

FAIRNESS UNDER FIRE

RICCI V. DESTEFANO AND THE RACIAL LEGITIMACY GAP

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EXECUTIVE SUMMARY

This paper analyzes *Ricci v. DeStefano*, a 2009 Supreme Court race-discrimination case concerning the New Haven Fire Department, from the perspective of political legitimacy. Legitimacy refers to the populace's respect for and compliance with authority; it is the glue that holds together the rulers and the ruled. *Ricci v. DeStefano* stoked racially-charged disputes about fairness—and therefore New Haven's legitimacy. The case centered on two promotional tests in which white firefighters scored significantly better than minorities. In the face of sharp racial tension, how could New Haven best uphold its legitimacy? This question matters immensely for an American society increasingly divided on questions of affirmative action, diversity, and institutional racism. What insight does *Ricci* provide for civil societies attempting to ensure equality of opportunity for all races without igniting racial tensions? What does “fair” look like?

This paper applies the concept of legitimacy to three elements in the *Ricci* narrative: whether the tests themselves were valid forms of assessment, whether the City's decision to discard the tests was appropriate, and whether the racially skewed results of the test would have degraded New Haven's legitimacy. Employing court and municipal records and first-hand interviews, I conclude that the tests, particularly the written portions, were of dubious fairness and that representative institutions and equality of opportunity are important to promoting social cohesion and civic participation in a diverse city; however, I find that New Haven's *ex post facto* decision to discard the tests for overtly racial reasons violated tenets of legitimacy. Two forms of legitimacy—individual- and group-oriented definitions—were therefore at odds with each other in *Ricci*.

To reconcile these two interests, governments should pursue proactive, race-neutral measures to increase racial diversity, such as, in the case of fire departments, outreach and training programs as well as alternatives to written exams. *Ricci*, however, exposes a more fundamental divide about legitimacy. I argue that the debate about fairness in *Ricci* reflects a racial legitimacy gap rooted in dueling historical interpretations. One's view of the fairness of the City's intervention in *Ricci* depended upon one's conception of the relevance of past injustices to the present. *Ricci* demonstrates that communities grappling with questions of affirmative action and diversity must bridge gulfs in historical worldviews if governments are to preserve their moral authority.

“Nobody wants to go through what we as a department have been through in the past. Everybody wants a fair shake.”

*Patrick Egan
President, New Haven Firefighters Union
Feb. 5, 2004*

FAIRNESS UNDER FIRE:
RICCI V. DESTEFANO AND THE RACIAL LEGITIMACY GAP

INTRODUCTION: “NO MATTER WHAT YOU DO”

On the evening of January 22, 2004 in a meeting room in New Haven’s Hall of Records, Corporation Counsel Thomas Ude Jr. delivered a grim legal opinion to an unassuming panel of four bureaucrats: “No matter what you do, you will get sued.”¹

Most meetings of the Civil Service Board are far less dramatic. The four civil service commissioners convened to vote on the certification of two promotional lists for upper-level positions in the New Haven Fire Department. Nearly 120 firefighters had taken written and oral assessments two months prior and now awaited word on their scores. The Board’s task is typically perfunctory; New Haven’s current human resources director could not recall another time when the Board rejected a test.² But in early 2004, this formerly mundane bit of bureaucracy devolved into fierce debates about fairness, racial justice, and merit. If affirmed, the test results would lead, at least initially, to the promotion of none of the 27 black firefighters who took the tests and who stood ready to sue the City for discrimination. But if New Haven cast aside the results, the largely white firefighters in line for promotions vowed to pursue legal action of their own. As debate raged about the tests’ validity and the City’s obligation to uphold the results, the Board faced an unenviable task. Lawsuits loomed around every corner.

No one, however, anticipated at that early date that the litigation that ultimately emerged from the Board’s decision would wind its way onto the docket of the United States Supreme Court. The case, *Ricci v. DeStefano*, became a major national story; cable news hosts pounced on the

¹ Thomas Ude Jr., interview with author, Oct. 23, 2019; recounted by Karen Lee Torre, in *Verbatim Proceedings, City of New Haven Civil Service Board In Re: Fire Captain and Lieutenant Promotional Examinations*, Feb. 5, 2004, 22. The epigraph on the preceding page is quoted from *ibid.*, 12.

² Stephen Librandi, interview with author, Oct. 28, 2019.

drama and symbolism of the “New Haven Firefighter Case.”³ In a controversial 5–4 ruling, the Court ultimately sided with the plaintiffs, a group of mostly white firefighters, finding New Haven’s refusal to certify the tests unlawful. *Ricci* appeared to herald a new direction in civil rights and employment law. It soon became a point of contention during the confirmation hearings for Supreme Court Justice Sonia Sotomayor, who heard the case as a judge in the Second Circuit Court of Appeals. But aside from its landmark national status, *Ricci* exposed wounds in New Haven’s civil society that five robed jurists could not heal. The firefighter case ignited a long-simmering divide over political legitimacy with stark implications for America’s multiracial society.

Political legitimacy functions as the glue that binds citizens and governments together in the social contract; it is the primary requisite for any functioning civil society. Citizens voluntarily comply with the rules of legitimate institutions, whereas illegitimate institutions rely on brute force alone to enforce the law. Legitimacy hinges on public perceptions of the government’s moral authority. It entails an implicit agreement: if authorities operate neutrally and transparently, citizens respect the law, even if particular outcomes are personally unfavorable. *Ricci*, however, threatened to upend that compact.⁴ Beyond its legal significance, the case created an imbroglio that animated the core principles of legitimacy. The burning questions facing the City of New Haven and its Civil Service Board revolved around the loaded concept of “fairness.” Was the promotional test fair? Would it be fair for the Board to intervene and block the promotions? In a diverse city, does fairness involve racial balancing? The impending lawsuits that Ude foresaw were anything but frivolous; New Haven’s moral authority was at stake. How could the City maintain its own legitimacy?

³ For example, see “Obama and the CIA; A Mortal Threat to U.S.; Reverse Discrimination,” *Lou Dobbs Tonight*, transcript, aired Apr. 22, 2009, *CNN*, <http://transcripts.cnn.com/TRANSCRIPTS/0904/22/ldt.01.html>.

⁴ For a more thorough definition of legitimacy and a review of literature on the subject, see Section I below, pp. 6–16.

Scholarly and popular discussion of *Ricci* have thus far neglected, with some exceptions, New Haven's legitimacy predicament. Legal commentators tend instead to categorize the decision as part of the rightward tilt of the John Roberts-led Supreme Court, which has overturned and eroded civil rights provisions.⁵ The case deserves attention from the perspective of legitimacy because it illuminates the charged connection between race, opportunity, and merit that extends far beyond the confines of employment law. Contemporary political discourse about affirmative action and diversity implicates the concern at the heart of *Ricci*. Americans are debating, now as ever, how to live up to their creed of "liberty and justice for all." What does "fair" look like? The firefighter case put competing answers to this question on a national stage.

Ricci therefore matters to New Haven, and indeed to American society writ large, not because it triggered internecine warfare in the City's Fire Department or even because it appeared to mark a pivotal turn in civil rights jurisprudence, but because it provides insight into how a civil society ought to navigate divisive social and racial issues without jeopardizing its legitimacy. This paper aims to grapple with, and rescue meaning from, the fraught relationship between race and legitimacy that smoldered underneath the disputes of *Ricci v. DeStefano*.

In the first section of this paper, I survey the robust literature on political and institutional legitimacy in order to reach a working definition for the purpose of this analysis. In the second section, I introduce the facts and legal questions presented in *Ricci* and raise three elements of the case that concerned legitimacy. In the third section, I apply my definition of legitimacy to the three dilemmas in *Ricci*, examining the competing claims about the Civil Service Board's decision not

⁵ One notable example of this trend is *Shelby County v. Holder*, 570 U.S. 529 (2013), which invalidated key portions of the Voting Rights Act of 1965. See generally John Blake, "Has the Roberts Court Placed Landmark 1964 Civil Rights Law on a Hit List?" *CNN*, Apr. 10, 2014, <https://www.cnn.com/2014/04/10/us/roberts-court-civil-rights-law/index.html>. For further discussion of legal scholars' interpretations of *Ricci*, see Section II below, Note 51.

to certify the promotional lists. Finally, I conclude with reflections on how *Ricci* clarifies racial conflicts about legitimacy and its ramifications for civil society today.

What emerges from New Haven's quandary in *Ricci*, I argue, are two antithetical conceptions of legitimacy. The City's ultimate decision to reject the promotional lists on account of their racial imbalance enhanced its legitimacy for some residents and undermined it for others. In seeking to remedy a potentially illegitimate, unfair test, the City opened itself up to charges of racial favoritism. Citizens' legitimate expectation of equality of opportunity clashed with their legitimate expectation not to be judged on the sole, crude basis of race.⁶ In short, what seemed fair for individuals fundamentally differed from what seemed fair for groups. The definition of legitimacy, I find, entails this tension between ensuring neutral individual treatment and averting race- or class-based stratification that undermines civic engagement and belonging. In New Haven, this tension fueled racial strife and distrust within the Fire Department and the City, adding greater stress to the community relationships and cohesion that legitimacy is supposed to strengthen.

Unpeeling the layers of *Ricci* helps to illuminate the extent to which Americans can ever reconcile these conflicting ideas of legitimacy. By pinpointing the moments in which the City compromised its political legitimacy, this analysis clarifies ways that cities can at once facilitate pathways to success for all races while cultivating faith in the transparency and neutrality of the procedures, whether in civil service or other realms. *Ricci* therefore provides lessons in how to avert or at least minimize the destructive outcomes that New Haven experienced. But the case also reveals a fundamental, philosophical gulf rooted in Americans' diverging perspectives on their

⁶ The language of "legitimate expectations" is borrowed from the Supreme Court's majority opinion in *Ricci*; as will be discussed below, Justice Kennedy wrote that employees have a "legitimate expectation not to be judged on the basis of race." Thus, in perhaps one of the most important phrases in the opinion, Kennedy invoked the concept of legitimacy. *Ricci v. DeStefano*, 557 U.S. 557 (2009), 585.

country's racial history. Dueling notions of the past's influence on the present produce a legitimacy gap that divides America from the Supreme Court down to local firehouses.

Tom Ude warned on January 22, 2004 of a legal morass. Ten years after the Supreme Court's decision, the litigation has finally subsided. But *Ricci* remains as relevant as ever for a polarized American society reckoning with race and its own history. When viewed through the lens of legitimacy, *Ricci* exposes an underappreciated connection between citizens' historical perspectives and their ideas about fairness, that, if understood and channeled, can help governments navigate fraught debates about race and justice while preserving their moral authority.

I. CONCEPTIONS OF LEGITIMACY

Legitimacy is as vague as it is important. To some extent, it may fall under former Supreme Court Justice Potter Stewart's definition for obscenity: "I know it when I see it."⁷ Legitimacy's inherent subjectivity accounts for the competing views on New Haven's legitimacy in *Ricci* and elevates the need for a thorough, nuanced definition of the concept. Scholars from a host of fields have grappled with the question: political theorists, sociologists, psychologists, international relations experts, criminologists, and legal scholars. Uncovering the layers and tensions within definitions of legitimacy elucidates the root of the conflict in *Ricci*.

Any discussion of institutional and political legitimacy must start with Max Weber. In 1922, editors posthumously published the German economist and sociologist's essay outlining "Three Types of Legitimate Rule." Legitimacy, Weber argued, facilitates popular compliance with an authority's "domination." People accept the commands of a legitimate ruler or governing

⁷ *Jacobellis v. Ohio*, 378 U.S. 184 (1964), 197.

structure. Weber outlined three sources of legitimation: the law, tradition, and charisma. Whether derived from a written system of rules and procedures, a dynastic cycle of inheritance, or the unique, mythical leadership qualities of one individual, political systems with legitimacy enjoy a stable relationship between the governed and the governors. To Weber, legitimacy meant that the ruled acknowledge and accept their rulers.⁸

From the broadest perspective, then, legitimacy is “the right to rule.” As one political theorist synthesized, “a legitimate state has the right to rule and an illegitimate state does not.”⁹ In the United States, Weber’s legal form of legitimacy predominates. Political scientist Robert Dahl underscored the legitimizing influence of the democratic system of representation: the supporters of a losing candidate tend to accept his or her defeat, recognizing that the political process promises them a fair opportunity to win the next time. Therefore, a legitimate democracy must champion the rights that ensure fair and open competition, such as freedom of expression and organization and the right to run for office.¹⁰ Yet other schools of thought stress the “output” side as much as the “input” side of the political system, arguing that legitimacy hinges not only on fair processes to elect candidates, but on elected governments effectively producing results that citizens desire.¹¹ Democracy does not guarantee legitimacy.

If legitimacy is “the right to rule,” it also encompasses the reverse: the consent to be ruled. Citizens voluntarily comply with a legitimate government’s laws and norms. Many political scientists and theorists employ this citizen-centered definition of legitimacy, rooted in the belief that “a legitimate authority is one that is *regarded by people* as entitled to have its decisions and

⁸ Max Weber, “The Three Pure Types of Legitimate Rule,” in Sam Whimster, ed., *The Essential Weber: A Reader* (London: Routledge, 2004): 133–45.

