

What is a Racial Classification? Confusion in the Court: A Short Analysis of Ricci v. Destafano Oral Argument

By Stephen Menendian¹

Background

The city of New Haven, Connecticut refused to certify the results of a firefighter promotion examination over concerns that the city could become liable for violating the anti-discrimination ‘disparate impact’ provision of Title VII of the Civil Rights Act of 1964. A review of the examination not only showed that the test produced extremely disproportionate results by race, but concerns were raised that the test had serious design flaws as a measure of performance qualifications. Based on the examination results, no African Americans would have been eligible for promotion. As a consequence, a group of white firefighters sued the city, arguing that the refusal to certify the test was ‘reverse discrimination’ in violation of the ‘disparate treatment’ provision of Title VII, the Equal Protection Clause of the U.S. Constitution, and other federal laws.

The Federal District Court threw out the lawsuit, and a divided Federal Appeals Court affirmed the decision. The plaintiffs appealed their case to the United States Supreme Court, which agreed to review the decisions below. On Wednesday, April 22, the Supreme Court heard over seventy minutes of oral argument.

The questions raised during oral argument are revealing, not only to the arguments that the Justices are likely to advance in their written opinions, but also for the ways in which they think about the issues and understand legal rules involved. Many of the points made during oral argument are not likely to see print in the more focused and tightly organized written legal opinions. Oral argument can thus provide insight into the ways in which the Justices conceptualize important issues in ways that written legal opinions do not.

Lines of Attack

In the first half of the oral argument, there emerged several distinctive lines of questioning.

The ‘liberal’ justices inquired about the permissibility of decision-making that is race-conscious, but not discriminatory or based upon individual classifications, building upon doctrine established in the concurrence of *Parents Involved In Community Schools v. Seattle School Dist. No. 1 (2007)*. These Justices suggest that the decision by the city of New Haven to reject and discard the promotion test is a valid and sensible response to avoid liability under Title VII’s disparate impact standards.

The ‘conservative’ wing of the Court appears to be launching several possible lines of attack. At one end, Justice Scalia appears to be suggest that there is a fundamental irreconcilability between the disparate treatment provision and disparate impact standards under Title VII. Although the Deputy

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Solicitor General (representing the United States government in the case) suggests that the disparate treatment and disparate impact provisions of Title VII are mutually reinforcing, Justice Scalia suggests that they are “at war with one another.”² Specifically, Justice Scalia, Justice Alito, and Chief Justice Roberts all suggest that even a good faith effort to avoid a disparate impact on the reasonable belief that an exam would violate Title VII would justify and permit intentional discrimination in violation of Title VII. In their view, an employer should not be able to ‘discriminate’ on the grounds that it is complying with the disparate impact provisions of Title VII. In the words of the Chief Justice, even a reasonable belief that a test might be legally invalid under the disparate impact provision of Title VII would be a “blank check to discriminate.”³

At the other end, there is a line of questioning speculating whether racial classifications are at issue. Under established Constitutional law, racial classifications trigger what is known as “strict scrutiny” review, which raises the presumption that the government activity at issue is unconstitutional. This is the most interesting issue, and probably the most decisive, since it is the point about which Justice Kennedy is most concerned. The Petitioners, the white firefighters who brought suit, strenuously argue that this is simply a case of racial classifications, undoubtedly targeting Justice Kennedy. In previous cases, such as the Seattle/Louisville voluntary integration cases and the University of Michigan affirmative action cases, Justice Kennedy has made clear that he rejects individual racial classifications, even where he believes that race-conscious decision making is permissible in pursuit of compelling governmental objectives.

The deputy solicitor general and the counselor for the respondents argued that these are not racial classifications, since no individual was being classified on the basis of race as the grounds for the city’s decision not to use the promotion exam. Rather, race was being used in a general way – in the aggregate rather than at the level of the applicant – to see whether the test had a disparate impact. Furthermore, no promotions were given, so no classifications were used as a criterion for advancement. The policy was, in the view of the lower courts, ‘race-neutral.’

