA CLARA* (1997).

4. *See, e.g.*, Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010); Joseph Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 BOSTON U. L. REV. 2181 (2010); Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: White(ning) Discrimination, Racing Test Fairness*, 58 UCLA L. Rev. 73 (2010).

5. *See, e.g.*, Roger Clegg, *Dousing the Fires of Racial Discrimination*, Clarion Call, July 28, 2009, www.popecenter.org/clarion_call/article.html?id=2209; Juan Williams, *Affirmative Action's Untimely Obituary*, WASH. POST, July 26, 2009, at B1; *cf.* George Rutherglen, Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity*, 2009 SUP. CT. REV. 83, 113 n.62 (observing that *Weber* was "conspicuously not cited in any of the opinions in *Ricci*.").

requires only court opinions and parties' legal briefs, and that one knows the legal field underlying precedent *x* and case *y*.

A. A Stare Decisis Norm Exists

First, the researcher must determine whether a stare decisis norm exists in the court under study. If it does exist there,[6] we should observe regular citations and arguments from prior cases of that court in briefs, in court opinions (majority and dissent) and, if available, in internal correspondence among judges.[7] Some court practices expressly depend on stare decisis, such as, for example, en banc rehearing in the federal courts of appeal, and this in turn should lead to practices consistent with that norm, such as arguments about circuit precedent in en banc rehearing petitions.[8]

That a stare decisis norm exists, however, does not necessarily imply how or how much it constrains what judges do. For example, Spaeth and Segal suggest that, even if the norm does not constrain Supreme Court Justices in their decisions, those Justices would still cite to and argue from precedent to each other and to readers of published court opinions. Doing so helps secure legitimacy by "cloak[ing]" policy preferences in "legal language, including rules of law and precedent." They may also use precedent to convince themselves of the propriety of outcomes they already prefer.[9]

In contrast, Knight and Epstein argue that if Supreme Court Justices knowingly act based on reasons "to maintain the 'myth' of the rule of law," such as securing societal legitimacy, then "those reasons have a causal effect on the decisions of the Court." Moreover, attorneys and Justices persist in strategically invoking precedent only because it actually helps "caus[e] others to accept their own preferred position," and this can happen only because at least some of those "others actually believe the importance of the norm."[10]

6. *See* Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850*, 3 AM. J. LEGAL HIST. 28 (1959) (arguing that there was no stare decisis norm before 1800).

7. Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. POL. SCI. REV. 1018 (1996).

8. Consistent with Federal Rule of Appellate Procedure 35(a)(1), every circuit court requires en banc rehearing to overrule circuit precedent, absent narrow exceptions, such as an intervening change in law. *See* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 18 (2009); *but see* Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeal*, 78 FORDHAM L. REV. 713 (2009) (describing use of "informal" en banc procedures).

9. SPAETH & SEGAL, *supra* note 2, at 43-44.

10. Knight & Epstein, *supra* note 7, at 1033.

B. Arguments From Precedent

Second, the researcher must determine whether in case *y*, at least one party's legal brief(s) or a judge's dissent expressly refers to precedent *x* in support of its position on an issue that the court majority actually decides, but the court does not refer to precedent x in deciding that issue.

Stealth precedent erosion cannot be validly or reliably inferred only from a silence in a court opinion. Which past case did the court not discuss but should have? And how does one know that the court's omission was intended, not inadvertent?

This criterion presumes that, given a stare decisis norm, judges writing or joining the majority opinion are more likely than not to feel non-negligibly compelled to address properly-raised arguments from precedent. Stare decisis, if it exists in a court, at least entails a burden on that court's judges to justify a decision as consistent with prior rulings with status as precedent. Judges who sincerely accept the stare decisis norm are likely to feel this way, even if they disagree with the particular argument. And judges who insincerely perform fealty to the norm are likely to act *as if* they feel this way for the same strategic reasons they feel compelled to invoke precedent generally.

However, courts need not decide all the legal issues that they could when deciding cases. For this reason, the stare decisis norm does not entail a burden on judges to expressly address *every* precedent that a party invokes. Accordingly, this criterion requires reading the parties' briefs to identify the issue for which the party has invoked the precedent and to determine whether the court actually decided that issue in its opinion. In this respect, the approach requires more work than research that counts how many citations from parties' briefs also appear in the court opinion.[11] The tradeoff is a stronger basis for inferring stealth precedent erosion.

To be sure, in some cases, researchers may disagree that a court has addressed a party's arguments from precedent. That issue might arise, for example, for courts opinions that conclude with a sentence that the court has considered all the "remaining" arguments and has found them meritless.[12]

11. *See, e.g.*, THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 132-36 (1978); Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251, 1274 tbl.3 (2008); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267, 272 tbl. 6 (2002). Cross raised, but did not pursue, the idea "that cases cited by the briefs of both parties, but ignored by the Court's opinion, might imply some affirmative avoidance of the decision." Cross, *supra* at 1276.

12. *See, e.g.*, Arumaichsothylingam v. Holder, 363 Fed. Appx. 836 (2d Cir. 2010) ("We have considered Arumaichsothylingam's remaining arguments and find them to be without merit."). In some variants, the court hedges on whether it rejects the "remaining" arguments on procedure or on the merits. *See, e.g.*, People v. Vaughns, 894 N.Y.S.2d 234, 235 (N.Y. App. Div. 2010) ("To the extent that defendant's remaining contentions are properly before us, they have been reviewed and are determined

Moreover, access to legal briefs remains uneven, particularly for State courts and older cases. Submitting written briefs to appellate courts appears to have arisen only in the mid-nineteenth century.[13] This criterion therefore excludes outright court opinions decided before written briefs became regularly submitted and preserved.

Finally, this criterion assumes that judges in fact carefully read the legal briefs submitted (or draft dissents circulated). Relax this assumption, and the researcher has to consider conditions under which judges are likely to miss arguments about precedent *x* in legal briefs, such as high docket loads or poor lawyer communication.

C. Court's Reasoning Contravenes Precedent

Third, the court's reasoning in case y contradicts a plausibly necessary implication of precedent *x*. An implication of a precedent *x* is plausibly necessary if and only if most lawyers in the relevant legal field would have taken that to be so at the time case *y* was being litigated. By focusing only on *plausible* necessary implications, this approach avoids the often contested question of which case similarities or differences *should* matter for deciding whether different cases are alike enough to be treated in the same way.

In practice, however, it may be hard to know what lawyers at some point in the past believed about any particular precedent's implications. If case *y* is old enough, all the practicing lawyers at that time may now be dead. Contemporaneous writings of legal commentators are not necessarily representative.

Accordingly, this criterion assumes that the norms for reading legal opinions have remained largely stable over time and, in any event, accessible to researchers.[14] Once familiar with those norms, researchers today can read the court opinions and infer from them what lawyers in the past would have understood the words in those opinions to imply. This approach is reasonable if researchers highlight uncertainty about particular coding choices, use multiple coders with legal training, and test for inter-

to be without merit."). In 2009, a sentence with such words appeared in 1,340 opinions of the New York state courts, as indicated by a Westlaw database (ny-orcs) search [remaining /s ("without merit" meritless) & da(2009)"] conducted on November 30, 2010.

13. R. Kirkland Cozine, *The Emergence of Appellate Briefs in the Nineteenth-Century United States*, 38 AM. J. LEGAL HIST. 482 (1994) (tracing rules and records concerning written appellate briefs in U.S. Supreme Court, Massachusetts Supreme Judicial Court, and New York's highest court).

14. G. Edward White, *The Appellate Opinion as Historical Source Material*, 1 J. INTERDISC. HISTORY 1491 (1971).

coder agreement as to whether any particular implication of a precedent is plausibly necessary.[15]

D. Plausible Alternative Reasoning

Fourth, the researcher must determine whether the court majority in case *y* could have ruled for the same prevailing party without using reasoning that would contravene a necessary implication of precedent *x*.

This criterion helps rule out cases in which the court majority did not refer to precedent *x* largely out of sympathy for the prevailing party or out of dislike or disgust for the losing party. In explaining the content of a court opinion, rival explanations to stealth precedent erosion include sympathy or antipathy for a party to the lawsuit. If the researcher can articulate plausible alternative reasoning that justifies ruling for the same party but does not change the scope of precedent *x*, it is less likely that the court majority failed to refer to precedent *x only* out of sympathy for the prevailing party in the case.

This inference is stronger if the lawyers in case *y* had actually suggested the alternative reasoning to the court. If not, the inference is, though weaker, still available, because, in practice, judges often do not limit their reasoning to what lawyers argue in their briefs. Since researchers may vary as to what set of alternative reasons should count as plausible and consistent with precedent *x*, the best procedure is, again, to have multiple coders with legal training assess the plausibility of any particular alternative reasoning and test for inter-coder agreement.

E. Departure From Judicial Commitments

Fifth the researcher must decide whether the portion of the written opinion that erodes precedent x itself plausibly runs contrary to professed commitments of one or more of the judges in the court majority as to how to read legal texts or otherwise decide cases.

Some judges profess that they are committed to certain approaches or techniques for deciding certain kinds of cases.[16] Such commitments may range from a fully-articulated judicial "philosophy" to excluding certain ways of interpreting legal texts, such as reliance on legislative history. The assumption here is that a judge's professed commitments imply a subsidiary expectation to at least address (even if poorly by some quality measure) any

15. *See* Matthew Lombard et al., *Content Analysis in Mass Communication: Assessment and Reporting of Intercoder Reliability*, 28 HUM. COMM. RES. 587 (2002); Mousumi Banarjee et al., *Beyond Kappa: A Review of Interrater Agreement Measures*, 27 CANADIAN J. STAT. 3 (1999).

16. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O'Brien ed., 2d ed. 2004).

disjunction between that commitment and the opinion that the judge writes or joins.

To be sure, judges in a court may regularly depart from such professed commitments across the court opinions that they write or join. If so, this criterion deserves far less weight than the others. Moreover, this criterion may not apply at all if one is not sure what the observable implications of a particular judicial commitment would be. For example, while a commitment to privileging the "plain meaning" of statutory text implies some explicit parsing of statutory text, it is less clear how the text of a court opinion would reliably indicate judicial commitment to "pragmatism" or "minimalism."

F. Extrinsic Evidence

Sixth, the researcher must look for extrinsic evidence that is consistent and inconsistent with judge desire to erode precedent *x*. With court opinions alone, it is hard to isolate judges' policy preferences from what those judges may sincerely believe legal texts or norms command in a particular case. Accordingly, researchers rely on indirect measures of judicial policy preferences, including past voting behavior, political affiliation, speeches prior to judicial selection, and newspaper editors' assessments at the time of judicial selection.[17] Here, by contrast, one need not care whether the judge wants to erode the precedent because of policy views, political ideology, sympathy or disgust for particular classes of litigants, social peer effects, or even sincere views of what authoritative legal texts entail. What matters is whether there is evidence of *some* reason for the judge to want to erode the precedent *x*.

II.
THE APPLICATION: RICCI V. DESTEFANO

This Part partially applies the method identified above to assess the claim that in *Ricci v. DeStefano* (2009), the U.S. Supreme Court issued a majority opinion that read Title VII of the Civil Rights Act of 1964, as amended, in a way to erode by stealth *United Steelworkers of America v. Weber* (1979) and *Johnson v. Transportation Agency* (1987).

The analysis is partial in two ways. First, it assumes that the first criterion is satisfied, *i.e.*, a stare decisis norm exists in the U.S. Supreme Court. Second, with respect to criteria three and four, it does not make the

17. *See* Paul Brace et al., *Measuring the Preferences of State Supreme Court Justices*, 62 J. POLITICS 387, 390-92 (2000); Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. POL. SCI. REV. 261, 263-66 (1996); *see also* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 173 (2006) (Supreme Court research literature has still not found "measures of the justices' policy preferences that are independent of their behavior and highly valid").

recommended checks for inter-rater reliability. These caveats aside, I find, by applying the remaining criteria, a strong basis to conclude that the *Ricci* Court more likely than not wrote the majority opinion in that case to erode *Weber* and *Johnson* by stealth.

A. Background

Title VII of the Civil Rights Act of 1964, as amended, declares certain kinds of conduct to be an "unlawful employment practice," authorizes a private right of action, and establishes the Equal Employment Opportunity Commission ("EEOC"), to which discrimination complaints must be filed before a lawsuit can proceed, and which itself may investigate charges of discrimination, initiate conciliation efforts, and bring suit against employers and others for violating the statute.[18]

Section 703(a) of the Act contains two important provisions. First, section 703(a)(1) provides that it is 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."[19]

Second, section 703(a)(2) provides that it is an "unlawful employment practice" for an employer to "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[20]

Since *Griggs v. Duke Power Company* (1971),[21] the Court has read section 703(a)(2) to authorize "disparate impact" liability, *i.e.*, to prohibit employer practices that make people of the same race or other protected characteristic much worse off than those without that characteristic, even if one cannot show that the employer engaged in that practice for that purpose.[22] Such disparate impact, however, does not warrant Title VII relief where the challenged practice was "job related for the position in question and consistent with business necessity," or the plaintiff shows, but the employer refuses to adopt, an equally valid but less discriminatory alternative employment practice.[23]

18. 42 U.S.C. §§ 2000e-2, 2000e-4, 2000e-5 (2010).

19. § 2000e-2(a)(1).

20. § 2000e–2(a)(2).

21. 401 U.S. 424 (1971).

22. For cases treating *Griggs* as a gloss on section 703(a)(2), *see, e.g.*, Connecticut v. Teal, 457 U.S. 440, 448-49 (1982). In 1991, Congress added these concepts to the statutory text. *See* 42 U.S.C. § 2000e-2(k)(1)(A); Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish-Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043 (1993).

23. 42 U.S.C. § 2000e-2(k)(1)(A).