⁹ N. P. Adams, “Institutional Legitimacy,” *The Journal of Political Philosophy* 26, No. 1 (2018): 86.

¹⁰ Bo Rothstein, “Creating Political Legitimacy: Electoral Democracy Versus Quality of Government,” *American Behavioral Scientist* 53, No. 3 (Nov. 2009), 313; Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989): 106–18.

¹¹ Rothstein, “Creating Political Legitimacy,” 312.

rules accepted and followed by others.”¹² Crucially, then, legitimacy arises not from any objective set of policies or practices pursued by a government or institution; it is inherently dependent on the perceptions of the citizenry. As law professor and scholar of legitimacy Tom Tyler clarifies, legitimacy is “the *belief* that authorities, institutions, and social arrangements are appropriate, proper, and just.”¹³ It is distinct, therefore, from lawfulness. As criminal justice scholars have noted, much police conduct is “very likely lawful” and yet perceived by citizens as “deeply illegitimate.”¹⁴ Institutional adherence to the law does not ensure that citizens *perceive* such conduct to be “appropriate, proper, and just.” Of course, blatantly unlawful conduct on the part of an institution would do much to discredit it from a legitimacy perspective, but the overlap is not complete. This blurred line between lawfulness and legitimacy begins to explain the complexities of the *Ricci* case; while both sides made legal arguments, they also appealed to notions of legitimacy. Moreover, the Supreme Court’s final decision on the unlawfulness of New Haven’s conduct did not by any means decide the City’s legitimacy. Five Supreme Court justices do not have the power to shape individual citizens’ perceptions.

Legitimacy’s basic definition as voluntary compliance to a body’s rules explains its supreme importance to the functioning of governance. In the absence of legitimate power, authorities must resort to coercive power to physically enforce the law. This is, in Tyler’s words,

¹² Emphasis added. Wesley Skogan and Kathleen Frydl, eds., *Fairness and Effectiveness in Policing: The Evidence* (Washington, D.C.: National Academies Press, 2004), 296–97; Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton, N.J.: Princeton University Press, 2008), 30; Thomas M. Franck, “The Emerging Right to Democratic Governance,” *The American Journal of International Law* 86, No. 1 (Jan. 1992): 50; Tracey L. Meares, “The Legitimacy of Police Among Young African-American Men,” Barrock Lecture on Criminal Law, *Marquette Law Review* 92, No. 4 (Summer 2009): 656–57; Jennifer Wallner, “Legitimacy and Public Policy: Seeing Beyond Effectiveness, Efficiency, and Performance,” *Policy Studies Journal* 36, No. 3 (Aug. 2008): 423.

¹³ Tom R. Tyler, “Psychological Perspectives on Legitimacy and Legitimation,” *Annual Review of Psychology* 57 (2006): 376. Emphasis added.

¹⁴ Tracey L. Meares and Peter Neyroud, *Rightful Policing*, New Perspectives in Policing Bulletin (Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, 2015): 7.

“unwieldy, costly, and time-consuming,” and, further, it fails to achieve compliance when the mechanism of coercion is absent. When physical force is the only bulwark against complete disorder, civil society teeters on the verge of collapse. Citizens lose out under a regime of pure coercive power: states that must devote substantial resources to coercive power lose flexibility to act in the long-term interests of the citizens. The need to secure public order overtakes all other considerations. Governance works better and achieves more under the blanket of legitimacy. In times of crisis, legitimacy offers institutions, as Tyler notes, a “reservoir of support.” And, as James Gibson adds, “[l]egitimacy is an endorphin of the democratic body politic; it is the substance that oils the machinery of democracy, reducing the friction that inevitably arises when people are not able to get everything they want from politics. Legitimacy is loyalty.”¹⁵ Politics always creates winners and losers; legitimacy facilitates acceptance of losses without the need for physical enforcement. In a legitimate state, the mice behave even when the cat is away.

Moreover, legitimacy is an essential foundation for developing a strong sense of community. Research has found that under legitimate institutions, citizens “identify more with their communities and engage in them socially by trusting neighbors, politically by voting, and economically by shopping and going to entertainment venues within that community.”¹⁶ Legitimacy boosts all aspects of civic life, from social interactions to local commerce and political engagement. When people trust their rulers, they become more invested in upholding their end of

¹⁵ Tom R. Tyler and E. Allan Lind, “A Relational Model of Authority in Groups,” *Advances in Experimental Social Psychology* 25 (Nov. 1992): 118; Tyler, “Psychological Perspectives,” 376, 377–78, 381; John Horton, “Political Legitimacy, Justice and Consent,” *Critical Review of International Social and Political Philosophy* 15, No. 2 (2012): 131; Skogan and Frydl, *Fairness and Effectiveness in Policing*, 294; Dane Imerman, “Contested Legitimacy and Institutional Change: Unpacking the Dynamics of Institutional Legitimacy,” *International Studies Review* 20, No. 1 (Mar. 2018): 79; James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004), 289.

¹⁶ Meares and Neyroud, *Rightful Policing*, 11.

the social contract. The spirit of trust and fairness enables vibrant civic life as well as effective governance. Rich social networks sustain successful communities. In short, legitimacy matters.

How, then, do institutions cultivate it? While scholars offer different prescriptions, the available research points toward two important dimensions of factors that promote legitimacy: those that function on the individual level and group levels. A legitimate institution treats any given individual fairly and, simultaneously, supports the social health of the community of which that individual is a part. While these two dimensions are related, it is helpful to separate them to capture legitimacy's multifaceted relationship to the vibrancy of a society.

On the individual dimension, the research shows that people tend to comply with the law when they are treated fairly. Importantly, research has found that fair treatment—or “procedural justice”—matters much more than the outcome of an encounter with a figure of authority such as a police officer for an individual's evaluation of legitimacy. Process is paramount. As Tom Tyler and Allan Lind conclude, if people believe that the procedures used to make a decision are fair, they are much likelier to comply with the decision no matter its personal cost; moreover, those individuals will maintain stronger relationships with each other. While “fair treatment” seems impossibly vague, Tyler and Lind outline four central components of procedures that lead to the perception of fairness: *participation*, *neutrality*, *quality of interpersonal treatment*, and *trust of decision makers*. Figures of authority increase their legitimacy when they involve the individual rather than making an authoritative decree; it matters to people to have a chance to explain themselves and express their perspective. Meanwhile, “neutral” decisions are more legitimate; individuals will lose respect for the authority if it is evident that subjective or biased factors, rather than facts, are playing a role in the decision.¹⁷ Unsurprisingly, for something as subjective as the

¹⁷ There is now significant debate about whether any decision can be truly “objective” or “neutral.” Research on implicit biases has complicated the idea that human decision-makers can fully divorce themselves from certain

perception of “fairness,” the interaction preceding the execution of authority matters enormously; authorities inculcate legitimacy by treating people with dignity and respect. Lastly, people have more faith in the legitimacy of the institution if they trust its intentions—if they believe the institution genuinely cares about their well-being.¹⁸ Each of these factors stems primarily from an *individual’s* interaction with an authority; what matters is how that individual feels he or she was *personally* treated. If someone believes that the procedures used to reach a decision affecting them were neutral and fair, and they were treated decently and given a chance to explain themselves, then that person will likely adhere to the decision and grant it legitimacy even if it disadvantages that person.

Procedural justice does more than satisfy the individual’s desire to be treated fairly; it cultivates a sense of group membership and validation. Tyler and Lind capture this group dynamic with the term “*standing*.” They start with the premise that belonging to groups is supremely important to people, as groups provide validation to an individual’s self-identity. As such, individuals are “very attentive to signs and symbols that communicate information about their status within their groups.” Interactions with institutions are one such source of information; people will perceive their treatment by an institution such as the police as a reflection of their standing within the larger group. Humiliating or rude treatment implies low status or exclusion

predilections. See, for instance, Keith Payne, Laura Niemi, and John M. Doris, “How to Think about ‘Implicit Bias,’” *Scientific American*, Mar. 27, 2018, <https://www.scientificamerican.com/article/how-to-think-about-implicit-bias/>.

However, neutrality still deserves consideration as a facet of legitimacy, given the importance of appearances and perceptions. When citizens *perceive* that a government has some ulterior motive or arbitrary consideration, they lose faith in the government; such *explicit* biases are perhaps more dangerous to legitimacy than the implicit biases that plague all people. The tension between seemingly overt versus hidden “biases” factored into the *Ricci* dispute.

¹⁸ Tracey L. Meares, “Policing and Procedural Justice: Shaping Citizens’ Identities to Increase Democratic Participation,” *Northwestern University Law Review* 111, No. 6 (2017): 1531; Skogan and Frydl, *Fairness and Effectiveness of Policing*, 304; Tyler and Lind, “Relational Model of Authority,” 121, 137, 140, 142, 162–63; Meares, “The Legitimacy of Police,” 658.

from the group, which is detrimental to that person's identity and sense of belonging.¹⁹ Furthermore, as Tracey Meares argues, the perception of low standing reflects not just one's personal lack of status, but often the collective inferior position of a particular group or sub-group. She applies the concept of the "hidden curriculum"—those messages that people absorb implicitly from interactions with authority figures and peers—to her study of legitimacy in policing, suggesting that policing strategies often convey a hidden curriculum that "sends certain citizens clear signals that they are members of a special, dangerous and undesirable class."²⁰ Procedural unfairness—such as police officers enforcing certain laws disproportionately in minority neighborhoods, or behaving more rudely toward minority residents—communicates an implicit but clear statement that the institution values some groups of citizens more than others. If Tyler and Lind are right that individuals validate their personal identities on the basis of their group membership, then an insidious hidden curriculum is devastating both to one's sense of self and to the entire society's cohesion.

Differential group treatment produces a troubling divide: those citizens who receive only the "overt curriculum," taking institutions at their word for supporting values of democracy and fairness, will believe them to be more legitimate than those citizens who receive the contradictory messaging of the hidden curriculum.²¹ When institutions treat classes of citizens differently and unequally, they produce skewed perceptions of legitimacy. Legitimate authority must therefore be attentive to its explicit and implicit impacts on collectivities as much as individuals; institutions achieve legitimacy through practices that extend equal validation and sense of belonging to all groups within a society.

¹⁹ Tyler and Lind, "Relational Model of Authority," 141; see also Meares, "Policing and Procedural Justice," 1533.

²⁰ Meares and Neyroud, *Rightful Policing*, 12.

²¹ Tracey L. Meares, "Broken Windows, Neighborhoods, and the Legitimacy of Law Enforcement or Why I Fell In and Out of Love with Zimbardo," *Journal of Research in Crime and Delinquency* 52, No. 4 (2015): 619.

In the United States, perhaps the most salient group division emanates from race, and therefore the relationship between race, procedural justice, and legitimacy merits special attention. As Meares contends, the hidden curriculum of policing in particular has functioned to signal that African Americans comprise a uniquely dangerous class distinct from the rest of the citizenry. “Stop and frisk” and “broken windows policing,” Meares and others find, target African Americans at alarmingly high rates compared to whites, regardless of their actual criminal histories.²² It is no surprise, then, that surveys consistently find that blacks have less trust and more negative views of the police than whites.²³ Americans’ perceptions of legitimacy, therefore, often differ by race.

Beyond policing, questions of race and legitimacy have often coalesced around the issue of affirmative action. In higher education admissions, to what extent should race play a role? Justice Sandra Day O’Connor invoked the concept of legitimacy in the majority opinion in *Grutter v. Bollinger*, a 2003 case that affirmed the University of Michigan Law School’s consideration of race in admissions to achieve the compelling interest of “diversity.” “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry,” O’Connor wrote, “it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”²⁴ Ignoring race in admissions decisions could lead to the perception of unequal access for minority races and, in turn, deal a blow to institutional legitimacy. Legitimate authority, O’Connor argued, required the perception and reality of equal racial and ethnic opportunity. Others, however, such

²² In New York City, for example, the police stopped 80 percent of black men between the ages 18 and 24 in the highest crime areas at least once in 2008; surely, Meares suggests, the police could not “reasonably” believe that 80 percent of African American youth were criminals. *Ibid.*, 620–21. Other studies found the proportion of police stops of young black men to range between 50 and 70 percent. For white men of a similar age, researchers estimate the probability of a police stop to be no more than 13 percent. Meares, “The Legitimacy of Police,” 654.

²³ Skogan and Frydl, *Fairness and Effectiveness in Policing*, 300; see also Richard R. W. Brooks and Haekyung Jeon-Slaughter, “Race, Income, and Perceptions of the U.S. Court System,” *Behavioral Sciences and the Law* 19, No. 2 (Mar./Apr., 2001): 249–64.

²⁴ *Grutter v. Bollinger* 539 U.S. 306 (2003), 332.

as the plaintiffs in affirmative action cases, view this race-consciousness as unjust racial preference that delegitimizes those colleges by interfering with their commitment to merit. *Ricci* was not the first time legitimacy fissured along racial lines.

