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Are All Civil Rights Special Privileges Now?

Assessing the damage done by the Supreme Court in the New Haven firefighters case.

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This Monday, in the New Haven, Conn., firefighters case *Ricci v. DeStefano*, the Supreme Court held that it's unlawful race discrimination for an employer to refuse to act on the results of a promotion exam because the test eliminated a disproportionate number of minority candidates (in the New Haven case, all the black firefighters up for promotion). I've written before that this argument threatens to burn down civil rights law. Now that the fuse has been lit, I'm writing to explain just how far the fire could spread.

The plaintiffs in *Ricci* were undoubtedly sympathetic: hardworking public servants—17 of them white, one Hispanic—who expected that the exam they studied for and did well on would determine their eligibility for moving up the ranks. But their legal argument is the latest in a long-standing campaign to turn civil rights laws against themselves. There's a striking progression in the attacks on civil rights. In the early 1970s, affirmative action was widely considered to be a logical extension of civil rights principles: Even President Nixon—a man not known for his enlightened racial attitudes—supported it. But by the end of the decade, affirmative action was under attack as reverse discrimination. And now we see the next step in the march against civil rights with the part of federal civil rights law—Title VII—called "disparate impact" that prohibits employers from using promotional or hiring procedures that screen out minorities unless they can prove that the procedure is closely job-related.

Until this Monday, lawyers and judges thought of disparate impact law as a logical extension of the law against intentional discrimination: The premise of the discriminatory impact prohibition is that an employment practice that unnecessarily screens underrepresented groups from the work force is, in effect, just as discriminatory as a "whites only" sign. As I've argued, plaintiff Frank Ricci's case was a loser under established law until this new Supreme Court ruling, which is why the district court was right to dismiss it on summary judgment and why the U.S. Court of Appeals for the 2nd Circuit Court was right to reject Ricci's appeal. Now the Supreme Court has changed the law, recasting disparate impact law as a kind of affirmative action—an unfair racial preference—rather than an equal-opportunity law.

In the time-honored tradition of the Supreme Court, Justice Kennedy's majority opinion in *Ricci* is frustratingly ambiguous. Some of his language suggests that the holding is limited to cases in which an employer tosses out the results of a test after it has been administered. But that's not clear—the logic of *Ricci* would seem to apply more broadly. Why would it be discriminatory to

discard the results of an employment exam in order to avoid a discriminatory racial impact but not discriminatory to choose one exam over another in order to avoid such a racial impact? If an employer chooses Exam A instead of Exam B because Exam A is more likely to increase the number of successful minority applicants, the members of the disfavored racial groups may well have a reverse discrimination case similar to Frank Ricci's. Since choosing the exam with the smallest racial impact is exactly what disparate impact law requires of employers, it's possible that *any* application of disparate impact law is discriminatory. Indeed, in his concurring opinion in *Ricci*, Justice Scalia looks forward to the day that the court will decide whether the disparate impact prohibition of Title VII is unconstitutional race discrimination under the equal protection clause of the 14th Amendment.

And the fall of this part of Title VII could be just the beginning. Because the Supreme Court typically interprets Title VII's prohibition of race discrimination to match the 14th Amendment's similar prohibition of racial classifications and vice versa, *Ricci* puts a wide range of race-conscious policies under a legal cloud. Consider for instance the vaunted "Texas 10 percent" admission policy, developed to replace the University of Texas' affirmative action policy after it was held unconstitutional. The university now admits any student in the top 10 percent of his or her public high-school class, and because so many of the public schools in Texas are racially segregated, this guarantees a racially diverse student body. Opponents of race-conscious affirmative action have pointed to this policy as an example of a viable, race-neutral alternative. But no one denies that the motivation for dropping the traditional admissions criteria in favor of the 10 percent plan is to achieve a better racial mix. Extending the logic of *Ricci*, this looks like impermissible race discrimination against the students who would have been admitted under the old criteria, just as dropping the firefighter promotion exam was impermissible race discrimination against the white firefighters who would have been promoted. And why stop there? Even recruitment efforts aimed at underrepresented minorities are designed to increase the representation of those groups in work forces and entering classes with a limited number of openings. If these outreach efforts are successful, some minorities will necessarily displace some whites who would otherwise have been hired or admitted. Are those efforts discriminatory, too?

One could say that *any* effort to combat racial inequality is itself race conscious and therefore discriminatory. So far, no one has been bold enough to make this argument against laws prohibiting intentional discrimination on the basis of race or sex, but opponents of gay rights have made just such an argument, attacking laws that prohibit discrimination on the basis of sexual orientation as "special rights." In 1996, in *Romer v. Evans* the Supreme Court invalidated a state constitutional amendment in Colorado that eliminated civil rights protections on the basis of sexual orientation. Justice Scalia, in dissent, described this amendment as "merely prohibiting … *special protections*," insisting that the basic civil rights banned by Amendment 2 gave gay men, lesbians, and bisexuals "*favored status* because of their homosexual conduct." (My italics.)

Of course, for the gay person looking for a job or an apartment and facing bias at every turn, basic protection against discrimination doesn't seem like favoritism. But taken out of their social and historical context, all civil rights can be made to look like special rights. Civil rights laws aren't just derived from abstract principles of justice—they also reflect a policy decision about how to best direct the scarce resources that must be dedicated to the enforcement of the law and the litigation of disputes. Federal law doesn't demand that employers treat all of their employees fairly

in every respect; it prohibits only unfairness that's based on race, color, sex, religion, national origin, age, and disability. (I hope we'll add sexual orientation to this list soon.) No one doubts that civil rights laws were intended to, and do in fact, disproportionately benefit those groups most likely to suffer from the prohibited types of discrimination: racial minorities, women, religious minorities. So because racial and sexual discrimination are illegal, but discrimination against people with abrasive personalities or antediluvian political views is not, you could argue that civil rights laws benefit people like Sonia Sotomayor at the expense of people like Antonin Scalia.

So is it discriminatory to prohibit discrimination? Of course not. This country has a long and ugly history of specific types of discrimination, such as discrimination on the basis of race. Although things have changed for the better, racism isn't a thing of the past yet. And the continuing effects of past racism still limit opportunities for many racial minorities today. Addressing these injustices isn't doing anyone a special favor—it's simply doing justice. The majority in *Ricci* ignored the social and historical context that defines civil rights law, just as it ignored more than three decades of judicial precedent and the explicit endorsement of Congress, which wrote disparate impact law into Title VII in 1991. By means of shameless judicial activism, it turned the civil rights tradition against itself and against social justice. The logic that condemned New Haven's awkward but defensible attempt to avoid the discriminatory effects of its promotion exam can be extended to condemn any attempt to prevent any form of discrimination. It will take only a sympathetic plaintiff, a hapless defendant, some bad facts, and some clever lawyers to make even the most well-established civil right look like a special privilege.

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