The Chief Justice, and Justice Kennedy in particular, disagreed. In a critical passage, Justice Kennedy stated: “Counsel, it looked at the results, and it classified the successful and unsuccessful applicants by race. And then --- and you want us to say this isn’t race? I have – I have trouble with this argument.”⁴ The Chief Justice took this argument a step further. While the deputy solicitor general explained that no individual was being classified and promoted or not promoted on the basis of their race, the Chief Justice underscored the absence of individual information other than the race of the applicant to suggest that the racial label -- the classification -- was the only concern.⁵ This debate raises the simple question: what is a racial classification?

² P. 29

³ P. 66

⁴ P. 39

⁵ For more on the history of the anti-classification principle, see Reva Siegel, *Equality Talks: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

In previous cases, the anti-classification principle has worked like this: An individual is labeled according to his or her race. That individual is then promoted (or not), admitted (or not), hired (or not), or assigned (or not) according – at least in part – to their racial label. These decisions triggered the anti-classification principle in prior cases. Is it a racial classification to take individual information, remove all identifiable, person-specific information such as names and social security numbers, and then aggregate that information by race, which may then be used for sorting or promoting, or analysis in pursuit of those objectives? The Chief Justice and Justice Kennedy are intimating that it may be so, if the aggregate data is drawn from individual classifications, even if the decisions regarding that data are not directly tied to any individual.

Or is it a racial classification only when the government labels a person of a particular race directly as the basis for sorting or promoting? This is the traditional understanding of racial classifications. Although it is now the leading principle in this area of the law, it is not clear how we can apply the anti-classification principle at the margin. What does it mean to classify on the basis of race? Does it literally mean any racial label, even if it is shorn of the individual, is impermissible as a criterion?

The argument that Justice Kennedy is making, that the aggregation of many individual classifications is still an impermissible racial classification, calls into question the safe harbor provision of Justice Kennedy's *Parents Involved* concurrence, which is quoted several times in oral argument. In that opinion, Justice Kennedy explained that "strategic site selection of new schools," and "drawing attendance zones with general recognition of the demographics of neighborhoods" were two mechanisms that do not classify on the basis of race and would therefore not even trigger strict scrutiny review.⁶ How can a school board choose a racially integrative school site if it can't label and aggregate students or families in the surrounding neighborhoods by race, even if the board is not assigning them or sorting them on the basis of their race?

In short, the Chief Justice and Justice Kennedy may be hinting at nothing less than a transformation of the principle of racial classifications into something that would render it practically infeasible to pursue a race-conscious purpose and still utilize race data. It's not simply individual classifications that are problematic or called into question as a criterion; it's the aggregation of such information, shorn of all other individual information, as the criterion, since that aggregate data, whether it is being used as a criterion or not, is merely the sum of many individual classifications. This would call into question the holding power of Justice Kennedy's opinion in *Parents Involved*.

The good news is that the Justices seem to draw back from this position somewhat. The Chief Justice abruptly switches his line of questioning, and begins to investigate the line between 'racial discrimination' and permissible 'race-conscious action.' Critically, the Chief Justice explains, "I thought both the plurality and the concurrence in *Parents Involved* accepted the fact that race-conscious action such as school siting or drawing district lines is – is okay, but discriminating in particular assignments is

⁶ *Parents Involved*, 127 S. Ct. at 2792. (J. Kennedy, concurring.)

not.”⁷ This statement should be warm comfort to those who are now revising student assignment plans using such mechanisms, and makes cases like the recently decided *Berkeley* decision look much easier.