The diverging trajectories of Chicago and Ferguson help to demonstrate how legitimacy functions in practice. If achieved, legitimacy can enrich civil society and foster new community ties; if neglected, it can wreak violence, chaos, and destruction. Chicago's Project Safe Neighborhoods deploys legitimacy to reduce gun violence and simultaneously improve the community's trust of the police. The program organizes hour-long "forums" in which state and local law enforcement members, community representatives, and social service providers meet with offenders with a history of gun violence and gang participation. They sit together around a table, and the meetings often produce informal conversations that last long after the forums officially end. The authorities stress the consequences of gun violence, detailing particular enforcement efforts. Then, an ex-offender discusses how he has distanced himself from crime. Finally, the community groups from the offenders' neighborhoods talk about other choices the offenders can make. The forums have achieved remarkable results; one analysis found that people who attended a forum were nearly 30 percent less likely to return to prison than people from the same neighborhood who did not. Monthly homicide rates in Project Safe Neighborhood areas fell by almost 37 percent.²⁵ The forums apply the tools of legitimacy to reach the offenders. Rather than disrespecting the criminals, law enforcement treats them as individuals capable of making choices. Officers seek out the offenders' opinions and give them an opportunity to participate in the conversation as equals. They are transparent about methods and consequences, working to establish trust. Legitimacy produces results.

²⁵ Meares, "The Legitimacy of Police," 660–63.

Illegitimacy, meanwhile, breeds violence. The protests and riots in Ferguson, Missouri in 2014 represent the other end of the legitimacy spectrum. The death of Michael Brown, an unarmed teenager, at the hands of a white police officer served as a catalyst for change among community members whose resentment at law enforcement had been mounting for years. Without using the word legitimacy, the Department of Justice’s report on Ferguson censured the local police department for violating its basic precepts. Through aggressive enforcement of the municipal code and harsh penalties for failure to appear in court, law enforcement treated Ferguson residents not as “constituents to be protected” but as “potential offenders and sources of revenue.” In other words, they violated the expectation of *standing*; police officers did not value residents’ dignity and humanity. Ferguson was a case of racial illegitimacy; blacks accounted for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests in Ferguson—and yet composed just 67 percent of the population. Richard Rothstein charted a similar pattern of inequality in housing: for decades, he found, city, state, and national housing policies coalesced in Ferguson to deprive African Americans of access to high-quality neighborhoods, treating them more as detriments to property values than as fully-fledged individuals. As governments afforded privileges to white residents, they let poverty and discontent fester among African Americans.²⁶ Therefore, Ferguson violated both the individual and group tenets of legitimacy. Citizens’ alienation from authority and from their own city drove them to loot and riot. The bonds of civil society frayed to a point where only physical force could reestablish order in the city. As Ferguson so hauntingly demonstrates, without the “glue” of moral authority—without a sense of mutual trust, respect, and dignity—the social contract can shatter.

²⁶ United States Department of Justice Civil Rights Division, *Investigation of the Ferguson Police Department*, Mar. 4, 2015, 2–6; Richard Rothstein, “The Making of Ferguson: Public Policies at the Root of Its Troubles,” *Economic Policy Institute*, Oct. 15, 2014.

For the purpose of this paper, then, legitimacy refers to the level of respect people have for the institutions and governments that shape their environment and to the degree to which they will not only comply, but actively engage, with those institutions. Legitimacy is the stitching that holds civil society together; in times of crisis, when the seams of society threaten to burst, legitimacy maintains order, compliance, and a feeling of community. It functions at two levels: a legitimate authority makes all people feel valued as individuals and as members of a larger group. The pillars of standing, neutrality, participation, interpersonal treatment, and trust create strong, enduring, mutually beneficial relationships between the governed and the government. Legitimacy thus transcends law; it is essential for a flourishing civil society.

Legitimacy functions as a foundation does for a house. It lies underneath the soil, hidden from our conscious observations; and yet it provides the sturdiness to support the entire structure of society. Isolated decisions will neither completely rip apart nor fully replenish the foundation. But over time, institutions can work to repair, strengthen, and renew that foundation, or, through neglect and misguided policy, erode it. At times, catalytic moments lift this bedrock to street level. *Ricci v. DeStefano* was one such moment for New Haven. In 2003, a set of tests for firefighters produced an earthquake that shook the City to its tottering foundation.

II. *RICCI V. DESTEFANO* AND THE LAW: “WE COULDN’T RESOLVE IT”

For all the drama *Ricci* created, it began as a particularly complicated episode in the saga of civil rights litigation. The facts themselves were not clear; even the Supreme Court justices, in their various opinions, argued over what facts were relevant.²⁷ Their debate about the pertinence

²⁷ Justice Ruth Bader Ginsburg asserted near the start of her dissent, “The Court’s recitation of the facts leaves out important parts of the story.” Justice Samuel Alito countered with a similar accusation in his concurrence. *Ricci v. DeStefano*, 557 U.S. 557 (2009), 609, 596.

of historical context helps to capture the gulf between the two dueling views of legitimacy in *Ricci*. However, I briefly set aside these disagreements to present the factual and legal basis of the case.²⁸ Before proceeding with an analysis of legitimacy in *Ricci*, it is necessary to understand the City's legal considerations and liabilities. The loaded question of racial fairness lies underneath the hazy smoke of legal dispute.

Ironically, the examination procedures that so rattled New Haven's Fire Department originated in an attempt to avoid the very issues at the heart of *Ricci*. In a profession historically characterized by traditions of nepotism and patronage, merit-based civil service tests offered municipal departments a more objective mechanism by which to make employment decisions. According to the Charter of the City of New Haven, civil service examinations determine hiring and promotions for public safety positions. The City publishes an eligibility list of those who passed the test in ranked order according to their score, and the list has a lifespan of up to two years to fill vacancies. Departments administer tests periodically according to their needs. For each vacancy, New Haven's Charter requires the City to consider candidates with the top three scores on the list—the so-called “Rule of Three.”²⁹ In the final two months of 2003, New Haven administered oral and written examinations for firefighters seeking promotion to the ranks of lieutenant and captain; it had most recently administered lieutenant and captain tests in 1999 and 1998.³⁰ Per the firefighters' union contract with the City of New Haven, 60 percent of a firefighter's final score would come from his performance on the written test, and 40 percent from the oral test. This provision would fuel significant controversy over the tests' legitimacy (as

²⁸ The background information presented in Section II is drawn from the District Court's opinion unless otherwise cited. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 142–50 (D. Conn. 2006).

²⁹ “Civil Service,” *The City of New Haven*, https://www.newhavenct.gov/gov/depts/hr/civil_service/default.htm; and Rule V, Section 6, City of New Haven Civil Service Rules, accessed at <https://www.newhavenct.gov/civicax/filebank/blobdload.aspx?blobid=23424>.

³⁰ Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 5, 2004, 31.

discussed below). In 2003, however, the 60/40 breakdown was non-negotiable. A passing grade was a cumulative score of 70 percent.

New Haven hired an Illinois company, I/O Solutions, to design the exams. While the City designs some of its civil service exams itself, it typically outsources the public safety exams—those for the Police and Fire Departments—to companies that specialize in such tests due to the “litigious” history of public safety civil service tests in New Haven, according to current Manager of Human Resources Stephen Librandi.³¹ I/O’s design of the exams and the prior history of litigation surrounding civil service in New Haven would both bubble up as issues in the ensuing *Ricci* dispute (as discussed below).

Seventy-five men and two women took the lieutenant exam, among them 43 whites, 19 blacks, and 15 Hispanics. Thirty-four men passed the test, among them 25 whites, six blacks, and three Hispanics. There were eight lieutenant vacancies, meaning that, per the “Rule of Three,” the top ten scorers on the test would be eligible to be considered; all top ten scorers were white, so whites would be guaranteed to fill the eight vacancies. Meanwhile, the Fire Department had seven captain vacancies to fill, meaning it would consider nine possible candidates from the eligibility list. A similar pattern emerged in the captain test: out of 41 total applicants, all but one of whom were male, 21 men passed, and the top scorers were seven whites and two Hispanics. Although three of the eight black applicants passed the captain test, they did not score well enough to be considered for promotion given the number of job openings.³² The sole woman to take the captain exam passed but scored too low to receive initial consideration for a promotion.³³ (See Fig. 1.)

³¹ Stephen Librandi, interview with author, Oct. 28, 2019.

³² As high-scoring lieutenants became captains, additional vacancies opened for the lieutenant list, which would make some black candidates eligible for promotion. Once the *Ricci* litigation began, the Fire Department froze all hiring, so by the time the Supreme Court made its decision, additional vacancies due to retirements remained unfilled. This enabled the promotion of three African Americans from the initial, challenged promotional lists.

³³ The gender imbalance in the Fire Department, as seen through the 2003 promotional tests, is far more disparate than the racial gap. Former Human Resources Director Tina Burgett noted that upper-body strength plays a large

Fig. 1: New Haven Fire Department Civil Service Examinations, Winter 2003–04

LIEUTENANT EXAMINATION				CAPTAIN EXAMINATION		
Demographic information	Took test	Passed test	Percentage	Took test	Passed test	Percentage
White	43	25	58.1%	25	16	64%
Hispanic	15	3	20%	8	3	37.5%
African American	19	6	31.6%	8	3	37.5%
Male	75	34		40	21	
Female	2	0		1	1	
Total	77	34	44.2%	41	22	53.7%

In early January 2004, Director of Human Resources Tina Burgett and one of her colleagues received the results from the test. Immediately, Burgett said, “I knew we had a problem.” Burgett double-checked the results and conferred with Ude and Chief Administrative Officer Karen DuBois-Walton, who arranged a private meeting with I/O Solutions to understand how the company designed the test and determine why it produced such a racial bias. The group then informed Mayor John DeStefano Jr. of the predicament. Citing DeStefano’s commitment to transparency, Burgett said that they decided to hold public meetings on the matter before making a final recommendation.³⁴

Between January and March 2004, the Civil Service Board held five hearings on whether to certify the results of the promotional tests; no candidates could be promoted without the Board’s certification. On January 22, Ude, the corporation counsel, shared the results that no African Americans would be eligible for promotion. He and Burgett raised severe concerns about the City’s

factor in the entrance test for the fire service, which precludes many women from entering the profession. The vast majority of the Fire Department’s calls, however, are medical and do not require extraordinary physical strength. The gender disparity is beyond the scope of this paper, but it raises questions of legitimacy in its own right. Tina Burgett, interview with author, Oct. 30, 2019.

³⁴ Tina Burgett, interview with author, Oct. 30, 2019.

legal liability if it proceeded with certification.³⁵ Later meetings heard testimony from a range of experts and stakeholders, including a representative of I/O Solutions.³⁶ On March 18, Ude, Burgett, and DuBois-Walton urged the Civil Service Board not to certify the lists. Patrick Egan, the president of Local 825, the City's firefighters' union; Frank Ricci, a firefighter who took the lieutenant exam; and Lieutenant Matthew Marcarelli spoke at the meeting in favor of certification. The Board's vote resulted in a 2–2 tie, which meant that the lists were not certified.³⁷ On July 8, 2004, Frank Ricci and 19 other firefighters who passed the test—all but one of whom were white—sued.³⁸

The legal issues at stake were two prongs of Title VII of the Civil Rights Act of 1964, as amended in 1991. Title VII concerns employment discrimination, and as initially written, it prohibited only intentional discrimination—or “disparate treatment”—on the basis of race, color, religion, sex, or national origin in the workplace. However, many companies worked around these new requirements with facially neutral policies that resulted in similarly discriminatory outcomes for minorities. In *Griggs v. Duke Power Co.*, the Supreme Court ruled in 1971 that even absent evidence of discriminatory *intent*, companies could be held liable under Title VII if workplace policies had a disparate racial *impact* and could not be justified by “business necessity.” Disparate

³⁵ William Kaempffer, “Fire Exams Flawed, Lawyer Says,” *New Haven Register*, Jan. 23, 2004, A3.

³⁶ The Board heard testimony from a regional representative of the Northeast Region of the International Association of Professional Black Firefighters; a representative of I/O Solutions; an industrial and organizational psychologist with a business in competition with I/O; a retired fire captain from Michigan who worked for the Department of Homeland Security; and a professor of counseling psychology who studies race and test performance, among others. Rev. Boise Kimber, a prominent leader in the black community and chairman of the New Haven Board of Fire Commissioners at the time, expressed vehement opposition to the certification of the examination results.

³⁷ The fifth member of the Civil Service Board, Barbara Tinney, abstained from all proceedings due to a conflict of interest; her brother, Gary Tinney, was a lieutenant in the Fire Department, the president of the Firebirds, and an opponent of certification. Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 5, 2004, 18.

