Penn Undergraduate Law Journal

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A student-run research publication at the University of Pennsylvania, the Penn Undergraduate Law Journal seeks to foster scholarly discourse on topical and historical issues pertaining to law or the legal system. In this spirit, the Journal's principal objective is to publish exceptional undergraduate works, drawn from an array of disciplinary perspectives, that evaluate and elucidate the intricacies, vagaries, and nuances of law as they relate to domestic and international affairs, business, academia, and society. PULJ aims to sustain and enrich a vibrant discussion about law at the undergraduate level because it recognizes that the student writers of today will be the leaders, lawyers, and scholars of tomorrow.

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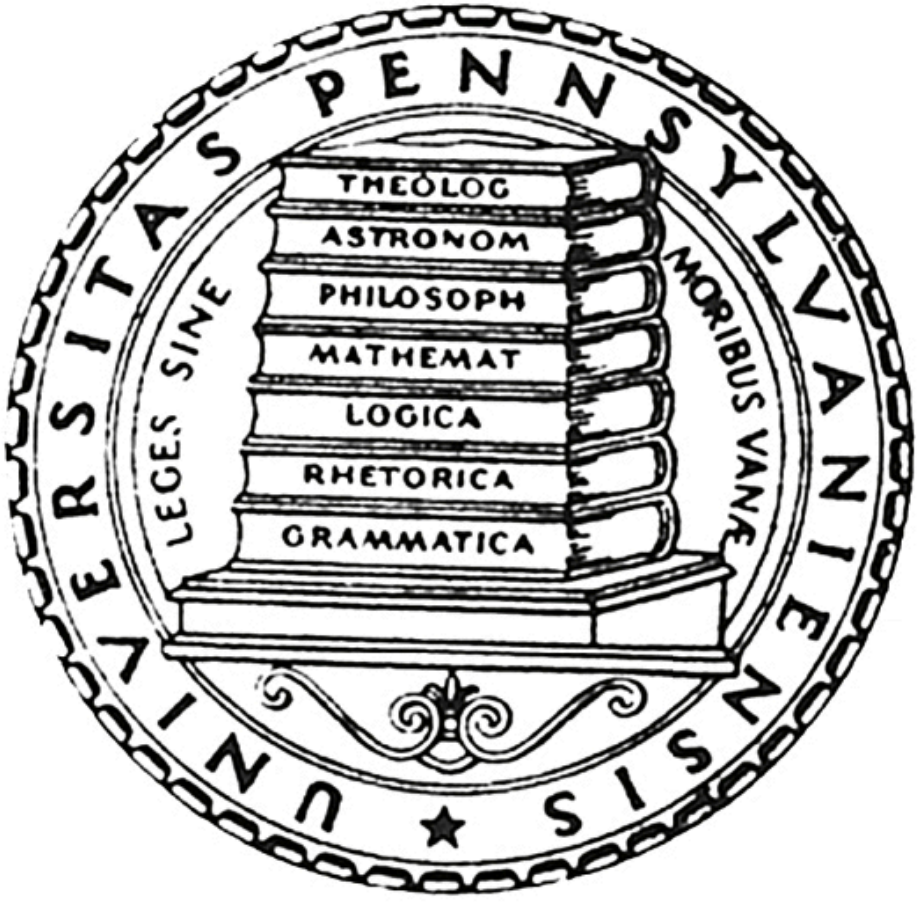
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LETTER FROM THE EDITOR-IN-CHIEF

Ana Lorenza R. Colagrossi, University of Pennsylvania

Dear Reader,

On behalf of the entire Penn Undergraduate Law Journal staff, I am very proud to present you with the fourteenth installment of our publication. This edition brings together four exceptional articles which highlight diverse topics ranging from class-based affirmative action to the Ethics in Government Act in *Morrison v. Olson*. These articles explore subjects that are incredibly relevant to the American legal system as a whole. Our entire team is deeply humbled and excited to share our authors' remarkable work with you.

Our first article, "An Inadequate Constitutional Jurisprudence: Substantive Due Process Through the Lenses of Constitutional Theory," comes to us from Jason Zhang of Columbia University. The author begins by examining the history of judicial restraint in addition to the major cases in the developmental history of substantive rights. Zhang analyzes the substantive due process doctrine through the lens of four theories: originalism and textualism, political process theory, pragmatism, and living constitutionalism. He argues that "lacking adequate safeguards, an unelected and life-tenured judiciary has been and will continue to be able to impose its own views upon law using substantive due process. In this way, courts erode democracy by shrinking the roles of the people and the legislature, thereby providing opportunities for the emergence of oligarchy."