But it also speaks to the confusion in the Chief Justice’s own jurisprudence. The anti-classification principle has always been an incomplete and overbroad principle. It has been incomplete because it has previously not been the mere fact of classification which has triggered strict scrutiny, but the use of that classification as a criterion for some other end via promotion, hiring, contracting, etc. It is overbroad because racial classifications, defined simply as “individuals” being “labeled” as a particular race would suggest that the mere collection of racial data itself is a racial classification, and presumably impermissible. What would that mean for twenty-two decades of the census? The Chief Justice and Justice Kennedy stumble into this paradox mid-way through oral argument, and the Chief Justice, at least, appears to make a hasty retreat. It remains to be seen whether Justice Kennedy will as well.

The Future of Disparate Impact Litigation

Ultimately, it appears likely that the Supreme Court will reverse the decisions below either on the grounds that the city engaged in impermissible and unjustifiable discrimination against the white firefighters or that this was an impermissible racial classification which does not survive strict scrutiny. In either case, the basic substance of Title VII’s disparate impact law remains intact – that, in order to have a qualifications test for a job, an employer must make sure the test is job related and consistent with a business necessity or that the discriminated against employees offered a less discriminatory test and the employer refused to adopt it. In the future, cities such as New Haven must better assess their promotion procedures for potential disparate impact before administering them rather than find themselves in the situation of facing a disparate impact suit or a disparate treatment/equal protection discrimination claim. Alternatively, Justice Scalia noted the possibility that an employer in the position of New Haven must have more substantial evidence of disparate impact beyond racial imbalance in the results.⁸

However, the more critical and far-reaching question is whether the Court will go so far as to overrule the disparate impact standard altogether, either as applied or on its face. As noted in oral argument, the Supreme Court created disparate impact discrimination in *Griggs v. Duke Power Co.*⁹ and Congress codified the decision in Section 703(K) of Title VII. Oral argument demonstrated at least three Justices were hostile to disparate impact, including the swing vote, Justice Kennedy, who describes the disparate impact and disparate treatment standards as “two tracks on the audio that don’t quite fit.”¹⁰ Even if the Court does not reach the question of the constitutionality of the disparate impact standard, as it should not, it may very well say that raising the disparate impact standard as a defense is no defense to a constitutional claim. It’s unclear what the practical effect would be on disparate impact jurisprudence.

A State of Confusion

⁷ P. 54

⁸ P. 53

⁹ 401 U.S. 424 (1971),

¹⁰ P. 52

To an unusual degree oral argument in *Ricci v. Destafano* was a confusing mess. One law professor explained:

*One of the reasons that this case is so challenging and so divisive is that this case seems to be all about the framing of the issue. It is very difficult to separate that framing from the factual question of the parties' subjective intent or the credibility question of whether to believe their assertions. The way that the facts and law get merged together make for a doctrinal mess. It seems like people talk past each other constantly.*¹¹

It's not only that the Justices were talking past each other, or even that they were frequently talking over each other. The usual mechanisms for oral communication, the shorthand, contextual ways in which human beings tend to speak and communicate in conversation, only multiplied the confusion here. Loaded terms of art, conflating and confusing references to statutory and constitutional doctrines, each with their own branching lines of inquiry and analysis, were jumbled together. Multiple hypotheticals proposed by various justices were overlaid, one over the other, and dizzyingly cross-referenced even when differences were being variously elicited, ignored, and misinterpreted. Often in this argument, the Justices and lawyers alike became tripped up in their own words. A single misplaced word or misspoken syllable changed the meaning of an entire line of questioning.

As it has in the past, it will undoubtedly fall to Justice Kennedy to figure out the contours of his understanding of the racial classification principle and reconcile his belief that government may pursue race-conscious objectives in the name of justice and equality with his concern that individual dignity is assaulted when the government applies a racial label. If racial classifications exist even in the use of aggregate data, then it could herald a change in the meaning of that principle. It remains to be seen how Justice Kennedy will treat this issue. Although Justice Kennedy may hear the dissonance of two tracks on one audio, the only sound that the rest of us will be tuning into is the voice of 'J. Kennedy, concurring.'

¹¹ Workplace Prof Blog, at http://lawprofessors.typepad.com/laborprof_blog/2009/04/analysis-of-ricci-oral-argument.html