³⁸ The other plaintiff was Benjamin Vargas, who, as legal scholar Richard Primus points out, is both white and Hispanic. The two are not mutually exclusive categories. Most coverage, however, tended to identify the “New Haven 20” as 19 whites and one Hispanic or Latino. Richard A. Primus, “The Future of Disparate Impact,” *Michigan Law Review* 108, No. 8 (2010), 1342, Note 4.

impact become codified in the Civil Rights Act of 1991. Employers can avoid liability if they prove their practices are “job related for the position in question” and consistent with “business necessity”; but plaintiffs can still win a claim if they demonstrate that alternative employment practices were available that would have lessened the disparate impact and still served the business’s needs.³⁹ As originally construed, law professor Reva Siegel explains, disparate impact law aimed to “smoke out” unlawful discrimination achieved through facially neutral means.⁴⁰

There was no dispute that the results from the New Haven Fire Department’s promotional tests created disparate impact in a statistical sense. The Equal Employment Opportunity Commission’s Guidelines have established the “four-fifths rule” as a threshold: if a protected class performs less than 80 percent as well as whites on an employment measure, disparate impact has occurred.⁴¹ In New Haven, the black pass rate on the each test was barely half of the white pass rate; the Hispanic pass rate on the lieutenant exam was even worse.⁴² But as noted above, disparate impact alone is not unlawful; the employer can maintain the employment practice by proving that it was job related and consistent with business necessity and that no less discriminatory alternatives were possible. *Ricci* represented an unusual situation in Title VII litigation—unprecedented in New Haven’s history of litigation—in that the City (through the Civil Service Board), rather than defending its own employment practice, discarded the results in order to avoid what it viewed as likely liability under Title VII. *Ricci*’s legal question was whether New Haven’s decision not to certify the results lawfully complied with Title VII’s disparate impact provision, or whether, as

³⁹ *Ricci v. DeStefano*, 557 U.S. 557, 577–79; 42 U.S.C. §2000e–2.

⁴⁰ See Reva B. Siegel, “Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court,” *Alabama Law Review* 66, No. 3 (2015), 656–58.

⁴¹ *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 153 (D. Conn. 2006).

⁴² On the lieutenant exam, the pass rate was 31.6 percent for blacks and 20 percent for Hispanics, compared with 58.1 percent of whites. On the captain exam, blacks and Hispanics both had a 37.5 percent pass rate, while whites had a 64 percent pass rate. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 145 (D. Conn. 2006); *Ricci v. DeStefano*, 557 U.S. 557 (2009), 586. See Fig. 1 above, p. 19.

alleged by the plaintiffs, it discriminated against the firefighters who passed the examination on the basis of their race—a violation of Title VII’s disparate *treatment* provision.

Notably, the City of New Haven had been litigating race discrimination cases about the Fire Department for decades. The Firebirds, a New Haven society of black firefighters, sued the Department in the early 1970s and won a judgment ordering increased minority representation; at the time, blacks and Hispanics composed about 30 percent of the City’s population and only 3.6 percent of the firefighting ranks. The disparity in the officer ranks was even more striking; only one of the 107 officers was black. A District Court order from 1973 demanded major change in the Fire Department’s racial composition; it required New Haven to hire at least 16 of the next 24 firefighters from among qualified minority group applicants and, thereafter, hire at least one minority firefighter for every non-minority firefighter until there were 75 minority firefighters.⁴³ Moreover, the City promised to exercise “good faith” to ensure that minorities would be represented in the upper ranks of lieutenant and captain.⁴⁴ The Firebirds sued the Department again in 1992 and yet again in 2004, each time with a new claim about a particular hiring practice that disadvantaged minorities. The Firebirds won both times. In the prior cases, Local 825 entered the litigation on the side of New Haven, against the Firebirds—that is, defending the employment practices that courts ruled were discriminatory against black firefighters, whom the union ostensibly represented.⁴⁵ Similar suits in Bridgeport, Connecticut further highlighted the racial

⁴³ See *Ricci v. DeStefano*, 557 U.S. 557 (2009), 610; *Firebird Society of New Haven, Inc. v. New Haven Board of Fire Commissioners*, 66 F.R.D. 457 (D. Conn. 1975); Thomas Ude Jr., “Civil Service Litigation History,” Memorandum to John DeStefano Jr., Jun. 1, 2007; and Emily Bazelon, “The Ladder: Part 1: A Connecticut City’s Race Problem Sparks a National Debate,” *Slate*, Jun. 25, 2009, http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_1_a_connecticut_citys_race_problem_sparks_a_national_debate.html.

⁴⁴ “Good Faith” became the title of a 2019 play at the Yale Repertory Theater exploring *Ricci v. DeStefano* ten years after the Supreme Court decision. See, for instance, Christopher Arnott, “Yale Rep Revisits ‘New Haven 20’ with a Conversation about Race in ‘Good Faith,’” *Hartford Courant*, Jan. 31, 2019.

⁴⁵ In 1992, the Firebirds sued to stop New Haven’s practice of “stockpiling” or “stacking,” in which the City hired or promoted many firefighters, mostly whites, just as employment lists were about to expire for jobs that were not yet vacant; in 2004 the Firebirds won a judgment against New Haven’s practice of “underfilling,” or the hiring of

exclusivity of local fire departments and established a lengthy precedent of judgments in favor of minority plaintiffs.⁴⁶ Historically, then, the New Haven Fire Department has fought, and lost, battle after battle over alleged racially-discriminatory employment practices in court.

In *Ricci*, the lower federal courts twice sided with New Haven. The District Court ruled in 2006 that the City had a “good faith belief that Title VII mandated non-certification” of the two tests. Judge Janet Bond Arterton sympathized with the City’s attempt to voluntarily comply with Title VII rather than proceed with a questionable practice showing severe statistical disparate impact.⁴⁷ Nearly two years later, the plaintiffs’ appeal reached the Court of Appeals for the Second Circuit, and a panel of three judges—including Judge Sonia Sotomayor—affirmed the District Court’s ruling in five crisp sentences. Although Ricci made personal sacrifices to score well on the exams, “it simply does not follow that he has a viable Title VII claim.” In fact, the Board “was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact.”⁴⁸ Then, Judge Jose Cabranes of the Second Circuit wrote a dissenting opinion arguing that the Court failed to address “questions of exceptional importance

additional lieutenants to positions funded as captain positions, thus leaving vacancies at the captain level, which the plaintiffs argued discriminated against minorities seeking promotion to captain. See *New Haven Firebird Society vs. New Haven Board of Fire Commissioners*, 32 Conn. App. 585 (Conn. App. Ct. 1993); *Broadnax v. City of New Haven*, 270 Conn. 133 (Conn. 2004); Reva B. Siegel, “From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases,” *Yale Law Journal* 120 (2011): 1337–40; Ude, “Civil Service Litigation History.”

⁴⁶ For example, see *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 454 F. Supp. 751 (D. Conn. 1978) and *Bridgeport Firebird Society v. City of Bridgeport*, 686 F. Supp. 53 (D. Conn. 1988).

⁴⁷ The District Court raised the 60/40 distribution of written and oral scores on the test as one potential area in which an alternative examination could have produced less discriminatory results. But definitive proof of a better alternative did not matter to the Court. “Notwithstanding the shortcomings in the evidence on existing, effective alternatives,” Judge Arterton ruled, “it is not the case that defendants *must* certify a test where they cannot pinpoint its deficiency explaining its disparate impact under the four-fifths rule simply because they have not yet formulated a better selection method.” The City’s valid fear of liability justified its race-conscious remedy in deciding not to certify the examinations; moreover, the Court ruled, the remedy of throwing out the results was not even particularly race-conscious, as the effects resulted every applicant equally. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 150, 156, 158 (D. Conn. 2006).

⁴⁸ *Ricci v. DeStefano*, 530 F. 3d 87, 87 (CA2 2008).

raised in this appeal,” urging the Supreme Court to take the case. On January 9, 2009, the Supreme Court granted Ricci’s writ of certiorari; the case was argued in April and decided in June.⁴⁹

Justice Anthony Kennedy wrote the majority opinion for a divided 5–4 Court, granting the plaintiffs’ motion for summary judgment. Professor Richard Primus identified a four-step argument in Kennedy’s ruling. First, the City’s refusal to certify the results on account of racial considerations violated Title VII’s disparate *treatment* provision, unless the City could justify its actions. Second, invoking disparate *impact* is a valid means of justifying race-conscious action. Third, an employer cannot use disparate impact to justify its practices unless it has a “strong basis in evidence” that such practices are necessary to avert disparate impact liability. Finally, New Haven lacked a strong basis in evidence, and so, its actions violated the ban on disparate treatment. The statistical disparate impact was not enough for the City to fend off the disparate treatment charge; New Haven, the Court ruled, could have justified the examinations as job related.⁵⁰ Commentators viewed *Ricci* as a landmark case in employment law, as it marked the first application of the “strong basis in evidence” standard to Title VII. Scholars have been debating its meaning and implications ever since.⁵¹

⁴⁹ William Kaempffer, “Top 50: New Haven Firefighters’ Case Set National Precedent,” *New Haven Register*, Jul. 15, 2018, <https://www.nhregister.com/news/article/Top-50-New-Haven-firefighters-case-set-13070745.php>.

⁵⁰ Primus, “The Future of Disparate Impact,” 1349; *Ricci v. DeStefano*, 557 U.S. 557 (2009), 587.

⁵¹ A survey of legal scholarship on *Ricci* finds many different ways of interpreting the decision, indicating its vagueness. However, a consensus seems to find that the decision, while delimiting disparate impact, is not fatal to it.

Richard Primus identifies three ways of reading *Ricci*: (1) a “general reading” that finds disparate impact and disparate treatment fundamentally in tension, with disparate treatment triumphing, because any effort to remedy disparate impact is race-conscious; (2) an “institutional reading,” in which only courts are authorized to remedy disparate impact through race-conscious actions; and (3) a “visible-victims reading,” which locates the problem in *Ricci* not in the race-consciousness of the decision to discard the promotional exams, but in its effect of disadvantaging “visible innocent third parties.” Primus thus points out, countering Justice Scalia, that *Ricci* need not destroy all disparate impact doctrine. Reva Siegel offers a fourth interpretation, the “antibalkanization reading.” In this view, the Court overturned the City’s decision not because of the race-consciousness of its decision to throw out the results, but because it invalidated a test already administered and thus functioned to “balkanize”—or polarize—the workplace. Siegel, too, seeks to salvage disparate impact from the *Ricci* decision. Barry Goldstein and Patrick O. Patterson likewise defend the disparate impact standard and argue for its “staying power,” against Justice Scalia’s concurring opinion, noting the unique factual circumstances of the *Ricci* case. Primus, “Future of Disparate Impact,” 1341–45; Siegel, “From Colorblindness to Antibalkanization,” 1331–32; Barry Goldstein and Patrick O. Patterson, “*Ricci v. DeStefano*: Does It Herald an ‘Evil Day,’ or Does It Lack ‘Staying Power’?,” *University of Memphis Law*

But the facts at issue in *Ricci* also raise vital questions about *legitimacy*. As previously defined, legitimacy stems from a stable, trusting relationship between rulers and the ruled. *Ricci* centered on many of the bedrock principles that forge that relationship, the principles without which civil society is impossible: trust, fairness, neutrality, standing, and opportunity. The facts of *Ricci* produced three contentious spheres of legitimacy questions. The first focuses on the *test* itself: Was the combination of written and oral examinations a legitimate means of determining promotions? The plaintiffs argued that the test was job related; the defendants raised questions about the applicability of some questions, the weighting of written versus oral scores, and the efficacy of a pen-and-paper test in selecting good leaders. Secondly, the City's *process* in refusing to certify the promotional results demands attention. Procedure is central to establishing and maintaining legitimacy, and the process of the Civil Service Board hearings drew significant criticism and suspicion. Did the City act on, and obscure, ulterior motives? Did its decision violate the principle of neutrality and reflect a bias in favor of certain citizens or groups? Or, alternatively, did the vote against certification reflect a thoughtful, open process in which the City did nothing more than attempt to comply with the law? Finally, the *results* of the test raise a third legitimacy issue: Would the disparate impact of the results have degraded the Fire Department's legitimacy among the populace and particularly among minorities? Or would setting aside a seemingly merit-

Review 40, No. 4 (2010): 705–96. See also George Rutherglen, “*Ricci v. DeStefano*: Affirmative Action and the Lessons of Adversity,” *The Supreme Court Review* 2009, No. 1 (2009): 83–114.

Cheryl I. Harris and Kimberly West-Faulcon argue that *Ricci* transformed the paradigmatic victim of disparate impact racial discrimination to whites and conclude that “*Ricci* is a warning that a majority of the Court’s current members subscribe to views that effectively confer the robust protection of civil rights laws on only one race.” Mark S. Brodin makes a similar claim, viewing *Ricci* as the “triumph of white privilege” and sharply critiquing the *Ricci* majority for buying into the belief in a “color-blind” society. Cheryl I. Harris and Kimberly West-Faulcon, “Reading *Ricci*: Whitening Discrimination, Racing Test Fairness,” *UCLA Law Review* 58 (2010): 73–165; Mark S. Brodin, “*Ricci v. DeStefano*: The New Haven Firefighters Case & the Triumph of White Privilege,” *Southern California Review of Law and Social Justice* 20, No. 2 (Spring 2011): 161–234.

based test undermine the City's credibility? To what extent must legitimate institutions be racially representative?

For each of the case's three legitimacy problems, each side offered plausible arguments. Intertwined among the complicated legal questions of disparate impact and disparate treatment are more fundamental tensions about the nature of democratic institutions in a racially polarized society. The dispute highlights the challenges governments face when navigating fraught questions of equality, opportunity, and merit among constituencies with vastly different notions of those terms. "We couldn't resolve it," said Rev. Boise Kimber, a polarizing leader of the local black community and the chairman of the New Haven Board of Fire Commissioners at the time, "so the law had to resolve it."⁵² And yet, because legitimacy arises from citizens' perceptions, the law could never decide these bigger-picture dilemmas facing New Haven. No Supreme Court decision, let alone a fractured and politically charged 5–4 ruling, could magically stabilize New Haven's foundation of legitimacy.⁵³ The City was on its own.