In *Ricci v. DeStefano* (2009), more white test takers passed and scored higher on City of New Haven firefighter promotion exams than black and Hispanic test takers (Table 1).

Table 1: Exam Pass Rate and Promotion Eligibility by Race, 2003[24]

Race	Pass	Total	Pass Rate	Adverse Impact Ratio	Promotion
Lieutenant's Exam					
Black	6	19	31.6%	0.54	0
Hispanic	3	15	20.0%	0.34	0
White	25	43	58.1%	.	8
Total	34	77	44.2%	.	8
Captain's Exam					
Black	3	8	37.5%	0.59	0
Hispanic	3	8	37.5%	0.59	0 to 2
White	16	25	64.0%	.	5 to 7
Total	22	41	53.7%	.	7

When the New Haven Civil Service Board did not certify the exam results, some firefighters who had passed the test sued. In this lawsuit, seventeen white firefighters and one Hispanic firefighter argued that by refusing to certify the test results, the City had committed race discrimination in violation of Title VII.

The City justified that refusal on the ground that, given the statistical disparity in test results by race, city officials sincerely feared incurring Title VII disparate impact liability if they had certified those results. On cross-

24. *Ricci*, 554 F. Supp. 2d at 145. Pass rate (= Pass/ Total) and Adverse Impact Ratio (= minority pass rate / White pass rate) are separately calculated. Promotion refers to then-vacant positions only and ranges reflect the City's Charter's Rule of Three and reported rankings for Hispanic and blacks on both exams. *See id.* at 145 nn.2-3. There is an ambiguity about the white pass rate. Elsewhere in its opinion, the district court reported the white pass rate for the lieutenant's and captain's exam as 60.5% and 88%, respectively. *See id.* at 153, 154. This implies that 26 (not 25) out of the 43 whites passed that exam (26/43=0.605) and that 22 (not 16) out of 25 whites passed that exam (22/25=0.88). The district court has sealed the underlying exhibit upon which it relied to report the number of passing test-takers. *See* Order Granting Motion to Seal Volume III, Volume VI and Exhibit 43 of Volume Exhibit 43 of Volume I, dated January 10, 2006, Ricci v. DeStefano, No. 3:04-CV-1109 (D. Conn., entered Jan. 13, 2006) (Kravitz, J.) [Doc # 75]. Defendants' submissions were also inconsistent on this point. *Compare* Ricci JA, *infra* note 172, at 223-26 (Marcano Aff. ¶¶ 17-19, 22-23, Nov. 2, 2005) (26 whites passed lieutenant's exam and 18 whites passed captain's exam); Defendants' Local Rule 56(a) Statement ¶¶ 18-23, Ricci v. DeStefano, No. 3:04-CV-1109 (D. Conn., filed Nov. 4, 2005) [Doc. # 53] (pass rates by race for each exam) *with* Ricci JA, *infra* note 172, at 218 (Marcano Aff., Oct. 27, 2005) (attached written summary of 2003 test results: 16 whites passed captain's exam); *id.* at 25 (transcript of Jan. 2004 Civil Service Board proceeding) (same).

motions for summary judgment, the district court granted summary judgment to the City, and the Second Circuit affirmed.[25]

The Supreme Court, by a 5-4 vote, reversed. The Court majority opinion was authored by Justice Anthony Kennedy and joined by Justices John Roberts, Antonin Scalia, Samuel Alito, and Clarence Thomas. This *Ricci* majority declared that the plaintiffs were entitled to summary judgment that the City had violated section 703(a)(1) of Title VII.[26] The *Ricci* majority reached this result in three steps.

First, the *Ricci* majority concluded that, by refusing to certify the test results, the City necessarily violated section 703(a)(1). The City had argued that since it had been solely motivated by the sincere desire to avoid Title VII disparate impact liability, it had not acted because of any plaintiff's race within the meaning of section 703(a). However, the *Ricci* majority declared this starting premise: "The City's action would violate the disparate-treatment prohibition of Title VII absent some valid defense."[27]

The *Ricci* majority then contrasted "the City's objective—avoiding disparate-impact liability" with "the City's conduct in the name of reaching that objective. . . . Whatever the City's ultimate aim-however well intentioned or benevolent it might have seemed-the City made its employment decision because of race. The City rejected the test results solely because the higher scoring candidates were white."[28]

Second, the *Ricci* majority announced what it variously referred to as a "valid defense," a "lawful justification," and an "excuse[ ]," to such liability[29] *i.e.*, a "strong basis in evidence" to believe that, absent the City's refusal to certify the test results, the City would have been subject to Title VII disparate impact liability.[30]

The Court borrowed this "strong basis in evidence" standard from its cases under the U.S. Constitution's Equal Protection Clause that, beginning with *Wygant v. Jackson Board of Education*, had declared that to survive judicial scrutiny, the government had to show that there was a "strong basis in evidence" to believe that a government racial preference was necessary to remedy that government's past discrimination.[31] The *Ricci* majority read this standard into Title VII, reasoning that it was the proper way to "allow violations of [section 703(a)(1)] in the name of compliance with" Title

25. Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *reh'g denied*, 530 F.3d 88 (2d Cir. 2008) (in banc).

26. *Ricci*, 129 S. Ct. at 2673.

27. *Id.*

28. *Id.* at 2674.

29. *Id.* at 2673 ("valid defense"); *id.* at 2674 ("lawful justification", "excuses").

30. *Id.* at 2664, 2677.

31. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). *See* Ricci, 129 S. Ct. at 2675.

VII's disparate impact provisions "only in certain, narrow circumstances," and thereby leaving "ample room for employers' voluntary compliance efforts . . . . ; it is not so restrictive that it allows employers to act only when there is a provable, actual violation."[32]

Third, the *Ricci* majority concluded that, based on evidence in the record, the City so clearly could not satisfy the "strong basis" standard that, rather than remand for a trial, the plaintiffs were entitled to summary judgment. The *Ricci* majority observed there was a "significant" adverse impact and that the plaintiffs did not dispute that the City had "a prima facie case of disparate impact liability."[33]

The Court concluded, however, that, on the summary judgment record, there was no genuine issue of material fact as to whether there was a "strong basis in evidence" to believe that (1) the exams were not defensible as "job-related" and consistent with "business necessity"; or (2) "there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."[34] Having resolved the case this way, the Court declined to reach the plaintiffs' argument that the City had also violated the Equal Protection Clause.[35]

B. Arguments From Weber *and* Johnson

This section shows that although neither *Weber* nor *Johnson* are cited in the *Ricci* majority opinion, the parties' legal briefs and the dissenting opinion made arguments that expressly relied on *Weber* or *Johnson* as precedent.

In *Weber*, the Supreme Court concluded that an employer's on-the-job training program did not violate sections 703(a) or 703(d) of Title VII by setting aside slots for black employees, because that program fell within the discretion afforded employers under Title VII to voluntarily adopt "plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[36] *Johnson* followed *Weber* to conclude that, under certain conditions, Title VII permitted a public employer to promote a qualified candidate based on sex pursuant to a voluntary affirmative action plan.[37]

32. *Ricci*, 129 S. Ct. at 2676.

33. *Id.* at 2677; *see id.* at 2678 ("Based on how the passing candidates ranked and an application of the 'rule of three,' certifying the examinations would have meant that the City could not have considered black candidates for any of the then-vacant lieutenant or captain positions."). The Rule of Three refers to a New Haven City Charter section that provides that "promotions from the eligibility lists must be from among 'those applicants with the three highest scores.'" Kelly v. City of New Haven, 881 A.2d 978, 984 (Conn. 2005) (footnote omitted) (quoting New Haven Charter, art. XXX, § 160).

34. *Ricci*, 129 S. Ct. at 2678.

35. *See id.* at 2681.

36. United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1979).

37. Johnson v. Transp. Agency, 480 U.S. 616, 627, 641-42 (1987).

In *Ricci*, the dissent and the parties expressly relied on *Weber* or *Johnson* as precedent.

First, in her *Ricci* dissenting opinion, Justice Ruth Bader Ginsburg (joined by Justices John Paul Stevens, David Souter, and Stephen Breyer) contrasted the Court's reasoning with *Johnson*: "[I]f the voluntary affirmative action at issue in *Johnson* does not discriminate within the meaning of Title VII, neither does an employer's reasonable effort to comply with the Title VII's disparate-impact provision by refraining from action of doubtful consistency with business necessity."[38] In response, the *Ricci* majority wrote nothing.

Second, both parties treated *Weber* and *Johnson* as precedent to be followed or distinguished in *Ricci*. I identified, for the plaintiffs' Title VII claim, all the Supreme Court cases involving Title VII that were cited in the parties' briefs. The parties cited ten such cases in common, including *Weber* and *Johnson*. Of these ten cases, only four cases were used to argue from precedent concerning an issue in *Ricci* that the Court actually decided. These four cases included *Weber* and *Johnson*.[39]

The plaintiffs' lawyers argued that *Weber* and *Johnson* did not justify the City's refusal to certify the test results, because the City "expressly disclaimed acting to remedy past discrimination, and never claimed in the district court that it was acting 'to eliminate a manifest racial imbalance' in 'traditionally segregated job categories'," and did not act "pursuant to a preexisting affirmative action plan."[40] They further argued that the "facts betray the city's preference for 'mere blind hiring by the numbers,' a goal *Johnson* 'emphatically did *not* authorize'."[41]

The City's lawyers also relied on *Weber* and *Johnson*. They argued that *Johnson*'s holding confirmed that "promotion decisions can be shaped by the need to comply with Title VII itself,"[42] and that "*Johnson* and *Weber* indicate that the constitutional 'strong basis' standard does not apply in the Title VII context and that Title VII sets a lower standard."[43] At the same time, they emphasized that *Weber* and *Johnson* involved voluntary "employer-initiated affirmative-action policies . . . that expressly sanctioned preferential hiring of minority and female employees," whereas the City had "merely decline[d] to use employment tests in an effort to comply with Congress's mandate in Title VII."[44] Finally, the City's lawyers asserted

38. *Ricci*, 129 S. Ct. at 2700 (Ginsburg, J., dissenting).

39. The other two cases were *Connecticut v. Teal*, 457 U.S. 440 (1982), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

40. Petitioner's Brief on the Merits at 61, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328) (quoting *Weber*, 443 U.S. at 208-09) (citations omitted).

41. *Id.* at 62 (quoting *Johnson*, 480 U.S. at 637).

42. Respondent's Brief on the Merits at 17-18, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328).

43. *Id*. at 20-21 (citations omitted).

44. *Id.* at 21 n.14.

that *Johnson* had rejected an argument "comparable" to the plaintiff's view that the City's refusal to certify the test results amounted to "direct evidence" of Title VII race discrimination, and that the City bore the burden of proving otherwise.[45]

In reply, the plaintiffs' lawyers argued that neither *Weber* nor *Johnson* supported the City's view that Title VII "requires less than the constitutional strong-basis-in-evidence standard." In those cases, they wrote, "employers acted to end manifest imbalances resulting from long histories of job-category segregation that raised strong inferences of past intentional discrimination." In contrast, the City could not and did not claim "such a manifest imbalance in" the ranks of the New Haven Fire Department.[46]

Third, thirteen of the twenty-seven amicus briefs referred to either *Weber* or *Johnson* or both.[47] Of these, six amicus briefs relied on either *Weber* or *Johnson* to argue that the City's refusal to certify the test results does not necessarily amount to race discrimination in violation of Title VII.[48] In addition, an amicus brief, filed to support the plaintiffs, relied on

45. *See id.* at 26 n.17.

46. Petitioner's Reply Brief on the Merits at 17 n.14, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328).

47. *See* Brief Amicus Curiae of Pac. Legal Found. and the Ctr. for Coll. Affordability and Productivity in Support of Petitioners at 12-13; Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 10, 12-14, 16; Brief of the Nat'l Ass'n of Police Orgs. as Amicus Curiae in Support of Petitioners at 22; Amicus Brief of the Ctr. for Individual Rights, the Center for Equal Opportunity, and the Am. Civil Rights Inst. in Support of Petitioners at 20-23; Brief of Amicus Curiae NAACP Legal Def. and Educ. Fund, Inc. in Support of Respondents at 26-30; Brief of Int'l Mun. Lawyers Ass'n et al. as Amici Curiae in Support of Respondents at 34; Brief of the States of Maryland et al. as Amici Curiae Supporting Respondents at 17; Brief of the Soc'y of Human Res. Mgmt. as Amicus Curiae in Support of Respondents at 12, 16; Brief of the Nat'l P'ship for Women & Families and the Nat'l Woman's Law Ctr. et al. as Amici Curiae in Support of Respondents at 6, 19; Brief of Am. Civil Liberties Union et al. as Amici Curiae in Support of Respondents at 6; Brief for the New York Law Sch. Racial Justice Project as Amicus Curiae in Support of Respondents at 16; Brief of Amici Curiae Asian Am. Justice Ctr. et al. in Support of Respondents at 9, 29-31; Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Respondents at 17, 19, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328).