Our second piece, "The Need for a Unitary Executive: *Morrison v. Olson* Revisited," is authored by Jack Carlson of Michigan State University. The author begins by providing historical and legal context on the supreme court case and its ruling, paying specific attention to the majority decision. He also calls attention to the Constitution and the specific powers that it vests in the president. Carlson argues that "a unitary executive is necessary for maintaining an effective and efficient constitutional government." He not only discusses the implications of the ruling at the time it was decided but also highlights its significance in modern politics and in the context of the current administration.

Our third article, "Affirmative Action in Education and Employment:

The Diversity Rationale at Work," comes to us from Jessica Lin of Columbia University. The author establishes that the issue of diversity in the workplace has taken center stage throughout the last decade. Link adds that though the question of affirmative action has been addressed in the context of higher education, it has yet to be confronted by the Supreme Court. She "examines *Bakke*'s impact on the workplace to assess how—and to what extent—*Grutter*'s expanded conception of diversity might influence an employer's ability to make race-conscious employment decisions, first under the Equal Protection Clause of the Constitution and then under Title VII of the Civil Rights Act of 1964."

Our final piece, by Steven Rome of Yale University, is titled "Fairness Under Fire: *Ricci v. DeStefano* and the Racial Legitimacy Gap." The author first contextualizes *Ricci v. DeStefano* and provides background on the firefighters in the New Haven Fire Department. He defines legitimacy as the "tension between ensuring neutral individual treatment and averting race- or class-based stratification that undermines civic engagement and belonging." Rome discusses what he believes to be two antithetical conceptions of legitimacy that emerged from the 2009 case. "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."

Thank you so much for our sponsors, our readers, and all the writers who submitted their work to our journal. I would especially like to thank our authors whose phenomenal work allows us to keep publishing our journal each semester. This semester was unusual in many ways. We started our work together on campus in January. We now conclude this edition virtually while spread across different locations around the globe. I am truly proud of our PULJ team who worked hard through zoom meetings, different time zones, and all the struggles associated with COVID-19 to make this edition possible. Your commitment to our publication is an inspiration to me and I am humbled to be your editor in chief. I dedicate this edition to each and every one of you.

Best,

Ana Lorenza R. Colagrossi

FOREWORD

THE ILLOGIC OF LAW

Professor Rogers M. Smith, University of Pennsylvania

Law as Governance. "The life of the law has not been logic; it has been experience." In 1881, when Oliver Wendell Holmes, Jr. published this oft-quoted sentence on the first page of *The Common Law*, he stated an undeniable reality that has vexed jurisprudential theories ever since. Most conventional forms of jurisprudence strive to show how we can understand the law in theory, and how legal actors can articulate and administer the law in practice, in ways that make the life of the law a coherent, reason-governed enterprise. Because the law elaborates structure of rules and resolutions of conflicts that are fundamental both to the architecture and to the maintenance of our common lives, we want the law to make sense. We want it to be logical. We want legal doctrines to rest on clear authority and to be unambiguous in their meaning. We do not want their origins to be obscure, their contents to be paradoxical, and their meanings to shift dramatically, depending on who is interpreting them, when, where, and how.

Yet some of our most important and enduring legal doctrines have all the negative qualities we do not want them to have. By no means *all* of our doctrines: much in the law is clear and logical, and it is important to remember that truth, even as we reflect on aspects that are not. It is nonetheless equally true that some of the elements of law that have most shaped America's development, such as the doctrine of "substantive due process," appear illogical to most people when they first encounter them. Moreover, though long study of law can make such doctrines familiar, it does not lead to the discovery that they are inherently logical after all. That is because the life of these very significant elements of the law has not been logic. It has been experience.

At this second repetition of an aphorism that was already a cliché, you, dear reader, are within your rights to ask, "OK, that sounds profound, but what does it mean?" The answer I give—there are of course others—is that the law is an institution of governance. As a result, its doctrines arise not just from logic (though that always plays a role) but from what appear to legal actors to be the needs of effective governance in their time. If they hit upon a particular legal doctrine that appears to work to achieve effective governance, one that helps solve the problems they are facing, they are likely to hold on to it, whether it is logical or not—all the more so if they find they can use it to resolve other problems. Even after a doctrine no longer seems to be helping, they may still adhere

to it for some time, because they know most of us do expect the law to be coherent and consistent. If they abandon established doctrines too readily, the law may instead appear to be inconstant and uncertain.

Still, if a doctrine is simply not working to solve the problems people are experiencing, the legal system will eventually kill it, sometimes through a dramatic public execution, sometimes by leaving it to waste away in remote, little visited regions of the law's domains. Yet even if a doctrine is left dead for many years, it remains part of law's experience; and so legal actors can always revive it in one form or another if they think it can do good work in the world once again. Treating what was once legally dead as again legally alive may heighten the inconsistencies and the illogic of the law. If, however, the result is successful governance, hey, it can happen.