⁵² Boise Kimber, interview with author, Oct. 16, 2019.

⁵³ In fact, the Supreme Court is itself an institution that relies on legitimacy to execute its decisions. The power of the Supreme Court, as Richard Davis has argued, is ultimately determined by the way other branches of government, institutional actors, and the American populace execute and adhere to its rulings. The Supreme Court does not enforce its own decisions through force or legal mechanisms of control; it relies on its moral authority. Recently, however, the Court's own legitimacy has been subject to increasing challenge. Brian Christopher Jones charts a "new world" for the Court involving "intense and widespread disparagement"; whereas criticizing the highest court in the land was once viewed as off-limits, it has now become common in public discourse. A central factor in this threat to the Court's legitimacy comes from the rising perception of its political partisanship. As Jones notes, when presidential candidates claim that different nominees would produce different results, they "rebrand the Court and its members from independent judges with interpretive differences into glorified party politicians." When seen as a partisan institution, the most enduring source of the Court's moral authority—its independence—crumbles. "The challenge for the Court," Jones argues, "is convincing the American public that law remains separate from politics." See Richard Davis, "The Symbiotic Relationship Between the U.S. Supreme Court and the Press," in Richard Davis, ed., *Covering the United States Supreme Court in the Digital Age* (New York: Cambridge University Press, 2014): 4–22 and Brian Christopher Jones, "Disparaging the Supreme Court, Part II: Questioning Institutional Legitimacy," *Wisconsin Law Review* 2016, No. 2 (2016): 239–62, quotes at 239, 253, 261.

All parties adhered to the *Ricci* decision, and the case itself did not substantially delegitimize the Court in the eyes of the public—but it certainly became a subject of fierce partisan debate. The Court's decision was subject to evaluation on grounds of legitimacy by the populace, and its own moral authority could not singlehandedly forge a consensus. While further consideration of the Court's legitimacy stretches beyond the scope of this paper, this is an issue of central importance to the overall functioning of America's democratic system and deserves careful attention.

III. *RICCI V. DEStEFANO* AND LEGITIMACY: “WHAT’S FAIR”?

A. THE TEST

The first conflict over legitimacy in the *Ricci* case concerns the fairness of the promotional exams themselves. The relevant components of the definition of legitimacy as it relates to testing are *neutrality* and *trust*: Does the testing procedure treat each candidate without bias? Does the candidate trust that the institution has designed the procedure fairly? The legitimacy of the exams is also connected to the legal standard for disparate impact, since an employment practice’s acceptability under Title VII depends on its “job relatedness.”⁵⁴ The question of job relatedness is, in a sense, a question of the test’s legitimacy; if the test has no bearing on the job, then the hiring decisions become arbitrary and unfair. A review of the dueling arguments over the tests finds little evidence that the exams operated to identify the best candidates; meanwhile, bias embedded itself into the written tests, compromising their legitimacy.

According to Frank Ricci and the other plaintiffs, the examination was not only job related but fair: there were no tricks, no secrets to which only white firefighters had access. The examination “wasn’t some IQ test or something that could be biased,” Ricci said. “It was the Department’s rules and regulations, it was the Department’s standard operating procedures.” The test also incorporated material from national textbooks on firefighting. Ricci noted that the City reached out to prospective applicants with instructions on what chapters to study and ensured that the test was written at a tenth-grade reading level.⁵⁵ He “absolutely” believed that a written test can be completely objective and free of bias.⁵⁶ Therefore, the only thing that could explain the

⁵⁴ As noted, in a case of prima facie discrimination, the employer can defend the employment practice if it is deemed to be job related and if no less discriminatory alternatives are available.

⁵⁵ Frank Ricci, interview with author, Oct. 9, 2019.

⁵⁶ Frank Ricci, interview with author, Nov. 20, 2019.

disparity in outcomes is that certain people studied more than others. Ricci, who is dyslexic, compared his study schedule to lawyers studying for the Bar: “You don’t have a life. I mean, I didn’t even carve a pumpkin with my kid for Halloween.”⁵⁷ Ricci’s view of merit is straightforward: if you work hard enough, you will, and deserve to, succeed. Ricci’s personal story certainly demonstrates that through single-minded dedication, individuals can overcome significant obstacles.

But Ricci’s intense investment in performing well on the test and ensuing success does not prove that the test was the most legitimate means of filling the lieutenant and captain vacancies or of assessing the information necessary to hold those positions. In addition, the presumption that written test questions are unimpeachably objective is dubious. As psychology professor Janet Helms testified at a Civil Service Board hearing, a wealth of research has found that whites consistently perform better on written tests than minority groups. The Fire Department’s exams, she said, generally aligned with the results predicted by the literature.⁵⁸ In the U.S., work ethic alone does not predict performance on a written test.

The testing company charged with creating the examinations did indeed make an effort to design the test around information important to the New Haven Fire Department, a process the Supreme Court emphasized in its decision for the plaintiffs. I/O Solutions interviewed incumbent captains and lieutenants and their supervisors, rode with and observed on-duty officers, and issued job-analysis questionnaires to current chiefs, captains, and lieutenants. The questionnaires asked for input on both the importance of particular tasks to performing the job successfully and the

⁵⁷ Frank Ricci, interview with author, Oct. 9, 2019.

⁵⁸ Helms said that any test, particularly a written one, would favor whites over racial minorities. *Ricci v. DeStefano*, 557 U.S. 557 (2009), 571–2; Verbatim Proceedings, *City of New Haven Civil Service Board In Re: Fire Captain and Lieutenant Promotional Examinations*, Mar. 11, 2004, 46, 55.

frequency with which the incumbents performed those tasks.⁵⁹ In Justice Kennedy’s view, “There is no genuine dispute that the examinations were job related and consistent with business necessity.”⁶⁰ Because the test design process included specific actions to confirm the job relatedness of the exams, the test itself achieved legitimate status. Moreover, I/O did make an effort to reduce disparate impact; the company deliberately oversampled minority firefighters at each stage of the job analyses, and the oral examination panels vastly oversampled minority firefighters.⁶¹

But no matter the procedures used to create the test, the vast gulf of success between white and black candidates demands further attention. John DeStefano, the mayor at the time, noted that previous civil service examinations had not produced this degree of disparate impact. “It was clear that this test result was different,” he said. “As to why it was different, that was not clear. The immediate issue was, the results were strikingly skewed from the past and fell into a place that was hard to imagine that they would not be litigated.”⁶² Fifteen years later, it is still not “clear” exactly what caused this yawning gap that resulted in no African Americans scoring highly enough to receive a promotion off the original lists for the 15 initial vacancies; but opponents of certification put forth a variety of explanations. Then-Human Resources Director Tina Burgett expressed concerns about I/O’s methodology, including its choice of “subject-matter experts”—those who participated in the job analysis study—and believes that the vendor should have spent more time observing the Fire Department.⁶³ I/O representatives spent just two days for their “job analysis visit,” according to Noelia Marcano, a New Haven official.⁶⁴ In addition, the City’s contract with

⁵⁹ Verbatim Proceedings, *City of New Haven Civil Service Board In Re: Fire Captain and Lieutenant Promotional Examinations*, Feb. 11, 2004, 19.

⁶⁰ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 587–88.

⁶¹ *Ibid.*, 565–66.

⁶² John DeStefano Jr., interview with author, Oct. 18, 2019.

⁶³ Tina Burgett, interview with author, Oct. 30, 2019.

⁶⁴ Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 11, 2004, 66.

I/O barred the company from consulting the New Haven Fire Department as it designed the examinations in an effort to achieve impartiality.⁶⁵ This complete lack of internal review may have hindered the Illinois-based company from writing a test appropriately tailored to the City of New Haven. Some questions, in fact, did not make sense in the context of New Haven, according to testimony given at the Civil Service Board hearings.⁶⁶ The inclusion of such questions raises doubts about I/O's test-design process.

Meanwhile, a set of factors worked against candidates of color beyond the particulars of this test. For one, accessing the study materials for the test was expensive—costing upwards of \$500⁶⁷—and difficult. Moreover, while some candidates waited for the books to come in on back-order, others already owned copies of the book—especially those with relatives or parents who were also firefighters. These obstacles had racially disproportionate effects. As the Supreme Court's dissent noted, “While many Caucasian applicants could obtain materials and assistance from relatives in the fire service, the overwhelming majority of minority applicants were ‘first-generation firefighters’ without such support networks.”⁶⁸ Boise Kimber, the polarizing black reverend, said that he believed white firefighters already knew the answers and expressly shared them with each other⁶⁹—an accusation as of yet unfounded in the record.

The weighting of the written and oral sections also attracted attention for its potential to function in a discriminatory fashion against African American candidates. There was nothing, Justice Ginsburg argued in her dissent, that explained why counting the written test for 60 percent and the oral test for 40 percent was consistent with business necessity. Bridgeport, for instance,

⁶⁵ Ibid., 24.

⁶⁶ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 613–14. However, an I/O representative testified that at least one question was removed from the exam after test-takers challenged its relevancy. All candidates received credit for that question. Ibid., 588, and Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 11, 2004, 43.

⁶⁷ Kaempffer, “Fire Exams Flawed.”

⁶⁸ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 613–14

⁶⁹ Boise Kimber, interview with author, Oct. 16, 2019.

changed its scoring mechanism from a 70/25 weighting in favor of the written portion (the final five percent was for seniority) to one that gave predominance to the oral score; this change, reported a black firefighter advocacy group, led to increased minority representation. Moreover, an industrial psychologist specializing in employment tests told the Civil Service Board that although the written test was “reasonably good,” “I have never one time ever had anyone in the fire service say to me, ‘Well, the person who answers—gets the highest score on a written job knowledge multiple-guess test makes the best company officer.’ We know that it’s not as valid as other procedures that exist.”⁷⁰ The capacity of written examinations to select the best lieutenants and captains became an important flashpoint with implications for the legitimacy of New Haven’s ultimate intervention.

The written-versus-oral dispute raised the matter of “test validation,” which became one of the most controversial aspects of the case. The term refers to a legal procedure mandated by the original *Griggs* decision; validation is the process by which an employment practice, such as a civil service test, is vetted in order to make sure it is sufficiently job related and therefore permissible, regardless of any racial disparity. Per the City’s contract with I/O Solutions, the test vendor performed the job analysis itself. According to Human Resources Director Stephen Librandi, the outsourcing of job analysis is a standard practice, and the City’s current contractors for employment tests follow it as well.⁷¹ When an I/O representative appeared before the Civil Service Board, he testified that the company followed a typical process to ensure that the tests’ questions measured requisite skills and knowledge.⁷² However, Patrick Egan, the union president, called for a “third-party professional” to carry out a “validation study.” “That’s the law,” he said.

⁷⁰ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 614–16, 632; Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Mar. 11, 2004, 16.

⁷¹ Stephen Librandi, interview with author, Oct. 28, 2019.

⁷² Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 11, 2004, 16–19.

“That’s what’s fair.”⁷³ The Civil Service Board never pursued such an option, in part due to concerns about meeting the 60-day deadline to vote on certification imposed by New Haven’s Civil Service Rules. The commissioners did, however, solicit the opinions of outside experts on the tests and read through the questions themselves.⁷⁴ But any independent analysis of the examinations would have been susceptible to the same vulnerability of I/O’s internal study: both failed to account for 60/40 scoring breakdown for written and oral components. Because the fire union’s contract with the City stipulated that distribution, I/O did not perform an analysis of whether the 60/40 weighting best captured the knowledge, skills, and attributes relevant to performing well as a lieutenant or captain. This broader question of test validation remained unanswered.

The provenance of the 60/40 distribution further complicates the legitimacy of that standard for scoring the tests. The firefighters’ union negotiated with the City for that rule within its collective bargaining agreement dating to the mid-1980s⁷⁵ and has long expressed a preference for written as opposed to oral tests. Frank Ricci argues that written tests are more objective than oral exams. “It’s very easy for the City or anybody else to rig an oral panel,” Ricci said. “You can’t rig a written test; it’s just factual. The answer is the answer, and you can go back to the book and say, here’s the answer.”⁷⁶ Others have expressed skepticism of the union’s sincerity on this point; an offshoot case from *Ricci—Briscoe v. City of New Haven*—specifically targeted the 60/40 rule as discriminatory. Michael Briscoe, a firefighter who served on the same shift as Ricci, received the highest score on the oral portion of the exam but floundered on the written component, causing

⁷³ Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 5, 2004, 12–13.

⁷⁴ *Ibid.*, 15; Rule IV, Section 1, City of New Haven Civil Service Rules, accessed at <https://www.newhavenct.gov/civicax/filebank/blobdload.aspx?blobid=23424>.

⁷⁵ Verbatim Proceedings, *City of New Haven Civil Service Board In Re: Fire Captain and Lieutenant Promotional Examinations*, Mar. 11, 2004, 28.