48. *See* Brief for the United States as Amicus Curiae Supporting Vacatur and Remand at 14 & n.3 (arguing that "this case involves no explicit racial classifications to make employment decisions," and adding: "[n]otably, this Court has upheld even explicit race- or gender-based classifications to remedy disparities in the workplace.") (citing to *Weber* and *Johnson*); Brief of Amicus Curiae NAACP Legal Def. and Educ. Fund, Inc. in Support of Respondents at 26 (arguing that City satisfies "the standard set forth in *Johnson* and *Weber*"); Brief of the Soc'y of Human Resource Mgmt. as Amicus Curiae in Support of Respondents at 12 ("This case is indeed stronger than the voluntary remedial setting of *Johnson* . . . ."); Brief of the Nat'l P'ship for Women & Families and the Nat'l Woman's Law Ctr., et al. as Amici Curiae in Support of Respondents at 19 (citing *Weber* in support of proposition that "requiring an employer to continue to use a selection device despite knowledge of its disparate impact – or, in the alternative, encouraging an employer to remain ignorant of its practices' disparate impact . . . – would frustrate Title VII's effort to undermine traditional patterns of segregation and hierarchy"); Brief of Amici Curiae Asian Am. Justice Ctr. et al. in Support of Respondents at 29 ("In fact, rather than practicing intentional discrimination [under Title VII], Respondents were actually complying with their affirmative obligation to avoid racial discrimination.")(citing *Johnson*); Brief Amicus Curiae of the

Weber and *Johnson* to support the view that even if the City refused to certify the test results to avoid disparate impact liability, they should be required to show more than a good-faith fear of such liability.[49]

C. Court's Reasoning Contravenes Weber *and* Johnson

This section offers exegeses of *Weber* and *Johnson* to establish that the *Ricci* majority contravened several of what most lawyers at the time *Ricci* was decided would have agreed were plausibly necessary implications of *Weber* and *Johnson*. The *Ricci* majority concluded that an employer's refusal to certify the test results because of a statistical race disparity was *sufficient* to find a section 703(a)(1) violation, but the employer could assert the *defense* that it had a "strong basis in evidence" that, absent its action, it would be subject to Title VII disparate liability.

This reasoning contravened four plausibly necessary implications of *Weber* and *Johnson.* First, the *Weber* Court rejected the view that any employer consideration of race is *sufficient* to violate section 703(a)(1). Second, the *Weber* Court rejected the view that Title VII permits an employer to consider race only to remedy actual or arguable past discrimination by that employer. Third, in *Johnson*, the Court rejected the argument that an employer may consider sex without violating section 703(a)(1) *only* when it has a "strong basis" in evidence that doing so would remedy past employer conduct that violates Title VII. Fourth, the *Johnson* Court rejected the argument that an employer that considers sex violates section 703(a)(1) unless it prevails on a "strong basis" *defense*.

Since these implications of *Weber* and *Johnson* were plausibly necessary when *Ricci* was decided, we should have expected the *Ricci* Court to at least address them expressly, if only to reject them. The harder it is to read *Weber* and *Johnson* not to carry the implications identified here, the easier it is to infer that the *Ricci* Court deliberately, not inadvertently, kept silent as to those cases in order to erode them by stealth.

1. Background

By the mid-1970s, three important features of federal employment law were in place. First, in *Griggs v. Duke Power Company* (1971), the Supreme Court had read Title VII to include liability under a disparate-impact theory.[50] Second, because of Executive Order 11246, federal

Equal Employment Advisory Council in Support of Respondents at 17 ("This Court also has afforded employers latitude under Title VII to address statistical disparities in the workplace through race- and gender-conscious measures.") (referring to *Weber* and *Johnson*), *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328).

49. Amicus Brief of the Center for Individual Rights et al. in Support of Petitioners at 20, 22-23, *Ricci*, 129 S. Ct. 2658 (Nos. 07-1428, 08-328).

50. 401 U.S. 424 (1971).

agencies, often through the Office of Federal Contract Compliance (OFCC), were pushing firms receiving government contracts to increase minority representation in their workforces.[51]

Third, after *McDonald v. Santa Fe Trail Transportation Co.* (1976),[52] it was settled that Title VII imposed the same standards of liability in cases where white plaintiffs claimed employer race discrimination that applied in cases where the plaintiffs were black. However, *McDonald* had expressly left open whether Title VII permitted employers to consider race in employment decisions pursuant to voluntary affirmative action plans.

In *McDonald*, two white men sued their former employer, Santa Fe Trail Transportation Co., as well as their union, arguing that when Santa Fe had allegedly fired them for stealing cans of antifreeze, Santa Fe violated Title VII by not also firing Charles Jackson, a black employee that had also stolen those items.[53]

Santa Fe's lawyers argued, among other things, that Santa Fe had not violated Title VII even if "our local manager" had not fired Jackson, thinking "'Jackson's black, all things considered, we'll give him a break'."[54] The reason: Title VII should be read to permit discrimination favoring racial minorities "under special circumstances or in isolated cases which cannot reasonably be said to burden whites as a class unduly, may not be 'invidious' and may be acceptable at this time in our history." If so, Title VII would preserve "reasonable 'affirmative action' programs . . . to remedy the wrongs of the past, and isolated cases like that at bar, in which a black man may have been given a 'break'."[55]

In an opinion by Justice Thurgood Marshall, the Supreme Court rejected this argument: "We . . . hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white." To this text, Marshall added a footnote in which he rejected any Title VII "exception" for "isolated cases," and then added, "Santa Fe disclaims that the actions challenged here were any part of an affirmative action program, and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted."[56]

51. *See* Bernard E. Anderson, *The Ebb and Flow of Enforcing Executive Order 11246*, 86 AM. ECON. REV. 298 (1996).

52. 427 U.S. 273 (1976).

53. *McDonald*, 427 U.S. at 276.

54. Brief of Respondent Santa Fe Trail Transportation Company at 16, *McDonald*, 427 U.S. 273 (No. 75-260), 1976 WL 194110 at *16.

55. *Id.* at 20.

56. *McDonald*, 427 U.S. at 280 & n.8 (1976) (citations omitted).

Marshall's draft opinion, circulated on June 11, had contained a similar disclaimer.[57] On June 14, Justice John Paul Stevens wrote to Marshall: "[W]e are kidding ourselves . . . to the entent [sic] that you disavow consideration of the validity of a voluntary affirmative action program. I agree that a judicially required program would not be covered, but the reasoning in the text will surely support the typical reverse discrimination claim which any quota system will stimulate."[58] Both Justices Potter Stewart and Harry Blackmun also indicated that they shared this doubt as expressed in Stevens' letter.[59]

The next day, Marshall replied to Stevens' concern: "[W]e agree that a judicially required affirmative action program, which is not the subject in this case, is not ruled out in my draft. I cannot agree with you, however, that a program which a judge can lawfully require is necessarily illegal without a judge's order. If this were true, then, among other things, the conciliation goal of Title VII, and the EEOC's role in implementing it, would be much deemphasized, if not ruled out, in many instances where they might otherwise be most valuable."[60] In emphasizing Title VII's "conciliation" goal, Marshall was referring to section 706(b) of the Civil Rights Act of 1964, which provided that if the EEOC found "reasonable cause to believe that the charge [of a Title VII violation] is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[61]

2. United Steelworkers of America v. Weber (1979)

This section presents an exegesis of the *Weber* case. It describes in detail the facts in the case (as stipulated and found), as well as the arguments made by lawyers and judges in the case. It shows that, at the time *Ricci* was decided, most lawyers would have found it plausible that the *Weber* Court rejected the view that any employer consideration of race is

57. "[W]e do not consider here the permissibility of employers' programs -- judicially required, or otherwise prompted -- to relieve the present effects of past racial discrimination; there is no indication that the actions challenged here were any part of such a program . . . ." Marshall Draft Opinion at 7-8 (circulated June 11, 1976), Box 393, Folder 7, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington, D.C.

58. Letter from John Paul Stevens to Thurgood Marshall (June 14, 1976), Box 171, Folder 13, Thurgood Marshall Papers (on file with Manuscript Division, Library of Congress, Washington, D.C. [hereinafter Marshall Papers]).

59. Letter from Potter Stewart to Thurgood Marshall (June 14, 1976), Box 171, Folder 13, Marshall Papers; Letter from Blackmun to Thurgood Marshall (June 17, 1976), Box 304, Folder 3719 (on file with Potter Stewart Papers (MS 1367), Manuscripts and Archives, Yale University Library, New Haven, CT).

60. Letter from Thurgood Marshall to John Paul Stevens (June 15, 1976), Box 171, Folder 13, Marshall Papers.

61. 42 U.S.C. § 2000e-5(b).

sufficient to violate section 703(a)(1), as well as rejected the view that Title VII permits an employer to consider race only to remedy actual or arguable past discrimination by that employer.

a. The District Court

On December 31, 1974, Brian Weber filed a Title VII suit against his employer, the Kaiser Aluminum & Chemical Corporation, and his labor union, the United Steelworkers of America ("USW"). Weber filed suit on behalf of himself, and he was later certified as the representative of a class of white Kaiser employees and USW members at Kaiser's Gramercy, Louisiana plant who had applied, or were eligible to apply, for on-the-job training programs since February 1, 1974.[62]

The underlying facts were largely undisputed. Since 1968, Weber had been an employee at Kaiser's plant in Gramercy, Louisiana, and a member of USW Local 5702.[63] On February 1, 1974, Kaiser and USW had entered into a collective bargaining agreement that provided, in relevant part, that Kaiser and USW would "review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications" in fifteen plants, including its plant in Gramercy, and, if necessary, "establish certain goals and time tables in order to achieve a desired minority ratio." In particular, "[a]s apprentice and craft jobs are to be filled, . . . at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates."[64]

Before the 1974 agreement, "substantially all maintenance and craft personnel employed at Kaiser's Gramercy Works were obtained by hire of persons qualified and trained in such crafts prior to employment at Kaiser." Moreover, "[t]he available supply of trained craft and trade personnel available for hire by [Kaiser] as new employees" had been, and remained, "almost entirely made up of white males."[65] In 1972 and 1973, black craft employees at the Gramercy plant were less than two percent of the total number of craft employees. [66]

Between 1964 and February 1974, Kaiser had conducted two programs for on-the-job training for certain craft positions at the Gramercy plant. First, Kaiser ran an on-the-job training program "in the 'Carpenter-Painter' craft category" from 1964 until 1971. To be eligible, Kaiser employees had to be "physically qualified" and have at least "one year experience in this

62. Appendix at 9-15 (Complaint), *Weber*, 443 U.S. 193, (Nos. 78-432, 78-435 and 78-436) (hereinafter "Weber App."); Weber App. 24 (class certification order, dated March 19, 1975).

63. *Id.* at 124 (Stipulation ¶ 2).

64. *Id.* at 125 (Stipulation ¶ 4).

65. *Id.* at 125-26 (Stipulation ¶ 5).

66. *Id.* at 167 (Kaiser Exhibit 3).

category." During this program, "11 employees entered this craft line, two of whom were black."[67]

Second, Kaiser ran an on-the-job training program in the "General Repairman" craft category from 1968 until 1971. For this program, Kaiser employees had to be "physically qualified" and have at least "three years' experience in this category." In 1971, Kaiser switched to a two year prior-experience minimum. "In this program, 13 trainees entered this line in 1969, 3 trainees entered the line in 1970, and one trainee entered the line in 1971." All of them were white. [68]

In 1974, and pursuant to its 1974 labor agreement, Kaiser posted bids for a new on-the-job training program for trainees in six craft categories. Unlike the past training programs, this program did not require prior experience in the craft, but did provide that "at least half of the persons selected, for such training, would be members of minority groups."[69] In total, six white and seven black employees were selected.[70]

Every black employee that occupied a craft training slot was junior in seniority to the one or more white bidders who had unsuccessfully bid for that slot,[71] including Brian Weber "and/or other members of the class" he represented.[72]

In 1976, after a bench trial, the district court found that the race set-asides in the 1974 training programs at Kaiser's Gramercy plant discriminated against Weber and the other plaintiff class members because of race in violation of Title VII, sections 703(a) and (d).[73] The court permanently enjoined Kaiser and USW "from denying Mr. Weber and the other members of the class access to on-the-job training programs on the basis of race."[74] The court found, among other things, "no evidence that Kaiser, in incorporating this quota system in the 1974 Labor Agreement, did so with a view toward correcting the effects of prior discrimination at any of the fifteen plants to which the system had application. To the contrary, it appears that satisfying the requirements of OFCC, and avoiding vexatious litigation by minority employees, were its prime motivations."[75] That court also found that the evidence at trial "sub judice established that the black employees being preferred over more senior white employees had

67. *Id.* at 126 (Stipulation ¶ 5).

68. *Id*.

69. *Id.* at 127 (Stipulation ¶ 6).

70. *Id.* at 127-28 (Stipulation ¶ 6),.

71. *Id.* at 128 (Stipulation ¶ 6).

72. *Id.* (Stipulation ¶ 7).

73. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 769 (E.D. La. 1976).

74. *Id.* at 770.

75. *Id.* at 765.

never themselves been the subject of any unlawful discrimination during hiring."[76]

b. The Fifth Circuit

On appeal to the Fifth Circuit, USW's lawyers argued that Title VII permitted the race preferences in the 1974 Kaiser training programs, because where companies and unions are aware of conditions that *arguably* violate Title VII, Title VII permits them to voluntarily adopt solutions, such as racial preferences, that a court could order as remedies upon finding an actual Title VII violation: "[I]f the evidence suggests that a plaintiff could establish a prima facie case and that the defendants do not have an obviously convincing rebuttal, then they should be permitted to confer remedial priorities as a court would were it to adjudicate the case and find unlawful behavior."[77]

This approach was justified, USW's lawyers argued, because voluntary compliance with Title VII could not happen "if employers and unions are paralyzed absent total certain[t]y that their prior actions were unlawful." First, while it was "rarely possible" to predict litigation outcomes "with absolute certainty, . . . changing legal tides make predictions under Title VII more hazardous than in other fields."[78]

Second, even with absolute certainty of a Title VII violation, employers and unions "would be unlikely to want to proclaim their own guilt," lest such an admission "automatically entitle[ ] employees to recover backpay for past sins."[79]

Third, EEOC conciliation authority confirmed that Congress had not intended to make "absolute certainty as to prior illegality" a necessary condition for "voluntary provision of remedial priorities."[80] In section 706(b), Congress required that when the EEOC had "reasonable cause to believe" that a discrimination charge was "true," it had to try to eliminate the allegedly discriminatory practice "by informal methods of conference, conciliation, and persuasion."[81] USW's lawyers argued that such "reasonable cause to believe" also sufficed to authorize, through EEOC

76. *Id.* at 769.

77. Brief for Defendant-Appellant United Steelworkers of America, AFL-CIO at 19-20, Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1980) (No. 76-3266). The Fifth Circuit appellate briefs in *Weber* were obtained from the National Archives, Southwest Region, Fort Worth, TX.

78. *Id.* at 16.

79. *Id.*

80. *Id.* at 17.

81. 42 U.S.C. § 2000e-5(b).

conciliation, voluntary adoption of "remedial priorities which the parties believe—rightly or wrongly—are required to cure past discrimination."[82]

With this reading of the statute, USW's lawyers then pointed to three facts as showing a "prima facie case" of Title VII disparate impact liability against Kaiser for how it filled "training vacancies prior to 1974."[83] When Kaiser and USW negotiated the 1974 agreement, they knew that "the percentage of blacks in craft jobs in the Gramercy plant was substantially below the percentage of blacks in the plant workforce and in the community."[84]

They also knew that only two black workers had been admitted to Kaiser's pre-1974 training programs.[85] By insisting on a prior-experience requirement for admission to its pre-1974 craft training programs, Kaiser had "disproportionately disqualif[ied] black employees as compared to whites, because blacks—unlike whites—had been unable to secure the relevant prior experience due to their exclusion from the building trades industry."[86]

Moreover, although Kaiser could argue that the prior-experience requirement was a "business necessity," it was "impossible to calculate" whether that defense to Title VII disparate impact liability would succeed in this case.[87] In addition, to prevail on that defense, USW's lawyers suggested, Kaiser would have had to persuade a court that "it was impossible for any employee to master its training program without prior experience" *and* that business necessity also "justified its not instituting changes in the training program prior to 1974, as it did in 1974."[88] To be sure, Kaiser had "greatly enlarged the scope of the training program, at great cost, when it eliminated the prior experience requirement," but that did "not necessarily prove that [it] lacked a 'business necessity' defense to installing that program earlier."[89]

Given such arguable Title VII liability, USW's lawyers explained, Title VII permitted Kaiser to "accord priority access to training employees" at least to "all blacks hired before February 1, 1974—the date [Kaiser] eliminated the prior experience requirement," because they had all arguably

82. Brief for Defendant-Appellant, *supra* note 77, at 17-18 (footnote omitted). At the same time, they added, it would a mistake to make an EEOC "reasonable cause" finding the predicate for voluntary remedial efforts, because employers would have to wait for months or years for the EEOC before taking "self-corrective action." *Id.* at 18. Nor did Congress intend for voluntary compliance to depend on EEOC conciliation. *See id.* at 19.

83. *Id.* at 22.

84. *Id.* at 21.

85. *Id.*

86. *Id.* at 21-22.

87. *Id.* at 23.

88. *Id.*

89. *Id.*

suffered the discriminatory effect of that prior experience requirement.[90] This voluntarily-adopted racial preference was what a court would have ordered in any event, because in the Fifth Circuit, when a court found "discriminatory exclusion of an affected class from a desirable job," the "traditional remedy" was to "grant the class members 'the first opportunity to move into the next vacancies which they would have occupied but for wrongful discrimination and which they are qualified to fill.'"[91] As it happened, because the trainee vacancies reserved for blacks under the 1974 training programs had been awarded in order of *their* seniority, all the black employees that had received training slots were thus far "pre-1974 employees."[92]

Kaiser's lawyers, in contrast, primarily argued that the training set-asides for black employees were part of an effort to comply with the regulations set forth under Executive Order 11246, and therefore consistent with past cases that found that valid affirmative action plans under such regulations did not violate Title VII.[93] The United States and the EEOC ("the Government") also spent most of its brief on a similar argument about EO 11246,[94] though largely in a footnote, it also endorsed USW's view.[95]

Brian Weber's lawyer, however, argued that *any* employer racial preference violated sections 703(a) and (d) of Title VII.[96] In so doing, he criticized the USW's arguable-violation argument. Among other things, the prior-experience requirement was "job related" and a "business necessity," because evidence at trial showed that "each year of prior experience eliminated the need for a year of training at a cost to Kaiser of $15,000 to $20,000 a year."[97] Furthermore, the evidence in the record did not establish that the prior experience requirement caused a disparate impact, because the

90. *Id.* at 26.

91. *Id.* (quoting *United States v. Georgia Power Co.*, 474 F.2d 906, 927 (5th Cir. 1973))

92. *Id.* at 27. To be sure, USW's lawyers admitted, at some point in the future, all the pre-1974 black employees who want them will have filled training vacancies, making it possible that the 1974 agreement might award preferences to black employees hired on or after Kaiser eliminated the prior-experience requirement, *i.e.* not "identifiable victims of discrimination." At that point, however, the case law would likely be clear as to whether Title VII "tolerates voluntarily-adopted benevolent quotas favoring non-discriminatee minority employees." But since only pre-1974 black employees had benefited from the racial set-asides, they argued, the Fifth Circuit need not resolve that question. *Id.* at 28.

93. *See* Original Brief on Behalf of Defendant-Appellant Kaiser Aluminum & Chem. Corp. at 17-43, *Weber*, 563 F.2d 216 (No. 76-3266).

94. *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae at 16-34, *Weber*, 563 F.2d 216 (No. 76-3266).

95. *Id.* at 37 n.19.

96. Brief of Appellees at 16-27, *Weber*, 563 F.2d 216 (No. 76-3266).

97. *Id.* at 38 (footnote omitted). At trial, Dennis English, Kaiser's industrial relations superintendent, had testified that for Kaiser's 1974 training program, on an "annual basis, the minimum cost is between 15 and $20,000.00 per trainee." Weber App., *supra* note 62, at 68 (Trial Tr. 63).

USW did not account for the confounding disparate impact of Kaiser's *seniority* system.[98]

In addition, one amicus, the Southeastern Legal Foundation, disputed that voluntary efforts to remedy arguable Title VII violations were justified by case law permitting courts to order race-based remedies for actual Title VII violations. The amicus likened this reasoning to "a rationalization that could be advanced by the organizers of a lynching party: 'Since courts can impose capital punishment, and since they are certain to do so in the case of this particular murderer, why should we wait for the law? Why can't we 'string him up' right now? After all, we know he's guilty!'"[99]

The Fifth Circuit affirmed the district court's judgment that Kaiser's plan violated sections 703(a) and 703(d). While Title VII permitted a court to require race preferences as part of a remedy for actual past discrimination, under the circumstances, Kaiser's race-based ratio for training program eligibility "could not be approved even had it been judicially imposed."[100] Absent "prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, § 703(a) and (d)."[101]

In so ruling, the Fifth Circuit quickly dismissed arguments about the prior-experience requirement for Kaiser's past training program: Its pre-1974 training program—only 28 trainees over ten years—"was so limited in scope that the prior craft experience requirement cannot be characterized as an unlawful employment practice, especially when Kaiser was actively recruiting blacks to its craft families during the same period."[102]

The Fifth Circuit also refused to conclude that Kaiser had discriminated in the *hiring* of craft workers: "That only three black crafts workers were hired from outside the plant reflects the general lack of skills among available blacks but does not reflect any unlawful practice by Kaiser."[103] It also disagreed that Kaiser's challenged practice was a remedy for societal discrimination, or that it could be upheld because of Executive Order 11246 even absent past hiring or promotion discrimination.[104]

98. Brief of Appellees, *supra* note 96, at 38-39. Title VII's disparate impact liability does not apply to the operation of a "bona fide seniority or merit system," 42 U.S.C. § 2000e-2(h). *See* Lorance v. AT&T Techs., 490 U.S. 900, 904 (1989); Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 350-55 (1977).

99. Brief Amicus Curiae of the Southeastern Legal Foundation at 36, *Weber*, 563 F.2d 216 (No. 76-3266).

100. Weber, 563 F.2d 216, 224 (5th Cir. 1977).

101. *Id*.

102. *Id.* at 224 n.13.

103. *Id.*

104. *See id.* at 225-27.

In dissent, Judge John Minor Wisdom endorsed the arguable-violation argument.[105] He identified three arguable violations of Title VII that Kaiser's 1974 training program could reasonably remedy. First, only 14.8 percent of Kaiser's employees were black in 1974, as compared to an area workforce that was 39 percent, raising the possibility that Kaiser "had determined qualifications through nonvalidated tests or impermissibly subjective processes."[106] Absent such arguable discrimination against blacks for unskilled jobs, "more blacks could have entered a training program based solely on seniority."[107]

Second, the prior experience requirement in place before 1974 arguably violated Title VII, because "[o]nly two of 28 employees trained under that program were black."[108] Business necessity would not have justified this disparity, despite "evidence that each year of a worker's experiences saved the company money," because "no effort was made to present contrary evidence," and because expense and convenience did not justify using "a criterion with divergent impact."[109] Nor was this training program "too limited in scope" to violate Title VII: "If past experience does not satisfy the business necessity requirement, and if more whites than blacks had past experience, then a serious question of Title VII liability is raised even if only one position is at stake."[110]

Third, requiring any training for some craft jobs may violate Title VII. This claim, though "most easily refuted" by the employer, would still require rebuttal, because of the "extremely narrow scope" of the business-necessity defense.[111]

c. U.S. Supreme Court

In December 1978, the Supreme Court agreed to hear the case.[112] In their briefs before the Supreme Court, the Government now offered a variant of an arguable-violation argument, except that it emphasized

105. *See id.* at 230-34. Judge Wisdom also concluded that the plan should be upheld as a reasonable response to societal discrimination against blacks in craft occupations, *see id.* at 234-36, or could be upheld if required by regulations under Executive Order 11246, which Congress had ratified as permitted by Title VII when it amended Title VII in 1972, *see id.* at 236-38.

106. *Id.* at 231 (footnotes omitted).

107. *Id.* (footnote omitted).

108. *Id.*

109. *Id.* at 231-32.

110. *Id.* at 232.

111. *Id.*

112. United Steelworkers of America v. Weber, 439 U.S. 1045 (1978). Although Kaiser and USW had sought rehearing in the Fifth Circuit, their petitions were denied. Weber v. Kaiser Aluminum & Chem. Corp., 571 F.2d 337 (5th Cir. 1978). Despite his dissent, Judge Wisdom opposed rehearing en banc, because it would result in a nine month to one year delay in a case that was likely to go to the Supreme Court. *See* JOEL WILLIAM FRIEDMAN, CHAMPION OF CIVIL RIGHTS: JUDGE JOHN MINOR WISDOM 327-28 (2009).

Kaiser's arguable Title VII violation for hiring for craft positions only those job applicants with at least five years of prior experience.[113] On this view, since Kaiser had used a "racial classification" to select employees to fill training slots, Weber had made a "prima facie showing" of section 703(a) and (d) violations. However, because that "race-conscious selection device" had been properly used "for remedial purposes," the prima facie case was rebutted.[114]

In contrast, in a bid to win the vote of Justice Potter Stewart,[115] the USW abandoned its arguable-violations approach, arguing instead, based on Title VII's legislative history, that Congress' silence in Title VII on voluntary affirmative action was in accord with its intent to preserve management autonomy, which included letting management and unions adopt voluntary affirmative action plans.[116]

This argument implied, however, that section 703(j) of Title VII[117] was intended to bar *government*-required affirmative action, including court-ordered racial quotas.[118] USW now expressly argued against the Government's (and its former) arguable violation theory as resting on the premise that courts could "order quotas as remedies in Title VII cases."[119] That premise was "flawed," because "[f]loor leaders and principal supporters of Title VII in both Houses assured their fellow members in unambiguous terms that under no circumstances would Title VII empower courts to direct defendants to adopt racial quotas, even in cases where discrimination in violation of the Act is proved."[120]

By a 5-2 vote, the Supreme Court reversed.[121] Writing for the majority, Justice William Brennan called "the Kaiser-USWA plan . . . an

113. Weber App., *supra* note 62, at 70 (Trial Tr. 67) (testimony of Dennis English: "We used to require a five years' experience factor for hire into the journeymen, top-paying, standard rate craftsman classification. . . . [T]hat requirement was a requirement to be hired from outside the plant, not a training program requirement."); and Brief for the United States and the Equal Employment Opportunity Commission at 42-54 (arguing that Kaiser race preference for 1974 training program was a reasonable remedy for the arguable violation caused by the effect of this five-year experience requirement), *Weber*, 443 U.S. 193 (Nos. 78-432, 78-435, 78-436), 1979 WL 199725 at *42-54.

114. Brief for the United States and the Equal Employment Opportunity Commission at 21, *Weber*, 443 U.S. 193 (Nos. 78-432, 78-435, 78-436), 1979 WL 199725 at *21.

115. Malamud, *supra* note 3, at 211-12 (citing interview with Michael H. Gottesman); JUDITH STEIN, RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM 189 & 362 n.7 (1998) (citing 1994 interview with Michael Gottesman).

116. Brief for Petitioner United Steelworkers of America at 15-21, *Weber*, 443 U.S. 193 (Nos. 78-432, 78-435, 78-436), 1979 WL 199720 at *15-21.

117. 42 U.S.C. § 2000e-2(j).

118. Brief for Petitioner United Steelworkers of America, *supra* note 116, at 15.

119. *Id.* at 22.