⁷⁶ Frank Ricci, interview with author, Nov. 20, 2019.

him to be ranked 23rd on the promotional list for lieutenant. Federal courts ultimately ruled against Briscoe, noting that a 30/70 distribution in favor of oral scores would not have resulted in the promotion of more black candidates than the 2003 lists did; the particular individuals eligible for promotion would change, but the overall disparate impact would not.⁷⁷ Changing the scoring rules, therefore, offered no panacea for eliminating disparate impact in this case, although a representative from a black firefighting organization testified to the Civil Service Board that preference for oral assessments significantly reduced disparate impact in the Bridgeport Fire Department.⁷⁸ Notwithstanding the *Briscoe* case, the seemingly arbitrary 60/40 distribution and the failure of any party to prove that it was specifically job related make it difficult to regard New Haven's exams as legitimate.

Justice Kennedy took the opposite view in his majority opinion, placing the burden of proof on the City to demonstrate "that the 60/40 weighting was indeed arbitrary" and that a 30/70 distribution "would be an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions." Moreover, Kennedy wrote, "because the formula was the result of a union-negotiated collective-bargaining agreement, we presume the parties negotiated that weighting for a rational reason."⁷⁹ Perhaps. But the white-

⁷⁷ Thomas MacMillan, "After *Ricci* Ruling, Black Firefighter Sues City," *New Haven Independent*, Oct. 15, 2009, http://www.newhavenindependent.org/archives/2009/10/after_ricci_rul.php; Thomas MacMillan, "Judge Tosses Firefighter's Lawsuit," *New Haven Independent*, Sept. 12, 2013, https://www.newhavenindependent.org/index.php/archives/entry/judge_tosses_black_firefighters_lawsuit/; *Briscoe v. City of New Haven*, 967 F. Supp. 2d 563 (2013).

U.S. District Judge Charles Haight distinguished between a disparate impact claim of a racial group and of an individual. The 60/40 weighting did not have a disparate impact on African Americans as a whole, Haight found: "It would be one thing if the statistics showed that the City's use of the 60/40 weighting resulted in no African Americans being promoted, whereas reducing or discarding the written exam component would result in three African Americans being promoted." Instead, the 60/40 weighting had an adverse impact upon Briscoe "as an individual," but it "had no disparate impact on African-American candidates as a race." Though there may have been overall disparate impact on pass rates, Judge Haight ruled, Briscoe's situation was different, since the firefighter *passed* the test; but he did not score well enough to be promoted. *Briscoe v. City of New Haven*, 967 F. Supp. 2d 563 (2013), accessed via *New Haven Independent*, https://www.newhavenindependent.org/archives/upload/2013/09/USDC_Ruling_Dismissing_Action_9-9-13.pdf.

⁷⁸ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 614.

⁷⁹ *Ibid.*, 589.

dominated union also had a long track record of supporting employment practices, whether for a “rational reason” or not, that judges found to be discriminatory. The fact that the 60/40 number was negotiated makes it more suspect; the agreement in which the scoring rules were determined covered many other issues, and the parties may have agreed to it as part of a larger package involving concessions on both sides. The negotiations were not limited to, nor did they concern, test validity.

In fact, the emphasis on a pen-and-paper test seems ill-suited for jobs that require intuition, leadership, and on-the-fly thinking more than the ability to memorize. “A very important trait” for lieutenants and captains, Frank Ricci said, “is to be calm in the face of adversity, [...] to be able to evaluate things when you’re high-stress and be able to apply your training to that stressful situation.”⁸⁰ The ability to cram information in one’s head is not the mark of a good lieutenant or captain; the ability to apply the necessary knowledge in high-pressure situations matters much more. A legitimate, fair procedure is one that tests what it says it is testing—in this case, the leadership, judgment, and resolve characteristic of successful lieutenants and captains. Certainly, the information on the test, as Ricci claimed, was relevant to fulfilling the responsibilities of an upper-level official in the fire service. “You can be a leader and lead people in the wrong direction,” he noted.⁸¹ But the test did not actually measure the application of knowledge in practice. One promising alternative is “assessment centers,” which put candidates in particular situations and test how they respond. A testing expert endorsed this method in testimony to the Civil Service Board, noting that “situation judgment tests [...] can be developed and designed, customized within organizations, that demonstrate dramatically less adverse impact that are very well-received by candidates.” Such assessments “test the ability to apply their knowledge as

⁸⁰ Frank Ricci, interview with author, Nov. 20, 2019.

⁸¹ Ibid.

opposed to just memorize and give the correct answer from a multiple choice.”⁸² Ricci counters that there is no way to artificially create the “stress of where your life is on the line.”⁸³ Yet such assessments are unquestionably better simulations of the snap decision-making required of lieutenants and captains than multiple-choice examinations.

The particular scoring method created an additional source of arbitrariness to the point of absurdity. A court order in earlier litigation precluded the rounding off of civil service scores. Therefore, miniscule fractions on the promotional list dictated promotions.⁸⁴ Wayne Ricks, a black firefighter who served for 27 years in the department, failed the lieutenant test by just 0.0167 points—that is to say, just over one-hundredth of a single point. “Just because you scored three points more than I did,” Ricks said, “that doesn’t make you a better officer.”⁸⁵ Indeed, even the best-designed test cannot be expected to be precise to the ten-thousandths place.

Moreover, the test—even the oral portion—seemed to ignore interpersonal qualities that are important to effective firefighting. “You need to be good with people,” Ricks said, “especially when you go into the communities and there might be a language barrier or a culture barrier. Not everyone is comfortable going into ‘the hood.’”⁸⁶ Softer, social skills matter for the job, too. In life-or-death situations, trust between the community and the fire officers is essential, and I/O’s test did not take it into account. Indeed, quality of interpersonal treatment is one of the four pillars of Tom Tyler’s definition of procedural justice; therefore, a fire department concerned about its

⁸² *Ricci v. DeStefano*, 557 U.S. 557 (2009) 571, 615–16; Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Mar. 11, 2004, 22–23.

⁸³ Frank Ricci, interview with author, Nov. 20, 2019.

⁸⁴ Thomas Ude Jr., interview with author, Oct. 23, 2019. See *Kelly v. New Haven*, 275 Conn. 580 (2003), which limited the number of candidates eligible for consideration for a promotion when rounding is used; and Ude, “Civil Service Litigation History.”

⁸⁵ “The Ladder: Part 3: Why Did New Haven’s White Firefighters Test Better than Blacks and Hispanics?” *Slate*, Jun. 25, 2009, http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_3_why_did_new_havens_white_firefighters_test_better_than_blacks_and_hispanics.html.

⁸⁶ *Ibid.*

own legitimacy would be justified in valuing social skills.⁸⁷ Given valid concerns about unequal access to study materials, the over-weighting of written components, flaws in the test-maker's process, and the disconnect between the skills and knowledge tested and those that are necessary for the job, the examinations administered in the winter of 2003 were of doubtful legitimacy, specifically violating the tenet of neutrality; unjustified bias seeped into the exams, yielding sharply disparate results. High-stakes written exams are hardly a fair means of identifying the best leaders. A hiring procedure assessing situation-based judgment, whether through an expanded oral exam or the use of assessment centers, would more legitimately determine the most qualified individuals for the positions.

B. THE PROCESS

In light of the City's justified qualms about the validity of the exams and well-founded fears about legal liability, the decision to oppose certification of the tests was not capricious. Administration officials had good reason, from both legal and legitimacy perspectives, to intervene. Nevertheless, the process of carrying out the decision not to certify the tests had its own implications for the City's legitimacy. Despite the problems with the exams, the Civil Service Board's *ex post facto* decision to discard the results violated many tenets of legitimacy, namely *standing*, *trust*, and *transparency*. Once the applicants had taken the test, the decision not to certify instigated additional division and racial strife as well as the sense among many white individuals that the City had degraded their personal dignity in an effort to make a political statement. Notwithstanding the truth of the matter, this *perception* of illegitimate action and procedural

⁸⁷ Tyler and Lind, "Relational Model of Authority," 141.

inconsistency on the part of many New Haven residents and firefighters detracted from the City's good-faith attempt to maintain legitimacy.

The primary concern weighing on Mayor DeStefano was the law. Based on the New Haven Fire Department's long history of losing race discrimination cases and the consensus interpretation of Title VII, the administration expected that courts would take issue with the tests' severe disparate impact. Before *Ricci*, New Haven had always defended its civil service examinations when sued. But DeStefano said he simply believed that "the result was one that would not be defensible in court." He also had concerns about the legitimacy of the institution if it promoted no African Americans in a city that was majority people of color (as discussed below). Independent of that consideration, DeStefano and Ude, the corporation counsel, deemed that the law was clear, and it was not on the side of the City. Rather than waiting to be sued by the Firebirds, who represented black firefighters, New Haven preempted the complaint. As DeStefano notes, the initial legal calculation was correct: both the District and Appellate Courts ruled in favor of the City, before a slim majority of the Supreme Court consciously asserted a new legal standard.⁸⁸

But the definitions of legitimacy and lawfulness are not identical. When the City urged the Civil Service Board not to certify the results, it interfered with the expectation of procedural justice, specifically the expectation of being treated with dignity and being validated within the larger social group. A central cause of the acrimony was the manner in which the City released the results of the exam; while names were redacted, the race of each candidate was listed. "It was essentially like pouring gasoline in a room, lighting a match, and walking away," Frank Ricci said. To Ricci, this was "nefarious" because it treated individuals only as members of a racial group: "They stopped looking at firefighters as individuals and they started putting everybody in classes."

⁸⁸ John DeStefano Jr., interview with author, Oct. 18, 2019.

Moreover, he thought the move was a political tactic designed to avert litigation: if firefighters did not know if they passed or were eligible for promotion, then perhaps they would not sue.⁸⁹ Egan, the president of Local 825, agreed at a public meeting that “as far as the process goes—not the test itself—but how this has all come forward to us, hasn’t really been fair to any of the firefighters.” He asked, now that the City had published the scores by race, if it could also provide individuals’ names.⁹⁰ New Haven’s racial decision-making alarmed the Supreme Court’s majority. While the City’s lawyers contended in oral argument that the decision was racially neutral, because the non-certification result forced *all* firefighters to retake the examination, rather than only one race or another, Justice Kennedy disagreed: “Counsel, [New Haven] looked at the results, and it classified the successful and unsuccessful applicants by race.” Chief Justice Roberts echoed this concern.⁹¹ For the purpose of assessing its disparate impact liability, the City had no choice but to separate the exam results by race. But from a legitimacy perspective, this sort of flagrant racial classification undermined each firefighter’s sense of himself as an individual. To Ricci, it was “insulting”: “The problem is they’re not looking for the best firefighter,” he said, “they’re just looking at people as what color they are.”⁹² As Reva Siegel explains, “Competing for promotion in a process in which racial considerations play a visible—and seemingly decisive—part undermines the confidence of job applicants that they have a fair opportunity to compete.”⁹³ The *appearance* of race playing a central factor, regardless of the reality, strained perceptions of the legitimacy and fairness of the non-certification decision.

⁸⁹ Frank Ricci, interview with author, Oct. 9, 2019.

⁹⁰ Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 5, 2004, 10–11.

⁹¹ *Ricci v. DeStefano*, Oral Argument Before the Supreme Court, Apr. 22, 2009, 39–40, accessed via *SCOTUSblog*, <https://www.scotusblog.com/case-files/cases/ricci-et-al-v-destefano-et-al/>.

⁹² Frank Ricci, interview with author, Nov. 20, 2019.

⁹³ Siegel, “From Colorblindness to Antibalkanization,” 1334–35.

The crux of the City's legitimacy problem was the timing of its process, which maximized the visibility of its racial decision making and thus polarized the workplace. In Justice Kennedy's view, race-conscious actions would have been legitimate *before* the firefighters took the test, but because they occurred *after the fact*, they had the function of tearing at the social fabric. Even Kimber, who disagrees with the majority opinion, recognized the centrality of timing to the issue: "I don't know that there could have been a different approach than what the approach was, simply because these individuals passed this exam," Kimber said.⁹⁴ In other words, some firefighters passed the test, no matter how poorly designed it was. For people who followed the City's rules on how to prepare for the test and succeeded, it was beyond comprehension that the test could be unfair. Burgett, the City's human resources director, acknowledged this baseline presumption. "[T]ake somebody, they studied hard, they believed they were doing all the right things. [...] Here are 60, 80 guys who are getting ready to take a test, and they believed that the test would be fair, and so for us to stand up and say, 'Well, we don't think this is a valid test,' is very personal."⁹⁵ For many if not most firefighters, the mere fact that New Haven administered the tests implied their legitimacy; why would a City give a test that it did not trust to be fair?

The post-test reversal became a centerpiece of the majority's argument. The Court, Kennedy wrote, does not "question an employer's *affirmative* efforts to ensure that all groups have a fair opportunity to apply for promotions and to participate in the process by which promotions will be made." Proactive action to avert unequal opportunities, Kennedy wrote, was permissible. However, "once that process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate

⁹⁴ Boise Kimber, interview with author, Oct. 16, 2019.