120. *Id.*

121. *Weber*, 443 U.S. 193. Justices Stevens and Powell did not participate. Years later, Stevens told a law school audience that he "would have joined Justice Rehnquist's dissent in the Weber case." John Paul Stevens, *Learning On the Job*, 74 FORDHAM L. REV. 1561, 1565 (2006).

affirmative action voluntarily adopted by private parties to eliminate traditional patterns of racial segregation." Brian Weber had erred by relying on "a literal construction of §§ 703(a) and (d) and upon *McDonald* [*v. Santa Fe Trail Transp. Co.*]"[122] Rather, starting with the statement in *Holy Trinity Church v. United States* (1892) that a "thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers," the *Weber* Court discussed the Title VII legislative history as evidence of congressional intent to permit such plans.[123]

The *Weber* Court ultimately concluded: "We therefore hold that Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans."[124] Title VII permitted Kaiser's plan for the Gramercy plant, because it fell "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[125] It was therefore unnecessary to consider "petitioner's argument that their plan was justified because they feared that black employees would bring suit under Title VII if they did not adopt an affirmative action plan."[126] In an earlier passage, that Court similarly noted that it did not intend to "suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII."[127]

In a concurring opinion, Justice Harry Blackmun underscored how the Court had read Title VII to permit employers, under certain circumstances, to consider race without proving that they had arguably violated Title VII in the past.[128] Rather, the Court had read Title VII to permit an employer to

122. *Weber*, 443 U.S. at 201.

123. *See id.* at 202-08.

124. *Id.* at 208.

125. *Id.* at 209. The Court so concluded after observing that the plan was designed to "open employment opportunities to Negroes in occupations which have been traditionally closed to them"; did not "unnecessarily trammel the interests of the white employees," as white workers would not be fired and replaced with "new black hirees"; did not "create an absolute bar to the advancement of white employees"; and that the racial preference at the Gramercy plant would expire "as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force." *Id.* at 208-09 (citations and internal quotation marks omitted).

126. *Id.* at 209 n.9.

127. *Id.* at 208 n.8.

128. *Id.* at 213 (Blackmun, J., concurring). Based on similarity in language, including some verbatim sentences, Blackmun appears to have borrowed portions of the text of Part II of this concurrence from a May 14, 1979 memorandum by his law clerk, Lewis Mumford. Mumford championed the arguable-violations theory, but in his May 14 memo, he presented three reasons to justify departing from that theory in favor of joining Brennan's opinion. *See* Memorandum from LTM To HAB re: Weber, May 14, 1979, at page 7-8, Box 294, Folder 1, Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

consider race for affirmative action "solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory practices in the past. While, under Title VII, a mere disparity may provide the basis for a prima facie case against an employer, it would not conclusively prove a violation of the Act."[129] Moreover, under the Court's reading, Title VII permitted "an employer to redress discrimination that lies wholly outside the bounds of Title VII," thereby preventing Title VII from becoming "a means of 'locking in' the effects of [job] segregation for which Title VII provides no remedy."[130]

The *Weber* decision was controversial. Among other responses, in July 1979, Utah Republican Senator Orrin Hatch introduced a two-page bill to amend sections 703(a) and 703(d) of Title VII—the provisions at issue in *Weber*—to "restate, with greater emphasis, the intent of Congress." The bill added, at the end of section 703(a)(2), the phrase "and we mean it this time." And after section 703(d), Hatch's bill added: "The language of this subsection is designed to accurately and faithfully reflect the spirit in which Congress acts in approving it."[131] This was an apparent jab at the *Weber* Court's quotation from *Holy Trinity* distinguishing the letter of a statute from its "spirit."

More importantly, when Ronald Reagan became President, his lawyers identified *Weber* as precedent to attack as part of general litigation strategy, including legal arguments to the Supreme Court.[132] In December 1981, some newspapers quoted assistant attorney general for civil rights William Bradford Reynolds as saying that *Weber* had been "wrongly decided" and the Supreme Court should "take another look at it."[133] Later that month, when President Reagan answered a reporter's question in a way that appeared to suggest that he favored voluntary affirmative action by private industry, White House assistant counsel Michael Luttig, in helping draft a statement to clarify Reagan's views, noted to himself: "DOJ sees Weber

129. *Weber*, 443 U.S. at 213 (Blackmun, J., concurring) (citations omitted).

130. *Id.* at 214-15 (Blackmun, J., concurring).

131. S. 1469, 96th Cong. (1979). *See* Orrin Hatch, *The Son of Separate But Equal: The Supreme Court and Affirmative Action*, *in* A BLUEPRINT FOR JUDICIAL REFORM 72 (Patrick B. McGuigan & Randall R. Rader eds., 1981) (writing that he was "moved" by the *Weber* decision to introduce this bill).

132. *See* RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 208-86 (1996).

133. Robert Pear, *U.S. Panel Report Backs Hiring Goals: Civil Rights View Differs From White House on Affirmative Action*, N.Y. TIMES, Dec. 9, 1981, at A21; Robert E. Taylor, *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, WALL ST. J., Dec. 8, 1981, at 4. *But see* William Bradford Reynolds, *They Use Discrimination to Cure Discrimination*, N.Y. TIMES, Dec. 11, 1983, at E4 (interview excerpts) ("Q. You were quoted as saying that the Supreme Court wrongly decided the Weber case . . . . A. I never said that. What I said, in response to a question, was that I didn't think that the decision in the Weber case would apply in a public employment situation.").

mischievous because established quota + thus not effort to broaden recruitment effort."[134]

This section has presented an exegesis of the *Weber* case to show two plausibly necessary implications of the *Weber* case. First, the *Weber* Court rejected the starting premise of the *Ricci* opinion, *i.e.*, any employer consideration of race is *sufficient* to violate section 703(a)(1). This view, argued by Brian Weber, who had sued under section 703(a) as well as section 703(d), was directly rejected by the *Weber* Court.

Second, the *Weber* Court rejected the apparent *Ricci* Court view that Title VII permits an employer to consider race only to remedy actual or arguable past Title VII discrimination by that employer. At various times in the *Weber* litigation, the lawyers for Kaiser, USW, and the Government, as well as Judge Wisdom, asserted variants of the arguable-violation approach to justify Kaiser's race set-asides for its 1974 on-the-job training program.

Yet, as the *Weber* majority opinion and Justice Blackmun's concurrence make clear, the *Weber* Court did not restrict employer affirmative action plans only to circumstances where the plan aims to remedy that employer's past actual or arguable Title VII disparate impact violations. Rather, it read Title VII to permit employer plans to address a "conspicuous imbalance in traditionally segregated job categories" without regard to whether the employer's past practices generated actual or arguable Title VII liability for that imbalance.

3. Johnson v. Transportation Agency (1987)

This section presents an exegesis of the *Johnson* case. It shows that the Supreme Court in *Johnson* plausibly (1) rejected the view that Title VII permits an employer to consider race or sex pursuant to an affirmative action plan only where is it has a "strong" basis to believe that the plan is necessary to remedy past discrimination by that employer, and (2) rejected the view that an employer may justify the validity of an affirmative action plan only as a *defense* to section 703(a)(1) liability.

a. The District Court

In 1981, Paul Johnson sued his employer, the Santa Clara County Transportation Agency ("Agency") for denying him a promotion because of his sex in violation of Title VII, section 703(a).[135] After a bench trial, the district court found as follows: Johnson and eight other Agency employees, including Diane Joyce, had applied for the position of road dispatcher.

134. Handwritten notes, Files of Michael Luttig, OA 10021, Ronald Reagan Library, Simi Valley, CA.

135. Joint Appendix at 3 (Complaint), *Johnson*, 480 U.S. 616 (No. 85-1129), LEXSEE 1985 U.S. Briefs 1129 at *3.

After examination before a two-person "oral board," seven of the nine applicants scored 70 and above, including Johnson (score: 75) and Joyce (score: 72.5), making those seven eligible for the road dispatcher position under merit system rules.[136] A second oral board interviewed the seven eligible applicants, and unanimously recommended Johnson to fill the road dispatcher position.[137] Based upon the examination results and the departmental interview, the district court found that Johnson was more qualified for the position of road dispatcher than Joyce.[138]

The Agency Director promoted Joyce,[139] because she was a woman and Johnson was a man.[140] The rationale for promoting Joyce was the Agency's affirmative action plan, dated December 18, 1978, which was in effect on the date of Joyce's promotion.[141] That plan had "no end date or other provision which would have had the effect of ending preferential treatment to women."[142] The Agency had not discriminated and did not discriminate "against women in regard to employment opportunities in general and promotions in particular."[143]

b. The Ninth Circuit

On appeal, the Ninth Circuit reversed the district court's judgment, concluding that the Agency's affirmative action plan satisfied the conditions in *Weber* for when such plans would not violate Title VII, sections 703(a) and (d), and that the district court had read *Weber* too narrowly by reading it to require affirmative action plans to have a specific end date.[144] In a partial dissent, Judge Wallace argued, among other things, that the validity of affirmative action plans should be analyzed as a separate affirmative defense to Title VII liability.[145]

136. Johnson v. Transp. Agency, No. C-81-1218-WAI, 1982 WL 31006 (N.D. Calif., Aug. 10, 1982) (Findings of Fact ¶¶ 8-9).

137. *Id.* (Findings of Fact ¶ 10).

138. *Id.* (Findings of Fact ¶ 18).

139. *Id.* (Findings of Fact ¶ 15).

140. "But for [Johnson's] sex, male," he would have been promoted to the road dispatcher position. *Id.* (Findings of Fact ¶ 18). Had she not been a woman, Joyce would not have been promoted to that position. *Id.* (Findings of Fact ¶ 19). Joyce's sex, female, was "the substantial determining factor in her appointment to the position of Road Dispatcher." *Id.* (Findings of Fact ¶ 21).

141. *Id.* (Findings of Fact ¶ 23).

142. *Id.* (Findings of Fact ¶ 24).

143. *Id.* (Findings of Fact ¶ 22). The court further explained that, on the face of either the Agency's December 1978 affirmative action, or the October 1979 affirmative action plan of Santa Clara County, nothing "tends to show" that the Agency's plan "was prompted by concededly discriminatory practices committed in the past by the County or the Agency as distinguished from generally prevalent societal attitudes." *Id.*

144. Johnson v. Transp. Agency, 770 F.2d 752 (9th Cir. 1985).

145. *Id.* at 762 (Wallace, J., concurring in part and dissenting in part).

c. The U.S. Supreme Court

In July 1986, the Supreme Court granted Johnson's petition to hear the case.[146] Over a month earlier, the Supreme Court had decided *Wygant v. Jackson Board of Education* (1986).[147] In *Wygant*, white school teachers had sued a school board under, among other things, the Equal Protection Clause, to challenge a provision in their collective bargaining agreement: In case of layoffs, the teachers would be laid off in order of reverse seniority, "except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[148]

Deciding that the provision amounted to a racial classification, a four-Justice plurality opinion declared that, to survive, the provision must be "supported by a compelling state purpose" and "the means chosen to accomplish that purpose" must be "narrowly tailored."[149] Moreover, where the asserted purpose is to remedy past discrimination, the district court must find "the employer had a *strong basis in evidence* for its conclusion that remedial action was necessary"; otherwise, "an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination."[150]

In a concurring opinion, Justice Sandra Day O'Connor observed: "[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken."[151] She, however, agreed with the plurality opinion that, when challenged, the district court must find that the public employer had "a firm basis for determining that affirmative action is warranted."[152]

The opinions in *Wygant* influenced how the parties in *Johnson* litigated before the Supreme Court. Both Johnson's lawyers and the Solicitor General's Office ("SG") argued that although Johnson only sued under Title VII, since the Agency was a public employer, the Court had to read

146. Johnson v. Transp. Agency, 478 U.S. 1019 (1986) (dated July 7, 1986). Justice Brennan had recommended denying the petition. *See* Memorandum from Brennan to the Conference, July 1, 1986, Box 445, Folder 3, Blackmun Papers, Manuscript Division, Library of Congress, Washington, D.C.

147. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (decided May 19, 1986).

148. *Id*. at 270 (internal quotation marks omitted). The agreement defined "minority group personnel" as "those employees who are Black, American Indian, Oriental, or of Spanish descendancy." *Id.* at 271 n.2.

149. *Id*. at 274; *see also id*. at 285-86 (O'Connor, J., concurring in part and concurring in the judgment).

150. *Id*. at 278 (emphasis added).

151. *Id.* at 291.

152. *Id*. at 292.

Title VII not as *Weber* did, but to conform to the Equal Protection Clause analysis applied in *Wygant*.[153]

The SG also argued that, under Title VII, an employer's voluntary affirmative action plan must be aimed to remedy that employer's past discrimination.[154] For how much proof showed a sufficient remedial purpose, the SG touted the *Wygant* rule: The employer must have "a strong basis in evidence for its conclusion that remedial action was necessary."[155] This rule best "resolved th[e] tension" between "an employer's understandable reluctance to concede guilt, opening him to liability for past discrimination against women or minorities, and . . . the emasculation of the remedial predicate, turning it into a mere matter of statistical balance after all."[156]

Moreover, the SG further argued that "the affirmative action plan in a Title VII lawsuit brought by a non-minority employee should be viewed as an affirmative defense." Accordingly, the employer bore the burden of production *and* persuasion to show that its affirmative action plan "rested on a proper predicate of prior discrimination, and was narrowly tailored to address that problem." Absent enough basis "for concluding that discrimination has occurred--and thus no serious threat of litigation exists--there are no competing demands to reconcile and no need for any settlement of discrimination charges, voluntary or otherwise."[157]

For its part, the Agency's lawyers argued for the approach articulated in Justice O'Connor's concurrence in *Wygant*: "The Court should now hold that when an employer has a firm basis for concluding that past discrimination may have occurred--such as awareness of evidence that would constitute a *prima facie* showing of a Title VII violation--it may adopt appropriate race or gender conscious remedial measures."[158]

On this record, they argued, such a firm basis existed.[159] Although the district court had found no past discrimination by the Agency against women, that was irrelevant given "the pivotal issue here, i.e., whether there was sufficient evidence to support the *Agency's* conclusion that it may have

153. Petitioner's Brief at 19-23, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728150 at *19-23; Brief of the United States as Amicus Curiae Supporting Petitioner at 6-9, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728148 at *6-9.

154. Brief of the United States at 13, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728148 at *13.

155. *Id*. at 16 (internal quotation marks omitted).

156. *Id.* (citation omitted).

157. *Id.* at 23.

158. Brief of Respondent at 18, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728165 at *18.

159. Among other things, they emphasized that out of 238 skilled craft employees, none were women; the Agency never had employed a woman road dispatcher; only one out of 110 road maintenance workers was a woman; and women comprised over 36% of the local area labor force and 22% of the total Agency workforce. *Id.* at 19.

discriminated against women in the past and that affirmative remedial action was warranted." [160] As for the burden of proof, the Agency emphasized that under "well-established" doctrine, "[*a*]*t all times the plaintiff bears the ultimate burden of proof.* The allocation of the burden does not change just because the case is brought in a 'reverse discrimination' context and involves a challenge to an affirmative action plan."[161]

The Supreme Court, by a 6-3 vote, affirmed the Ninth Circuit's decision. The Court opinion was authored by Justice Brennan and joined by four Justices, while Justice O'Connor wrote an opinion concurring in the judgment.

First, the Court placed the burden of persuasion on the plaintiff. Under *McDonnell Douglas* burden shifting doctrine, the employer could point to the existence of a valid affirmative action plan to satisfy its burden of producing a legitimate non-discriminatory reason.[162] To be sure, the employer "will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, . . . that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff."[163]

Second, the Court disagreed that an employer must show either actual, or a sufficient basis to believe, past discrimination by that employer: "As Justice BLACKMUN's concurrence [in *Weber*] made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part. Rather, it need point only to a 'conspicuous . . . imbalance in traditionally segregated job categories.'"[164]

Here, the *Johnson* majority refused to treat the "conspicuous imbalance" condition established in *Weber* as satisfied only when "it would support a prima facie case against the employer, as suggested in Justice O'Connor's concurrence." In an opinion concurring in the judgment, Justice O'Connor had taken this position, essentially extending to Title VII the required showing she articulated in her *Wygant* concurrence to establish the remedial purpose of public employers' affirmative action plans.[165]

160. *Id.* at 25 n.21.

161. *Id.* at 40 (citations omitted).

162. *See Johnson*, 480 U.S. at 626.

163. *Id.* at 626-27.

164. *Id.* at 630 (citations omitted).

165. *See id.* at 649 (O'Connor, J., concurring) ("[T]he employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination.").

The *Johnson* majority, however, concluded that applying that standard in Title VII cases "would be inconsistent with *Weber*'s focus on statistical imbalance," and could unduly discourage employers from adopting affirmative action plans: "A corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit.[166] The *Johnson* majority further observed that had *Weber* itself "been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser's work force would have made it vulnerable to a Title VII suit."[167]

The *Ricci* majority read Title VII in a way to contradict these necessary implications of *Johnson*. First, the *Ricci* majority read into Title VII the very "strong basis' rule from *Wygant* that the SG in *Johnson* had touted but that the *Johnson* Court refused to read into Title VII. Second, the *Ricci* majority made that "strong basis" rule a defense to Title VII liability. Although the SG in *Johnson* had touted the parallel argument, as had the dissenting judge in the *Johnson* Ninth Circuit opinion, the Supreme Court in *Johnson* unequivocally rejected it.

D. Plausible Alternative Reasoning

This section concludes that the *Ricci* majority could have but did not write a plausible alternative opinion that would not have eroded *Weber* or *Johnson*. In that alternative, the "strong basis" rule from *Wygant* would have not been a defense to liability under section 703(a)(1), but an evidentiary standard for satisfying the employer's burden of production under *McDonnell Douglas* doctrine.

McDonnell Douglas doctrine governs the evidentiary burdens of proving a violation of section 703(a)(1) in a single motive case. Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer-defendant to provide a legitimate non-discriminatory reason for the firing, failure to hire or promote, or other adverse employment action. If the employer satisfies that burden, the plaintiff must persuade that the proffered reason is pretext and the employer really acted because of the plaintiff's race or other protected characteristic.[168] As *Johnson* made clear, the *McDonnell Douglas* framework applies to Title VII challenges to affirmative action plans.[169]

166. *Id.* at 633.

167. *Id.* at 633 n.10.

168. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-12 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

169. *Johnson*, 480 U.S. at 626-27.

The *Ricci* Court could have treated its "strong basis" rule as a special rule governing the conditions under which the employer *satisfies* its burden of production under *McDonnell Douglas* doctrine in those cases where an employer proffers the fear of disparate impact liability as its legitimate, non-discriminatory reason. If the employer demonstrated a "strong basis in evidence" to fear disparate impact liability, then the plaintiff must persuade that this motive was a pretext and that employer's actual motive for the adverse action was illegitimate under Title VII.

Under this approach, the *Ricci* majority could still have found that the plaintiffs were entitled to summary judgment, albeit because the City could not satisfy its burden of *production* (because, according to the Court, on the record before it, the City so clearly could not show a "strong basis" for fearing Title VII disparate impact liability). That approach is consistent with *Johnson*'s rejection of the "strong basis" rule as a defense and with *Weber*'s refusal to treat any employer consideration of race as sufficient to establish section 703(a)(1) liability.

E. Departure from Judicial Commitments

This section shows how, in its reasoning, the *Ricci* Court did not address plausible departures from professed commitments of some members of the *Ricci* majority to statutory interpretation that privileges the statutory text.

This criterion, however, deserves much less weight in the analysis, for two reasons. First, in reading statutes, recent Supreme Court Justices, including those in the *Ricci* majority, tend to join majority opinions that use a wide range of statutory interpretation techniques, including ones that they profess to disdain. For opinions they write, there is still some, though less, divergence.[170] Second, the *Ricci* opinion's nominal author, Justice Kennedy, has not professed commitment to a "textualist" method of statutory interpretation to the same degree as others in the *Ricci* majority, such as Justice Scalia.[171]

Accordingly, *to the extent* that one or more of the *Ricci* majority are committed to textualism, we should expect those Justices to push for the majority opinion to address, or opine separately to address, plausible

170. *See* Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L. J. 221, 250-51 tbl. 2 (2011) (reporting individual Justice rates of reliance on interpretative tools and canons in the opinions they authored); *see also* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 149-50 (2009) (mean scores by Justice for relying on "textualism" and other methods in statutory interpretation cases decided from 1994 through 2002).

171. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and the Laws* in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-37 (1997).

disjunctions between the *Ricci* majority's reasoning and the text of section 703(a)(1).

This section identifies those plausible disjunctions. Section 703(a)(1) provides, in relevant part, that it is 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." The *Ricci* Court's reasoning plausibly departs from the meaning of the phrase "because of such individual's race" in that section by (1) ignoring the role of the word "such", and (2) treating the word "individual's", a singular possessive noun, as if it was a plural possessive noun. No member of the *Ricci* majority addressed these plausible disjunctions.

1. Ignoring "Such"

The *Ricci* majority ignored the word "such" in the phrase "such individual's" in section 703(a)(1). To see this, suppose only Benjamin Vargas, the Hispanic firefighter plaintiff, had sued.[172] Since the Court granted all the plaintiffs summary judgment, including Mr. Vargas, we must suppose that, on the record, the Court thought that the City discriminated against Mr. Vargas in violation of Title VII, and that the Court would have granted Mr. Vargas summary judgment had he alone brought the Title VII suit.[173] Under the *Ricci* majority's reading of section 703(a)(1), however, the City violated section 703(a)(1) when it refused to certify the test results because "the higher scoring candidates were white."[174]

As applied to Mr. Vargas' Title VII claim, this ignores the word "such" in the phrase "such individual's" in section 703(a)(1). Under existing norms of English grammar, the word "such," which modifies "individual's," necessarily refers the reader back to a particular person—the "any individual" who is the direct object of the relevant verb "discriminate" in section 703(a)(1). Accordingly, if the City's refusal to certify the test results counts as discrimination against Mr. Vargas within the meaning of section 703(a)(1), and since the *Ricci* majority treated all the plaintiffs' Title

172. Joint Appendix at 180, *Ricci*, 129 S. Ct. 2658, (Nos. 07-1428, 08-328), 2009 WL 454249, at *180 (hereinafter "Ricci JA") (Amended Complaint ¶ 13) ("Benjamin Vargas is Hispanic. All of the other plaintiffs are white."); Ricci JA at 204 (Answer & Affirmative Defenses ¶ 13) ("Admit, upon information and belief, the plaintiffs' self described ethnicity . . . .").

173. The plaintiffs' lawsuit was not a class action or under any other procedural vehicle for aggregating claims. Under certain conditions, Title VII does not require identity between the plaintiff bringing a suit under Title VII and the individual or individuals allegedly harmed by a practice prohibited by Title VII. *See, e.g.*, *Int'l Woodworkers of Am. v. Georgia-Pacific Corp*. 568 F.2d 64 (8th Cir. 1977) (labor union has Article III standing to bring Title VII claim on behalf of its members).

174. *Ricci*, 129 S. Ct. at 2674.

VII claims as race discrimination claims,[175] the City's refusal must be discrimination against Vargas because of *his* race, *i.e.*, because *he* is Hispanic.

However, the Court's reading of section 703(a)(1) sustains Vargas' claim based on a set of persons ("the higher scoring candidates") whose race (white) is not *his* race (Hispanic), even though section 703(a)(1) does not say "because of race" or "because of *any other* individual's race." Nor does Mr. Vargas' Title VII claim depend on adverse treatment because the City disapproved of *his* association with one or more third parties of another race.[176]

This interpretative difficulty persists even if Mr. Vargas had argued that the City's refusal to certify the test results violated section 703(a)(2).[177] Unlike section 703(a)(1), section 703(a)(2) refers to the employer's "employees" (plural) as the direct objects of the employer action, and then connects that action to race. Like section 703(a)(1), however, section 703(a)(2) also contains the phrase "because of such individual's race."

Under this section, Mr. Vargas' lawyer can easily argue that when the City sorted the test takers by score and race, and then identified a statistical race disparity, the City "limit[ed]," "segregated," or "classif[ied]" that subset of its "employees" within the meaning of section 703(a)(2).

175. I proceed here as if the Court treated Mr. Vargas' Title VII claim as only a race discrimination claim. A plaintiff alleging discrimination because of his or her self-reported status as Hispanic could argue Title VII discrimination "because of such individual's . . . national origin," 42 U.S.C. § 2000e-2(a)(1), for which the term "national origin" means "the country where a person was born, or from which his or her ancestors came," Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973). *See, e.g.*, Bennun v. Rutgers State University, 941 F.2d 154, 171-72 (3d Cir. 1991). The *Ricci* plaintiffs did refer to "national origin" discrimination as part of their Title VII claims, albeit inconsistently. Ricci JA, *supra* note 172, at 196 (Amended Complaint ¶ 62) ("[T]he City of New Haven, in depriving the plaintiffs of promotions and opportunities for promotions on account of their *race*, violated the plaintiffs' rights to be free from discrimination in employment on account of their *race and/or national origin* in violation of 42 U.S.C. §2000e-2(a)(1), (2), and 3(b).") (emphasis added). The *Ricci* majority, however, acted as if all the plaintiffs had only brought Title VII race discrimination claims. *See Ricci*, 129 S. Ct. at 2673.

176. *See, e.g.*, Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008) ("[W]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

177. That section provides that it is an "unlawful employment practice" for an employer to "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . ." 42 U.S.C. § 2000e–2(a)(2). In their district court papers, the plaintiffs, discussing their Title VII claim, referred to both section 703(a)(1) and section 703(a)(2) of Title VII, but did not discuss the precise words of those provisions in any detail. *See* Plaintiffs' Revised Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment at 33-34, *Ricci*, 554 F. Supp. 2d 142, (No. 3:04cv1109), 2006 WL 776519 at *33-34. The U.S. Supreme Court did not refer to section 703(a)(2).

Similarly, it is plausible that by refusing to then certify the test results, the City limited, segregated, or classified its employees "in a[ ] way" that "would deprive or tend to deprive" each plaintiff of "employment opportunities" or "adversely affect" each plaintiff's "status as an employee." The premise here is that the City refusal to certify denied each *Ricci* plaintiff a promotion opportunity (an "employment opportunit[y]"), even if it did not necessarily guarantee enough vacancies for actual promotions to occur.[178] The problem is that, in deciding whether that deprivation or adverse effect occurred "because of such individual's race," Mr. Vargas' lawyer runs into the same problem as with section 703(a)(1): the deprivation or adverse effect did not depend on the fact that *his* race is Hispanic.

For contrast, compare a case where a black job applicant sued a company that required job applicants to pass a company-administered generalized intelligence test. If black applicants tended to fail that test at a substantially higher rate than white applicants, then it would be more likely than not that the black plaintiff would fail that test because he was black and, importantly, *regardless* of the race of the other job applicants. Accordingly, if the company could not show that the test was a good predictor of job performance, it is easy to conclude that the company's generalized intelligence test requirement did "tend to deprive" the plaintiff of "employment opportunities" at the company because of *his* race.

The point here is not to argue for the right or best way to read the statute. Rather, if sincerely committed to textualism, the *Ricci* majority should have at least *addressed* plausible disjunctions between the majority opinion and the word "such" in section 703(a)(1). Consider two possible responses.