⁹⁵ Tina Burgett, interview with author, Oct. 30, 2019.

expectation not to be judged on the basis of race.”⁹⁶ At first, the Court’s logic seems inconsistent. Why would race-conscious behavior be any more permissible at one time than another? If an employer has the right to try to ensure that all groups have a fair opportunity to succeed, then it would seem that the employer would be justified in scrapping its process if it deemed its efforts—upon seeing the results—a failure. Indeed, Justice Souter, who dissented in the case, took precisely this “damned if you do, damned if you don’t” stance in oral argument.⁹⁷

Legitimacy and social cohesion help to explain Kennedy’s distinction. Not certifying the tests amounted to the suggestion to white applicants that they would have been promoted, if not for their race. This perception—even if it were not the City’s intention—could not help but drive racial animus and division. Of course, as Siegel notes, Title VII was written to combat discrimination against minorities, not whites. Even so, what she termed “majority group aggrievement” can still “stimulate racial resentments that erode social cohesion.”⁹⁸ Just as blatant racial determinations violate legitimacy when police departments assume minorities to be dangerous, the perception of blunt racial categorizations can undermine whites’ sense of dignity and value in the community and their faith in the fairness of institutions. This is not to say that the two forms of “discrimination” are of equal weight or deserve equal attention. But all people, no matter their race, have similar expectations of procedural justice. Overturning the test results with an overtly racial calculus appeared to infect the fairness of the process—no matter the dubious fairness of the exams.

The *Ricci* case thus exacerbated racial tensions in the Fire Department and across the City, indicating the extent to which the process of refusing to certify the tests damaged the City’s ability

⁹⁶ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 585. Emphasis added.

⁹⁷ *Ricci v. DeStefano*, Oral Argument Before the Supreme Court, Apr. 22, 2009, 8.

⁹⁸ Siegel, “From Colorblindness to Antibalkanization,” 1335–36.

to inculcate community trust and engagement. The Department was racial divided; one black firefighter told *Slate* in 2009, “When you sit down and eat lunch, you usually sit with your own, eat with your own.”⁹⁹ In 2004, after the Civil Service Board decided against certification and Ricci sued the City, the firefighters’ union executive board held a vote on whether to file a separate suit to support Ricci and the other plaintiffs. All of the white people on the board voted in favor; all the African Americans opposed. At a full-union vote, firefighters sat with members of their race (most Hispanics did not attend). The white firefighters once again voted to join Ricci and sue New Haven; the black firefighters did not. Courts ultimately dismissed the union’s suit on account of a conflict of interest; this spawned a countersuit from the Firebirds.¹⁰⁰ “It was very divisive, inside the Fire Department, inside the City of New Haven,” Burgett said. At the level of personal relationships, she said, many of “those divisions never got healed.”¹⁰¹ If a central characteristic of legitimacy is a community’s social health and vibrancy, *Ricci* was toxic.

Beyond the question of increasing racial discord, the decision of non-certification also attracted doubts about legitimacy for its alleged political motivations. Legitimacy hinges on trust and transparency; legitimate institutions’ motivations are clear and fair. As Boise Kimber noted, in a legitimate government, “the people [who] are running government are honest in their dealings.”¹⁰² The *Ricci* plaintiffs, however, argued that the City used disparate impact law only as

⁹⁹ Bazelon, “The Ladder: Part 1.” Another firefighter, speaking to the *New York Times* in 2009, said, “It causes a lot of animosity. This is almost a daily debate among firefighters.” Mark Pazniokas and Thomas Kaplan, “Case in Court, New Haven Firefighters Wait and Work,” *New York Times*, Jun. 5, 2009, <https://www.nytimes.com/2009/06/06/us/06firefighters.html>.

¹⁰⁰ U. S. District Judge Mark Kravitz ruled that the union had no standing to sue because “the interests of a significant subset of the Union’s members are diametrically opposed to the interests of another significant subset.” *New Haven Firefighters Local 825 v. City of New Haven* (D. Conn. 2005); Ude, “Civil Service Litigation History”; “The Ladder: Part 2: Do White, Black, and Hispanic Firefighters in New Haven Get Along?” *Slate*, Jun. 25, 2009, http://www.slate.com/articles/news_and_politics/jurisprudence/features/2009/the_ladder/part_2_do_white_black_and_hispanic_firefighters_in_new_haven_get_along.html; Thomas MacMillan, “NAACP Backs City in Firefighter Case,” *New Haven Independent*, Jan. 16, 2009, http://www.newhavenindependent.org/archives/2009/01/naacp_reacts_to.php.

¹⁰¹ Tina Burgett, interview with author, Oct. 30, 2019.

¹⁰² Boise Kimber, interview with author, Oct. 16, 2019.

a pretext in order to score points with the politically important constituency of African American voters. “It was pure politics over public safety,” Ricci said. “There’s no question about it.”¹⁰³ To Ricci, the City never cared about whether the test was job related or not because it ignored the testimony of many who said the test was fair and never asked firefighters how hard they worked to prepare for the examination. Instead, it was all a “political charade.” According to Ricci, the City disingenuously presented the results, because while no African Americans scored well enough to be promoted for the current vacancies, some were eligible to be promoted if additional jobs opened.¹⁰⁴

Justice Samuel Alito reprised Ricci’s argument in a concurring opinion, joined by Justices Antonin Scalia and Clarence Thomas, claiming that New Haven had no “legitimate reason” to discard the test results because the reason it urged against certification was “the desire to placate a politically important constituency.” The political relationship between DeStefano and Kimber was the centerpiece of Alito’s analysis; Kimber, Alito charged, exerted pressure on the administration behind closed doors. Transparency thus became a central dividing line in views about the legitimacy of the non-certification decision. Burgett stressed the City’s commitment to an open process: “The process of having three or four Civil Service Commission meetings over a period of time that were brutal beyond words was done in the spirit of, how do we become more transparent?”¹⁰⁵ By soliciting public testimony in open and contentious hearings, the City organized a process, in its view, to restore faith in the Civil Service Board’s independence. On the contrary, Justice Alito charged that the DeStefano administration had decided its stance from the beginning and only wanted to maintain the appearance of neutrality. After the first Civil Service

¹⁰³ Frank Ricci, interview with author, Oct. 9, 2019.

¹⁰⁴ Ibid.

¹⁰⁵ Tina Burgett, interview with author, Oct. 30, 2019. In fact, the Board held five public meetings, though not all were open to public comment.

Board meeting, the mayor's executive aide sent an email to DuBois-Walton, Burgett, and Ude reminding them that "these folks are not against certification yet. So we can't go in and tell them that is our position; we have to deliberate and arrive there as the fairest and most cogent outcome."¹⁰⁶ This email indeed suggests that the administration's private and public stances were not completely symmetrical, justifying residents' concerns about the City government's trustworthiness and commitment to the process of hearing testimony and deliberating at the Civil Service Board meetings.

The City, of course, contends that its motivations were completely legitimate: it acted to adhere to the clearly defined legal standard of disparate impact. The degree to which any racial political calculus influenced DeStefano and his allies as they considered the results cannot be proven or determined with any certainty; in recent interviews, DeStefano and Kimber both acknowledged their political relationship but denied undue influence or pressure.¹⁰⁷ Either way, as Justice Ginsburg noted in her dissent, the Civil Service Board also faced heated testimony and pressure in favor of certification. The Board, which tied 2–2, rendered "an independent, good-faith decision on the certification."¹⁰⁸ The City, Ginsburg reminded the majority, did not make the decision; the Civil Service Board did. DeStefano did not deny that the civil service tests posed a political question. In fact, he argued that the debates about certification were just what politics is about: "creating space for public voices to advocate," deliberating, and coming to a decision "rooted in our values and beliefs."¹⁰⁹ Acrimonious disputes are part of politics; democracy is about negotiating between the views of many different people. The question is whether the City manipulated the process, and there is scant evidence that it did so, even if the email Alito cited

¹⁰⁶ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 596–601.

¹⁰⁷ John DeStefano Jr., interview with author, Oct. 18, 2019; Boise Kimber, interview with author, Oct. 16, 2019.

¹⁰⁸ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 640–41.

¹⁰⁹ John DeStefano Jr., interview with author, Oct. 18, 2019.

suggests that the administration made its decision before the conclusion of the public hearings. James Segaloff, the chairman of the Civil Service Board, expressed his colleagues' independence in no uncertain terms. "I can assure you," he told the lawyer for the future plaintiffs, "[Tom Ude] is not leading us anywhere. We're a pretty independent-thinking group."¹¹⁰ Two members of the Civil Service Board, after all—including Segaloff—voted to certify the tests. Nevertheless, the particular circumstances of the case caused at least the *appearance* that racially-based political considerations stood between those who passed the test and their promotions. A cloud of suspicion, whether just or unjust, hung over the decision. That perception did indeed damage the City's legitimacy, no matter its commitment to following Title VII's disparate impact standard.

Even assuming good faith on the part of New Haven in attempting to comply with the law, the rejection of the tests created a racially divisive process that caused people to believe they were being judged solely on the basis of race and denied benefits due to political calculations made behind closed doors. Such perceptions reflect clear violations of the tenets of neutrality, trust, and equal standing. In opposing certification of the tests, New Haven recognized their flawed nature and sought to start over—but from a legitimacy perspective, it acted too late. Having already administered the problematic exams, the City became embroiled in a double-bind. Approving tests of questionable fairness would certainly harm New Haven's legitimacy. But the City's ultimate decision—an *ex post facto* refusal to certify the exams—likewise undercut its moral authority.

C. THE RESULTS

Even as the *Ricci* process contravened principles of legitimacy, the City in fact grounded its decision against certification in the very same concept of legitimacy, with regard not only to

¹¹⁰ Verbatim Proceedings, *In Re: Fire Captain and Lieutenant*, Feb. 5, 2004, 24.

the tests but the implications of their results. Proceeding with the promotions off of the list—and therefore not elevating a single African American—would have undermined the City’s efforts to build a community that valued and provided equal opportunities for all residents. Such community-oriented concerns uphold the group-based facet of legitimacy, particularly the principle of group standing. The City was hamstrung. Notwithstanding the concerns about its process, the City’s opposition to certification, in light of the disparate results, actually demonstrated its commitment to cultivating a strong social fabric and trust among community members—its commitment to legitimacy.

The impetus to comply with Title VII was not New Haven’s only motivation in opposing the certification of the examination results; the racial disparity of the promotions worried Mayor DeStefano at a more fundamental level. At the time, New Haven’s population was nearly 40 percent African American and, collectively, 60 percent people of color, and DeStefano expressed concern that promoting no African Americans would lose “the respect of the community.” While firefighters like Ricci may have had what Justice Kennedy termed the “legitimate expectation” of not being judged on the basis of their race, New Haven residents, in DeStefano’s view, had a legitimate expectation that City institutions would include people who looked like them. DeStefano was frank: “To answer the question on the basis of litigation, I can alibi the decision, but it wasn’t just that. It was also political, in the sense that the City was 60 percent people of color, [and] I just wasn’t interested in having, irrespective of the law, a test certified that [promoted] no African Americans.” In fact, prior to the final vote, the City had prepared a press release promising to explore alternative means of not promoting from the list if the Civil Service Board decided to certify it.¹¹¹

¹¹¹ John DeStefano, interview with author, Oct. 18, 2019.

According to Frank Ricci, race and representation should not have been a consideration for the City. “When people call 911, nobody cares what you look like,” Ricci said. “They just care that you get there quick, you’re competent, you’re courteous, you treat them with respect, and you provide them with the best possible care.”¹¹² Any consideration of race, therefore, is irrelevant and problematic. At some level, he is right; the importance of competence in public safety cannot be minimized. It is certainly not in the interest of the City nor the people to promote unqualified individuals.

Yet the Fire Department is about more than just putting out fires; it is a symbolic and substantive link between government and the people with important social and economic meaning. Firefighters, especially after the September 11, 2001 terrorist attack, are revered in the community and embody, in the minds of most Americans, the virtues of bravery, self-sacrifice, and public service. At the Civil Service Board hearings, minority firefighters raised concerns about young people of color in New Haven not finding role models on a predominantly white-led fire service.¹¹³ The Fire Department is also an important economic gateway for many people to secure, middle-class jobs; Ricci and Kimber agreed on the economic opportunity that the profession provides.¹¹⁴ Shutting down that pathway to prosperity to people of color—even if only in the short term, until more vacancies opened—would carry economic as well as social costs to the majority-minority community of New Haven. The principle Justice O’Connor used to justify affirmative action in *Grutter* is also relevant to disparate impact: in order for leaders to have legitimacy in the view of the public, people must have confidence that the process to select and train those leaders was “visibly open to talented and qualified individuals of every race and ethnicity.”¹¹⁵ In *Ricci*,

¹¹² Frank Ricci, interview with author, Oct. 9, 2019.

¹¹³ Siegel, “From Colorblindness to Antibalkanization,” 1340–41.

¹¹⁴ Frank Ricci, interview with author, Oct. 9, 2019; Boise Kimber, interview with author, Oct. 16, 2019.

¹¹⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003), 332.

proceeding with the test results would challenge the integrity of the Fire Department as an institution, undermining minorities' confidence that it is designed fairly and neutrally. While such an opinion may not affect a citizen's likelihood to adhere to a firefighter's orders in a crisis situation, it would reduce that citizen's overall engagement and sense of belonging in the community. The group dimension of legitimacy centers around a promise that people of a certain class receive the same treatment and opportunity as any other class. Depriving one racial class the symbolic, social, and economic benefits of leadership in the Fire Department would undermine the City's credibility among the larger populace of people of color.