First, the City did adversely affect Mr. Vargas because of *his* race if we treat his race not only as Hispanic, but also "not black," a race he shares with the other plaintiffs. This response, however, works only if the City refused to certify the test results only because of the *black* pass rate (relative to the white pass rate) on the captain's exam. If the City was motivated by *both* the black and Hispanic pass rates (relative to the white pass rate) on that exam, then it is harder to argue that the City's refusal to certify occurred because of Vargas' race. While Vargas continues to be "not black," by definition Vargas' race cannot be Hispanic and "not Hispanic" at the same time.

Second, while Vargas must show that the City discriminated against an "individual" because of "such individual's" race under section 703(a),

178. The district court did not consider section 703(a)(2)'s focus on "employment opportunities," 42 U.S.C. § 2000e-2(a)(2), when it found that "plaintiffs were not 'deprived of promotions,' " reasoning that at best "the Rule of Three would give top scorers an *opportunity* for promotion, depending on the number of vacancies, but no *guarantee* of promotion," *Ricci*, 554 F. Supp. 2d at 159-60.

Vargas need not show that *he* was *that* individual to obtain relief on his Title VII claim. This response requires decoupling section 703(a), which defines conduct that counts as an unlawful employment practice, with Title VII's enforcement provisions under section 706.

The premise here is that the "individual" in section 703(a) need not be, or need not be represented by, the same individual "claiming to be aggrieved" by an unlawful employment practice that sections 706(b) and 706(f) authorize to file an EEOC charge and a civil action, respectively.[179] Moreover, section 706(g), which authorizes court relief upon finding an unlawful employment practice "charged in the complaint," does not expressly identify *who* may or may not receive such relief.[180] If it had adopted this response, the *Ricci* majority would have resolved lower court disagreement over whether Title VII affords relief to an individual plaintiff who suffers from an employer action that discriminates because of somebody else's race or sex.[181]

2. "Individual's" As Singular, Not Plural

The *Ricci* majority treated the word "individual's" in section 703(a)(1) as a plural possessive noun, when in fact it is a singular possessive noun. To see this, suppose only one white firefighter had sued and the issue is whether the City discriminated against him "because of" his race. By the majority's reasoning, the City discriminated against this white firefighter plaintiff in violation of section 703(a)(1) when it acted because "the higher scoring candidates were white."

The interpretative difficulty is that the word "individual's" in "because of such individual's race" in section 703(a)(1) is a singular possessive noun, not plural possessive. It is not "because of *individuals'* race," which is consistent with the fact that "any individual," the phrase to which "such individual's" refers, is also singular, not plural.

179. 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1)

180. § 2000e-5(g)(1).

181. 2 EEOC Compliance Manual § 2-V(A)(2) (2000) (reading Title VII to permit filing of charge "by an individual who was not subjected to prohibited discrimination but was harmed by prohibited discrimination against others")(footnote omitted)(citing cases). Canvassing these cases, one commentator suggests that *Ricci* can be understood to have read Title VII to permit such claims, given how it treated Vargas' claim. *See* Kerri Lynn Stone, Ricci *Glitch: The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOYOLA L. REV. 751, 784-89 (2010). On the other hand, *Ricci* did not necessarily resolve whether, for Vargas to prevail on his Title VII claim, the City needed to have acted because of *Vargas'* race, either as a matter of statutory interpretation or prudential standing doctrine, because those issues were neither litigated nor jurisdictional. The *Ricci* Court, however, necessarily concluded that Vargas had *Article III* standing, because such standing is necessary for federal court jurisdiction. *See* FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-231 (1990) ("[W]e are required to address the [standing] issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.") (citation omitted).

This matters, because to treat "individual's" in section 703(a)(1) as singular, not plural, any hypothetical white firefighter plaintiff must at least show that the City refused to certify the test results "because of" *his* race (singular possessive), not the race and scores of all the white firefighter test-takers who passed, *i.e.*, not *their* race (plural possessive).

For this to occur, that plaintiff must show that his race and test score *caused* the racial disparity in test outcomes to be large enough to have motivated the City to worry about Title VII disparate impact liability, *i.e.*, to have satisfied the judicial rule of thumb derived from the Uniform Guidelines for Employee Selection Procedures. Those Guidelines provide that federal enforcement agencies generally regard a "selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate . . . as evidence of adverse impact."[182]

This in turn depends on how a judge reads the phrase "because of" in section 703(a)(1). In a 1989 dissenting opinion in *Price Waterhouse v. Hopkins*, Justice Kennedy (joined by Justice Scalia and then-Chief Justice Rehnquist) argued that the phrase "because of" in section 703(a)(1) indicates a "but-for cause" requirement for liability: If an employer decides not to promote an individual "because of" her sex, her sex must be "a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause."[183] This view did not then clearly command a Court majority with respect to those cases in which the employer allegedly acted because of both permissible and impermissible motives (so-called "mixed-motives" cases).[184] However, this view appears to prevail with respect to Title VII cases in which the employer allegedly acted only because of an impermissible motive.[185] The *Ricci* plaintiffs pursued this latter kind of Title VII claim.

182. 29 C.F.R. § 1607.4(D). *See Ricci*, 129 S. Ct. at 2678 ("The pass rates of minorities . . . fall well below the 80-percent standard set by the EEOC to implement the disparate-impact provision of Title VII.") (citations omitted). For criticism of this rule as applied to *Ricci*, see Joseph L. Gastwirth & Weiwen Mao, *Formal Statistical Analysis of the Data in Disparate Impact Cases Provides Sounder Inferences Than the U. S. Government's "Four-Fifths' Rule: An Examination of the Statistical Evidence in* Ricci v. DeStefano, 8 LAW, PROBABILITY & RISK 171 (2009).

183. Price Waterhouse v. Hopkins, 490 U.S. 228, 284 (1989) (Kennedy, J., dissenting); *see id.* at 262 (O'Connor, J., concurring in the judgment) ("The legislative history of Title VII bears out what its plain language suggests: a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action.").

184. *See id.* at 241 (plurality opinion of Brennan, J.)

185. *See, e.g.*, *St. Mary's Honor Center*, 509 U.S. at 514 ("the required finding that the employer's action was the product of unlawful discrimination") (majority opinion of Scalia, J.); *cf.* Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009) (reading by same Justices in the *Ricci* majority of the phrase "because of such individual's age" in a parallel provision of the Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), to require but-for causation).

To apply the but-for cause reading of "because of" here requires posing a counterfactual: For any particular white firefighter plaintiff, if that firefighter had been black, would the race disparity with respect to (1) exam pass rates, or (2) promotions to then-vacant positions, have fallen below the Guidelines' eighty-percent threshold? Given the actual exam results, we know that the black pass rate and the expected black promotion rate (to fill then-vacant positions) fell below the eighty percent threshold (Table 1). Table 2 calculates the pass rates and promotions in a hypothetical scenario in which we start with the actual pass rates (Table 1) and the ranks of the plaintiffs' scores (Table A1, Appendix). Then, for each exam, we switch the race of a *single* plaintiff from white to black.

Table 2: Hypothetical Firefighter Exams, Pass Rates and Promotion[186]

Race	Pass	Total	Pass Rate	Pass Rate Adverse Impact Ratio	Promotion	Promotion Adverse Impact Ratio
Lieutenant's Exam						
Black	*7*	19	36.8%	0.66	1	0.32
Hispanic	3	15	20.0%	0.36	0	0
White	*24*	43	55.8%	.	7	
Total	34	77	44.2%	.	8	
Captain's Exam						
Black	*4*	8	50.0%	0.83	1	0.78 to 0.52
Hispanic	3	8	37.5%	0.63	0 to 2	0 to 1.56
White	*15*	25	60.0%	.	4 to 6	
Total	22	41	53.7%	.	7	

In this counterfactual scenario, whereas the black pass rate for the lieutenant's exam continues to fall below the eighty-percent threshold (0.66), the black pass rate for the captain's exam no longer does (0.83).[187] In other words, looking only at pass rates, each plaintiff who passed the captain's exam, but no plaintiff that passed the lieutenant's exam, can show that the City deprived him of a promotion opportunity because of *his* race ("such individual's race") within the meaning of section 703(a).

In contrast, looking only at promotion to then-vacant positions, changing any single plaintiff from white to black does not push the adverse

186. Promotion assumes the City's Rule of Three and that plaintiff is not ranked in the bottom three for each exam. Promotion Adverse Impact Ratio is the minority promotion rate (number promoted / number of test-takers) divided by white promotion rate.

187. This ratio for the captain's exam, however, falls below 0.80 for different calculations of the white pass rate. *See supra* note 24 (note to Table 1).

impact ratio for promotion rates above the eighty-percent threshold. None of the three lowest-ranked plaintiffs for each exam, had he been black, would have been promoted in any event, given their rank, the number of then-vacant positions, and the City Charter's Rule of Three. If any one of the other plaintiffs, if black, had been promoted, the number of blacks promoted for each exam would increase from zero to one, and the resulting adverse impact ratios would still fall below eighty percent.

Again, the point here is not to argue for the right or best way to read the statute. Rather, if sincerely committed to textualism, the *Ricci* majority should have at least addressed plausible disjunctions between the majority opinion and the statutory text. Consider three possible responses.

First, the Court might have considered whether the phrase "such individual's race" in section 703(a)(1) also includes its plural form (such *individuals'* race) by operation of the Dictionary Act: "In determining the meaning of any Act of Congress, unless the context indicates otherwise-- . . . words importing the singular include and apply to several persons, parties, or things . . . ."[188]

This argument turns on whether "context indicates otherwise" within the meaning of the Dictionary Act.[189] The answer is not obvious. Perhaps relevant is that Congress defined the word "person" in Title VII to include "one or more individuals," but did not use any similar plural form in section 703(a)(1).[190] In the parallel provisions to section 703(a)(1) in sections 703(b) and (c), which cover employment agencies and labor unions, the text varies slightly in ways that are consistent with the singular, not plural, possessive noun "individual's" in section 703(a)(1).[191]

Second, the Court could have decided that the City violated not section 703(a)(1), but sections 703(l) or 703(h), which govern employment tests. Section 703(l), added in 1991, declares that it is unlawful for an employer selecting candidates for promotion "to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race. . . ."[192] Section 703(h) provides, in pertinent part, that an employer may "act upon the results of any professionally developed

188. 1 U.S.C § 1.

189. *See* Rowland v. California Men's Colony, 506 U.S. 194, 201 (1993) (interpreting this phrase).

190. 42 U.S.C. § 2000e(a).

191. In section 703(b), the text uses the singular possessive adjective "his," not the plural possessive adjective "their": It declares it unlawful for an employment agency to "discriminate against, any individual because of *his* race . . . , or to classify or refer for employment any individual on the basis of *his* race . . . ." 42 U.S.C. § 2000e-2(b) (emphasis added). In section 703(c), the parallel provision for labor organizations, section 703(c)(1) uses the singular possessive adjective "his" ("because of his race"), while section 703(c)(2), like its section 703(a)(2) counterpart, uses the singular possessive noun "individual's" ("because of such individual's race"). § 2000e-2(c).

192. 42 U.S.C. § 2000e-2(l); Civil Rights Act of 1991, Pub. L. No. 102-66, § 106, 105 Stat. 1071, 1075.

ability test" except where such action is "designed, intended or used to discriminate because of race."[193]

The Court might have reasoned that by refusing to certify the test results, the City thereby "alter[ed]" those test results "on the basis of race" in violation of section 703(l). Indeed, the plaintiffs' lawyers suggested as much by drafting one of the questions presented in their Supreme Court certiorari petition to ask if an employer violates section 703(l) "when it rejects the results of such tests because of the race of the successful candidates."[194] Similarly, if the Court read "act upon the results" in section 703(h) to cover the City's refusal to certify the test results, then it could have concluded that the City acted upon the test results "to discriminate because of race" under that section.

This approach in *Ricci* would have avoided the "such individual's" difficulty of section 703(a)(1), because sections 703(l) and (h) do not restrict the "race" to which each section refers to that of any particular individual. The direct object of the verbs in these sections are all plural (test scores and test results), not singular as in section 703(a)(1) ("any individual"). This approach would have also avoided directly eroding *Weber* and *Johnson*, because those cases concerned violations under sections 703(a) and (d), not sections 703(l) or (h).

To be sure, the *Ricci* Court did point to sections 703(l) and (h) as "consistent with" or "in keeping with," respectively, its reading of section 703(a)(1). Pointing to section 703(l), the *Ricci* Court wrote that, absent proving a strong-basis defense, "[i]f an employer cannot rescore a test based on the candidates' race, § [703](l), then it follows *a fortiori* that it may not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates."[195] The *Ricci* Court also pointed to section 703(h) as "in keeping with" a restriction on "an employer's ability to discard test results (and thereby discriminate against qualified candidates on the basis of their race)."[196]

This reasoning, however, is opaque. If discarding the test results is not "alter[ing]" those results under section 703(l), but a "greater step," and thus categorically different, then section 703(l) does not apply. If it is "alter[ing]" under section 703(l), it is still not clear how such a section 703(l) violation would be "consistent with" the Court's reading of section 703(a)(1). If a section 703(l) violation entails a section 703(a)(1) violation,

193. 42 U.S.C. § 2000e–2(h).

194. Petition for a Writ of Certiorari at i, *Ricci v. DeStefano*, 129 S. Ct. 894 (2009) (No. 08-328), 2008 WL 4185424 at *i.

195. *Ricci*, 129 S. Ct. at 2676. Though "more desirable racial distribution" is ambiguous, the City had alleged, and the Court so assumed, that the City had refused to certify the test results to avoid Title VII disparate impact liability.

196. *Id.*

as the Court may have assumed, then section 703(l) would be superfluous. To so assume also ignores that section 703(a)(1) uses the phrase "because of such individual's race," while section 703(l) uses the phrase "on the basis of race." Similarly, for section 703(h) to be "in keeping with" the Court's reading of section 703(a)(1), one has to ignore that section 703(a)(1) uses "because of such individual's race," while section 703(h) uses "because of race."

Third, the *Ricci* majority could have reasoned that "because of such individual's race" in section 703(a)(1) has to be read *in para materia* with a new section 703(m) added in 1991: "Except as otherwise provided in this subchapter," a plaintiff can establish "an unlawful employment practice" under Title VII by showing that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[197] If the plaintiff pursues and proves a violation under this standard, and if the defendant shows that it would have "taken the same action in the absence of the impermissible motivating factor," then the statute limits the set of remedies available to the plaintiff.[198] Section 703(m), unlike section 703(a)(1), does not expressly tie the protected characteristic to the individual who suffers from the challenged employment practice.

Section 703(m)'s "motivating factor" standard, however, does not obviously supplant the conception of causation in the phrase "because of" in section 703(a)(1). The phrase "[e]xcept as otherwise provided by this subchapter" in section 703(m) covers section 703(a)(1), because section 703(a)(1) appears in the same subchapter as section 703(m). Moreover, earlier statements in Court opinions have suggested that section 703(m) only applies in cases where plaintiffs pursue so-called "mixed-motive" Title VII claims.[199] Since the *Ricci* plaintiffs did not pursue such a claim,[200] the *Ricci* majority would have had to decide whether the plaintiffs thereby forfeited any benefit of section 703(m).[201]

197. 42 U.S.C. § 2000e-2(m); *see* Civil Rights Act of 1991, § 107, 105 Stat. at 1075. On the conception of causation adopted by this "motivating factor" standard, see Martin Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L. J. 489, 503-07 (2006).

198. 42 U.S.C. § 2000e-5(g)(2)(B).

199. *See* Landgraf v. USI Film Products, 511 U.S. 244, 251 (1994) (observing that section 107 of the Civil Rights Act of 1991 "responds to *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), by setting forth standards applicable in 'mixed motive' cases").

200. Ricci v. DeStefano, 530 F.3d 88, 89 (2d Cir. 2008) (Calabresi, J., concurring in denial of rehearing in banc) ("The parties did not present a mixed motive argument to the district court or to the panel.") (footnote omitted).

201. In the Civil Rights Act of 1991, which added section 703(m), Congress appears not to have intended to affect *Weber* or *Johnson*. *See* § 116, 105 Stat. at 1079 ("Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, *affirmative action*, or conciliation agreements, that are in accordance with the law.") (emphasis added); 137 Cong. Rec. 30683 (Nov. 7,

F. Extrinsic Evidence

This section collects evidence outside the *Ricci* opinion that is consistent with the view that the Justices in the *Ricci* majority would prefer to reduce the scope of *Weber* and *Johnson*.

Justice Scalia called for *Weber* to be overruled in his *Johnson* dissent.[202] There, Scalia also criticized Justice O'Connor's concurrence in *Johnson*, which had called for a "firm basis" approach, as "something of a halfway house between leaving employers scot-free to discriminate against disfavored groups, as the majority opinion does, and prohibiting discrimination, as do the words of Title VII."[203] Scalia's opinions in other cases[204] and his off-the-bench statements[205] also indicate a consistent and credible opposition to race-conscious affirmative action plans. Before becoming a judge, Scalia had criticized Judge Wisdom's dissent in *Weber* as forsaking white ethnics, like Scalia's father, who had not discriminated against blacks and who, Scalia argued, would primarily suffer from affirmative action plans.[206]

Similarly, before he became a judge, Clarence Thomas voiced opposition to race-conscious policies such as affirmative action programs.[207] On the Court, his judicial voting record and opinions are consistent with such opposition.[208] For Justices Roberts and Alito, their voting record in Equal Protection Clause cases seems to be consistent with an effective bar on race-conscious policies,[209] either as a matter of policy preference or a sincere view of what the Equal Protection Clause demands.

1991) (portion of interpretative memorandum concerning section 116) ("[T]his legislation should in no way be seen as expressing approval or disapproval of *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), or *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), or any other judicial decision affecting court-ordered remedies, affirmative action, or conciliation agreements."); and 137 Cong. Rec. 29040 (Oct. 30, 1991) (same for memorandum analysis of equivalent section in Senate bill).

202. *Johnson*, 480 U.S. at 673 (Scalia, J., dissenting).

203. *Id.* at 665 n.4.

204. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and in the judgment).

205. *See, e.g.*, JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 159-60 (2009) (quoting interview with Scalia on opposition to affirmative action).

206. Antonin Scalia, *The Disease as Cure: 'In order to get beyond racism, we must first take account of race'*, 1979 WASH. U. L. Q. 147, 150-52 (1979).

207. *See* KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 159-63 (2007) (describing statements by Thomas on affirmative action in early legal career in Reagan administration).

208. *See, e.g.*, Parents Involved in Community Schools v. Seattle Sch. District No. 1, 551 U.S. 701, 748-82 (2007) (Thomas, J., concurring); *Adarand*, 515 U.S. at 240 (Thomas, J., concurring in part and in the judgment).

209. *Parents Involved*, 551 U.S. at 748 (plurality opinion of Roberts, C. J., joined by, among others, Alito, J.).

Justice Kennedy's voting record in Equal Protection Clause cases supports a similar inference.[210]

Moreover, Roberts and Alito expressed opposition to affirmative action while working as government lawyers in the Reagan administration. Alito, who had a "big hand" in writing the Solicitor General's brief in *Wygant*,[211] later wrote in a 1985 job application for a deputy position in the Justice Department that he had been honored and personally satisfied to "help advance legal positions in which I personally believe very strongly," and that he was "particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed."[212]

Similarly, in December 1981, Roberts, then a special assistant to Attorney General William French Smith, wrote to Smith about how to bring the Department of Labor and the Office of Federal Contract Compliance "into line with our views stressing color and sex blindness in employment decisions." In so doing, Roberts anticipated that those agencies might argue that "the [Department of] Justice view of Title VII – that it requires color blindness in employment decisions –- was rejected in Weber." Roberts offered an answer: "Weber did not consider government pressure, but only a private program. It also has only four supporters on the current Supreme Court. We have difficulties with its reasoning, and do not accept it as the guiding principle in this area."[213] In counting "four supporters," Roberts left out Potter Stewart, part of the *Weber* majority, because Stewart had left

210. *See Parents Involved*, 551 U.S. at 787-88 (Kennedy, J., concurring in part and concurring in the judgment); Grutter v. Bollinger, 539 U.S. 306, 395 (2003) (Kennedy, J., dissenting); League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) (plurality opinion of Kennedy, J.); Miller v. Johnson, 515 U.S. 900, 911-15 (1995) (majority opinion of Kennedy, J.); Metro Broad., Inc. v. FCC, 497 U.S. 547, 631 (1990) (Kennedy, J., with whom Scalia, J., joins, dissenting); *J.A. Croson Co.*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). *See* FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY 106-120 (2009) (describing Justice Kennedy's opinions in Equal Protection Clause race cases).

211. *Panel of Former Solicitor Generals, Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. Rev. 153, 179 (statement by Charles Fried: "There was . . . the brief in the *Wygant* case. I had a big hand in writing it, and so did Sam Alito, who had this marvelous phrase saying that a particular African American baseball player would not have served as a great role model if the fences had been pulled in every time he was up at bat . . ."(footnote omitted). For the phrase Fried attributed to Alito, see Brief for the United States as Amicus Curiae Supporting Petitioners at 23, *Wygant*, 476 U.S. 267 (No. 84-1340), 1985 WL 669739 at *23.

212. Attachment to Personal Qualifications Statement, Form SF 171, Nov. 15, 1985, Folder "Alito, Jr., Samuel A.," Box OA 18576, Presidential Personnel Office of: Records Files, Ronald Reagan Library, Simi Valley, CA.

213. Memorandum from John Roberts to Attorney General, Dec. 2, 1981, p.2, Folder "Affirmative Action," Box 112 (Entry 42 P), Subject Files of Special Assistant John G. Roberts, 1981-92, Records of the Office of the Attorney General, RG 60, National Archives, College Park, MD.

the court that July and Sandra Day O'Connor had filled the vacancy that September.[214]

To be sure, Roberts and Alito, young lawyers at the time, may have mostly wanted to write what they thought their superiors wanted to read. In any event, I have found no evidence to suggest that they, or any other member of the *Ricci* majority, prefer *Weber* and *Johnson* in particular or voluntary affirmative action plans in general.

CONCLUSION

This paper offered and applied a method for detecting stealth precedent erosion to show that in *Ricci*, the Court likely wrote the majority opinion in such a way as to erode *Weber* and *Johnson* by stealth to make it easier to later expressly limit the circumstances under which Title VII permits voluntary affirmative action plans. In so doing, the paper has identified an important development in how courts treat such plans. The paper has also contributed to research on the stare-decisis norm by offering a method for identifying stealth precedent erosion.

Once we know when stealth precedent erosion has occurred, we can test hypotheses as to why courts adopt that strategy over other ways to handle precedent. In some cases, the reason may be unique to the case. Perhaps the *Ricci* Court eroded *Weber* and *Johnson* by stealth to avoid sending a strong hostile signal during the first year of the first black President's administration and during the then-pending nomination to the Supreme Court of Sonia Sotomayor, who had been on the Second Circuit panel that affirmed the district court's judgment in *Ricci*.[215]

However, stealth precedent erosion may also occur more often in, for example, statutory cases where a judge in the majority with a pivotal vote believes that Congress will react negatively to an express diminution of precedent *x* and is likely to supplant that decision by legislation.[216] Moreover, intermediate appellate courts may erode precedent by stealth more often. For example, in federal courts of appeal, a panel majority may prefer to ignore contrary circuit precedent rather than confront it, particularly in circuits that rarely grant petitions for en banc rehearing. These and other hypotheses must wait to be tested until we learn, with the help of the method presented here, when, where, and how often stealth precedent erosion has occurred.

214. *Retirement of Justice Stewart*, 453 UNITED STATES REPORTS vii (1983); *Appointment of Justice O'Connor*, 453 UNITED STATES REPORTS xi (1983).

215. Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008).

216. *Cf.* William N. Eskridge, Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613, 651-52 (1991) (suggesting prospect of legislative override as explanation for Burger Court's less conservative decisions in statutory civil rights cases as compared to constitutional civil rights cases).

APPENDIX

Table A1: Race, Score, and Rank of *Ricci* Plaintiffs on Firefighter Exams[217]

Plaintiff	Race	Score	Rank
Lieutenant's Exam			
Greg Boivin	White	90.10	1
Frank Ricci	White	84.10	6
Michael Christoforo	White	82.73	7
Michael Blatchley	White	82.73	8
Steven Durand	White	82.50	9
Mark Vendetto	White	81.93	10
Ryan Divito	White	79.43	11
Christopher Parker	White	76.90	13
Sean Patton	White	73.33	21
Captain's Exam			
Matthew Marcarelli	White	92.81	1
Brian Jooss	White	.	2
Timothy Scanlon	White	85.15	3
William Gambardella	White	80.88	5
Gary Carbone	White	79.68	6
Benjamin Vargas	Hispanic	79.68	7
Edward Riordan	White	76.91	10
John Vendetto	White	76.45	11
Thomas J. Michaels	White	71.35	20

217. Scores and ranks from Plaintiffs' Exhibits, vol. V: Ex. A (Ricci Aff., Dec. 16, 2005, ¶ 21); Ex. B (Blatchley Aff., Nov. 18, 2005, ¶¶ 8-9); Ex. C (Boivin Aff., Nov. 18, 2005, ¶¶ 7-8); Ex. D (Carbone Aff., Nov. 18, 2005, ¶¶ 8-9); Ex. E (Christoforo Aff., Nov. 18, 2005, ¶¶ 10-11); Ex. F (Divito Aff., Nov. 18, 2005, ¶¶ 9-10); Ex. G (Durand Aff., Nov. 18, 2005, ¶¶ 10-11); Ex. H (Gambardella Aff., Nov. 18, 2005, ¶¶ 8-9); Ex. I (Jooss Aff., Dec. 16, 2005, ¶¶ 9-10); Ex. J (Marcarelli Aff., Nov. 23, 2005, ¶ 10 ("total score of 92.81% [sic]"); *id.* ¶ 11; Ex. K (Michaels Aff., Nov. 18, 2005, ¶¶ 8-9); Ex. L (Patton Aff., Nov. 18, 2005, ¶¶ 8-9); Ex. M (Parker Aff., Nov. 18, 2005, ¶ 8) ("total score of 76.90% [sic]"); *id.* ¶ 9; Ex. N (Riordan Aff. Nov. 18, 2005, ¶¶ 8-9); Ex. O (Scanlon Aff., Nov. 23, 2005, ¶¶ 8-9); Ex. P (Vargas Aff., Nov. 18, 2005, ¶¶ 10-11); Ex. Q (John Vendetto Aff., Nov. 18, 2005, ¶ 8) (reporting score "for promotion to the rank of Lieutenant [sic]"); *id.* ¶ 9 (reporting rank on "eligibility list for promotion to the rank of Captain"); Ex. R (Mark Vendetto Aff., Nov. 18, 2005, ¶¶ 8-9); and Ricci JA 184 (Amended Complaint ¶ 25). Race from Ricci JA 180 (Amended Complaint ¶ 13); Ricci JA 204 (Answer & Affirmative Defenses ¶ 13); and Plaintiffs' Exhibits, vol. V, Ex. P, Vargas Aff., Nov. 18, 2005, ¶ 1 ("I am Hispanic."). In his affidavit, Jooss did not report his composite score, only the oral score (80) and written score (95). *See* Ex. I (Jooss Aff., Dec. 16, 2005, ¶ 9).