Denying promotions to black applicants would also threaten to create additional fissures between the Department and the people of New Haven, inciting resentment against promoted captains and lieutenants who lived in surrounding suburbs rather than the City itself. "This is a core issue for the community of, 'What does this government look like, is it representative of *us*?'"

DeStefano said. "And the huge distinction here is, 100 percent of the people of New Haven live in New Haven; 25 percent of the firefighters live in New Haven. So who is *us*?"¹¹⁶ One black firefighter noted in an interview in 2009 that when black children peek into her firehouse to marvel at the trucks, the black firefighters interact with them much more than the white ones. In addition, she said, she has heard white firefighters joke about "working in the ghetto." "How dare you," she asked, "when you live in Madison or Guilford, come in here and take our money and go back to your communities and talk shit about New Haven?"¹¹⁷ (Madison and Guilford are two nearly all-white suburbs east of New Haven. Frank Ricci lives in Wallingford, another demographically homogenous suburb.) Legitimate government encourages the development of strong social networks and civic participation; when people respect and trust their institutions, they are more

¹¹⁶ John DeStefano Jr., interview with author, Oct. 18, 2019.

¹¹⁷ "The Ladder: Part 2," *Slate*.

likely to engage in the community. In a Department already fraught with division, the question of what promoted firefighters looked like and where they were from was explosive, threatening to stymie the spirit of engagement and trust characteristic of legitimate authority.

Therefore, the City's unprecedented decision not to stand by its potentially discriminatory test reflected a mindset in accord with the interests of legitimacy. To the extent DeStefano's decision was "political," it was less about securing votes and more about preserving the compact of civil society. In *Ricci*, New Haven attempted to avoid perpetuating a racially stratified society, enhancing its moral authority in a diverse community. The City's recommendation against certification and the Civil Service Board's ultimate refusal to approve the promotions increased the people's confidence that city government was *their* government, instilling the faith in representative institutions on which all government relies.

IV. CONCLUSION: STRADDLING THE RACIAL LEGITIMACY GAP

New Haven's substantive decision therefore upheld core elements of legitimate government by questioning the credibility of the written tests and aiming to ensure equality of opportunity and full civic participation; yet the process by which it executed that decision undercut its legitimacy by seeming to engage in crude racial classifications and cloak its true intentions. Applying the definition of legitimacy to the test itself, the process of non-certification, and the test results yields an irreconcilable, mixed conclusion. Both sides in the case made compelling arguments that the other violated legitimacy.

Ricci thus exposed fundamental tensions in the way people perceived fairness as it relates to race; it exposed a racial legitimacy gap. The plaintiffs argued that legitimate government treats each citizen neutrally, which means never taking race into account one way or the other; fair and

legitimate treatment depends on being treated as an individual—as a person, and not as part of a racial category. The City’s process in revoking the test results after a racial assessment of those eligible for promotion therefore violated this notion of procedural justice. But the defendants invoked a group-based consideration of legitimacy in which authority cultivates and validates a sense of group membership and equal standing; legitimate government, which depends on strong social relations, cannot withstand severe hierarchies along arbitrary lines such as race or class. This viewpoint of legitimacy, then, contends that when leadership pathways are and appear to be exclusive on the basis of race or other social distinctions, the government implicitly communicates messages to the community that detract from public engagement and level of respect for authority. The tensions between the City’s process and policy were therefore intertwined with tensions latent in the definition of legitimacy itself.

The purpose of this analysis is not, with fifteen years’ hindsight, to second-guess difficult decisions. In fact, given the history of litigation, the sheer extent of the disparate impact, and the clear legal standard on Title VII at the time, before the Supreme Court’s intervention, the City made an appropriate decision under the circumstances.¹¹⁸ But those circumstances were far from ideal. *Ricci* presents an opportunity to study the relationship between race and legitimacy to clarify ways civil societies can uphold their moral authority without inevitably alienating one race or another. This is no easy feat; as Reva Siegel explains, “invalidating test scores for openly racial reasons can estrange majority applicants, while promoting employees on the basis of tests that are of uncertain job-relevance but have dramatic racial disparate impact can estrange minority

¹¹⁸ Despite the headaches the case caused, key members of the DeStefano administration continue to believe that they made the right decision. No alternative decision, moreover, could have averted litigation or controversy. Tina Burgett, interview with author, Oct. 30, 2019; Thomas Ude Jr., interview with author, Oct. 23, 2019; John DeStefano Jr., interview with author, Oct. 18, 2019.

applicants.”¹¹⁹ Both outcomes threatened to estrange citizens and incite division—in other words, both outcomes strained perceptions of legitimacy. Is there any way out of this quagmire?

Ricci in fact provides lessons in how to design policy to accord with the considerations of both individual- and group-oriented legitimacy. Governments can, with proactive programs and careful attention to the processes by which they are executed, embrace diversity without appearing to exclude or disadvantage white people. The Supreme Court’s majority opinion did not invalidate all forms of race-conscious action. Even Frank Ricci did not dispute the general aim of diversifying the Fire Department. “As a goal, to say, it would be great if we look like the population, that’s great,” he said. “But to engineer the outcome is dangerous.”¹²⁰ Before administering the test, New Haven could have taken many steps to minimize the likelihood of a vast racial disparity without entering the territory of *ex post facto* “engineering.” Indeed, since *Ricci*, the Fire Department has started new initiatives to increase community connections and minority recruitment. “I have no problem with outreach,” Ricci said. Now, firefighters “go into the schools; they go into the churches.”¹²¹ Minority firefighters lead study groups when promotional exams approach. To some extent, these policies have worked, although the increased diversity in the Fire Department in recent years can also be attributed to a general boon in hiring in the aftermath of the *Ricci* decision.¹²² Strange bedfellows as they are, Boise Kimber and Frank Ricci agree on the benefits of aggressive outreach and recruitment.¹²³

Meanwhile, rather than relying on written tests with unwieldy and expensive reading loads to determine the most qualified leaders, New Haven could embrace more relevant and less

¹¹⁹ Siegel, “From Colorblindness to Antibalkanization,” 1344.

¹²⁰ Frank Ricci, interview with author, Nov. 20, 2019.

¹²¹ Ibid.

¹²² John DeStefano, interview with author, Dec. 3, 2019.

¹²³ Boise Kimber, interview with author, Oct. 16, 2019; Frank Ricci, interview with author, Oct. 9, 2019.

discriminatory means of hiring, promoting, and developing talent in the Fire Department. For example, assessment centers eschew pen-and-paper exams for tests of firefighters' reactions to mock scenarios in the field. If the union insists on maintaining traditional tests, the City could press the Fire Department to reduce the amount of knowledge tested on the exams, and therefore minimize the potential for disparate impact, by adopting more extensive training for higher-level positions such as lieutenant and captain. In such a system, the Department would identify promising individuals with strong judgment and then develop their knowledge and skills in programs similar to those for entry-level positions. Ricci also expressed support for an "explorers program" that would recruit and train children to make them qualified applicants for the fire service.¹²⁴ A robust commitment to training current and prospective firefighters would help to narrow the performance gaps on written tests, if not preclude the need for them altogether.

New Haven's legitimacy problem in *Ricci* was not, ultimately, that it supported equitable representation in a majority-minority city. Rather, it was that in revoking the results of a test, the City stoked racial antagonisms and appeared to engage in racial favoritism, thus delegitimizing its otherwise-legitimate attempt to reject the questionable exams. Such backtracking is not the best way to cultivate broad-based support for efforts to address racial disparities. With the benefit of hindsight, *Ricci* instructs cities to avoid this double-bind and take proactive measures to support equal opportunity and to anticipate, as much as possible, sources of unequal outcomes. When these measures predate any particular examination, most citizens—perhaps even Frank Ricci—will accept them as legitimate. Process and policy need not collide with each other as violently as they did in *Ricci*.

¹²⁴ Frank Ricci, Nov. 20, 2019.

But such measures do not fully reconcile the tension between the two forms of legitimacy, for they fail to recognize the influence of history on perceptions of fairness. The division in historical perspective is perhaps in starkest relief in the majority and dissenting opinions from the Supreme Court. Each opinion told a story about the New Haven Fire Department. Justice Anthony Kennedy's story began in 2003; he started the second paragraph of his opinion by stating, "In 2003, 118 New Haven firefighters took examinations to qualify for promotion to the rank of lieutenant or captain."¹²⁵ Justice Ruth Bader Ginsburg's opinion opened with a call for a much earlier start to the story: "In assessing claims of race discrimination, '[c]ontext matters.'"¹²⁶ She situated *Ricci* in the history of the Civil Rights Act of 1964 and New Haven's own discriminatory past, asserting, "It is against this backdrop of entrenched inequality that the promotion process at issue in this litigation should be assessed."¹²⁷ At the core of *Ricci* was a debate about just how much context matters when it comes to racial discrimination—and, by extension, legitimacy.

This discrepancy in historical viewpoint spawned the racial legitimacy gap in *Ricci*. For Frank Ricci and the other plaintiffs, each firefighter who sat for the test was on an equal plane; they had been provided with the same information on how to succeed, and the test objectively measured knowledge necessary to holding the lieutenant or captain position. Starting with the baseline assumption of fairness, they perceived New Haven's decision not to certify the tests as a violation of legitimacy. The only reason the promotions were invalidated, it seemed, was race. Viewing the City's motives with suspicion, the plaintiffs felt that New Haven degraded their personal dignities in the service of an illegitimate attempt to skew the racial scales and amass political capital. By contrast, minority firefighters started from a presumption of lingering

¹²⁵ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 562.

¹²⁶ *Ibid.*, 608. Justice Ginsburg quoted the "[c]ontext matters" phrase from the affirmative action case *Grutter v. Bollinger*, 539 U.S. 306 (2003), 327.

¹²⁷ *Ricci v. DeStefano*, 557 U.S. 557 (2009), 611.

inequality and unfairness, recalling the Department's longstanding history of discrimination. The emphasis on a written test seemed to entrench whites' advantages. The Civil Service Board's rejection of the test, then, reflected New Haven's commitment to finding a better way of assessing leadership for the fire service and ensuring that all people had equal access to a promotion, a hallmark of legitimate government. As Siegel suggests, the central question was whether disparate impact law "even[ed] the playing field, or tilt[ed] it."¹²⁸

The extensive literature on legitimacy has thus far overlooked the role and relevance of history.¹²⁹ Individual and collective memories matter in a citizen's perception of an institution's moral authority, because the same action can be interpreted by some as a legitimate effort to address past injustice and by others as an illegitimate intervention on behalf of a favored group. The Court could not resolve this gulf in outlook about the past; the justices were themselves divided. *Ricci* suggests that notions of fairness, and thus legitimacy, hinge on a matter of historical perspective.

At the start of Barack Obama's presidency, it seemed as if the U.S. had finally overcome its checkered racial past. A black man served in the White House built by slaves; the U.S. had become "post-racial." *Ricci* appeared before the Supreme Court precisely at the peak of this hopeful, and ultimately naïve, historical moment. The immense racial backlash both during and after the Obama presidency cautions against a sweeping rejection of racial history.¹³⁰ The

¹²⁸ Siegel, "Race-Conscious but Race-Neutral," 663.

¹²⁹ The most compelling parallel in the legitimacy scholarship surveyed in Section I is the distinction between the "hidden" and "overt" curricula. While white Americans may absorb the "overt" curriculum of the United States's commitment to liberty and equality, minorities have received the "hidden" curriculum of exclusion, prejudice, and limited opportunities. The same set of facts, therefore, could produce diverging conclusions as to their fairness. See Meares and Neyroud, *Rightful Policing*, 12. But this concept does not fully capture the fundamental differences in historical memory and interpretation on display in *Ricci*.

¹³⁰ For a snapshot of post-racial commentary, see Thomas L. Friedman, "Finishing Our Work," *New York Times*, Nov. 4, 2008, <https://www.nytimes.com/2008/11/05/opinion/05friedman.html> (claiming that Obama's election officially "ended" the Civil War) and "MSNBC's Matthews on Obama: 'I Forgot He Was Black Tonight,'" *Real Clear Politics*, Jan. 27, 2010, https://www.realclearpolitics.com/video/2010/01/27/msnbcs_matthews_on_obama_i_

legitimacy gap will therefore persist, driving apart Americans on a whole range of racial issues, until they start to more deeply assess and address the generations of history underneath present conflicts. To achieve legitimate status, appeals for greater diversity and representation must make this history come to life, illuminating the enduring legacies of slavery and discrimination. To engender support for affirmative action in the present, advocates will first have to change how people think about the past.

Ricci v. DeStefano is a story about legitimacy, race, and fairness. It ended, in one sense, in the Supreme Court's decision in 2009. But in their fierce debates about racism, diversity, and affirmative action, Americans are still writing and rewriting the *Ricci* story. Indeed, it will not end—and more *Riccis* will emerge—unless Americans engage with each other in a deeper conversation about how, and especially when, the story started.

forgot_he_was_black_tonight.html. For a critique of post-racialism in light of Donald Trump's election, see Nikole Hannah-Jones, "The End of the Post-Racial Myth," *New York Times Magazine*, Nov. 15, 2016, <https://www.nytimes.com/interactive/2016/11/20/magazine/donald-trumps-america-iowa-race.html>.

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