The Illogical Life of Substantive Due Process. The poster child in America for these deeply constitutive features of law is, as elaborated in the article that follows, is the doctrine of "substantive due process." The name itself sounds puzzling, if not oxymoronic. Is this a doctrine about legal processes and procedures, or is it a doctrine about the content, the substance, of law? The origins of the due process clauses that appear in the 5th and 14th Amendments to the U.S. Constitution, and in American state constitutions, are well known. The Magna Carta, the agreement through which King John I of England prevented a tax revolt by his barons in 1215 by making them various guarantees, included a provision preventing the Crown from engaging in various coercive acts "except…by the law of the land." This meant that the royal authorities had to act in accordance with established laws, customs, and practices, regardless of the substance of what they were doing. Over time, various legal authorities in England and British North America came to use the phrase "due process of law" in place of "by the law of the land." The writers of early American state constitutions, as well as American federal and state judges during the antebellum period, particularly favored the "due process" wording.

Here is where the obscurity about "substantive due process" begins. It is not clear just which state judge was first to state the doctrine, nor exactly what the reasoning was. But in the early 19th century, it became increasingly common for American judges at the state and local levels, where almost all governing and judging was then done, to rule that some laws violated state due process clauses, not because of the procedures by which they were enacted, administered, or adjudicated, but because of the substance of what legislatures tried to do. Examples included laws taking away settlers' land rights, taking away husbands' control over their wives' property, and laws restricting making and selling liquor. Sometimes judges viewed these laws as violations of due process because they were "ultra vires," beyond the legislature's constitutionally authorized powers. Sometimes judges ruled that laws that infringed on property rights violated due process. The core notion, as summarized in the New York case of *Wynehamer*

v. People (2 Parker Crim. Rep. 490, 1956), was that if "the 'law of the land,' and 'due process of law,'" permitted a legislature to destroy legally established rights, "then the legislature is omnipotent." Since American legislatures were not supposed to be omnipotent, when they tried to something that their constitutions did not authorize, in ways that violated rights they were supposed to protect, then those lawless efforts, and any enforcement of them, were substantively inconsistent with "due process of law." The procedures by which governments enacted, administered, and adjudicated them did not matter.

It is an argument that makes just enough sense to be state-able. Many antebellum judges, however, did not buy it. They thought it was not only sufficient, it was preferable, simply to point out the lack of constitutional authorization for various legislative actions, or to invoke more directly relevant clauses, like bans on a government's taking of property without just compensation, while leaving "substantive due process" out of the discussion. Due process clauses, many (probably most) judges thought, should be confined to the purely procedural meaning that traced all the way back to Magna Carta.

For judges who really, really thought the legislatures were trying to do terrible things, however, it seemed risky to rely either on claims that state constitutions did not authorize certain laws—there were lots of ambiguous provisions in state constitutions that could be used to claim sweeping powers—or to rely on takings clauses in state constitutions to protect property rights. Often the laws in question did not involve the state actually seizing property from anyone. They simply eliminated certain uses of the property (feed that barley to your pigs, boys, don't start a brewery), or they announced that in cases of disputes over property, one class of private parties would win over another (yes, she's your wife, but she gets to keep what her daddy left her). From the standpoints of the visions of good governance that these judges favored (visions that admittedly often favored them), it seemed a good idea to, as we might put it today, "weaponize" another legal doctrine against any and all such laws. Many therefore helped elaborate the doctrine of "substantive due process," citing each other's rulings to add to its legal credibility. The doctrine was vague enough to wield against many laws many judges disliked.

However, the nation's most authoritative court, the U.S. Supreme Court, steered clear of this emerging doctrine of "substantive due process" until the fateful decision that showed just how explosive a weapon it could be. In the infamous case of *Dred Scott v. Sandford* (609 U.S. 393) (1857), Chief Justice Roger Taney invoked the doctrine to contend that Congress had no power to deprive slaveholders of their human "property" in any U.S. territory. Anti-slavery constitutionalists like Abraham Lincoln thought Taney's ruling was an outrageous misreading of the due process clause, and Lincoln ran for president on a platform calling for Congress to go ahead and ban slavery in all the territories. When he and the Republicans won in 1860, outraged southern slaveholders

seceded. And the war came.

One might well think that reasonably objective Americans would then conclude that "substantive due process" rulings were not such great tools of governance after all. Not so. The Civil War spurred American industrial innovations and development. In the postwar era, the U.S. became an industrial capitalist society for the first time—by the end of the 19th century, the world's leading industrial economy. Farmers became dependent on railroads, and the financiers who owned the railroads, to store and ship farm products. Workers became dependent on the captains of the industrial corporations who paid their wages. The corporate owners and bankers on whom farmers and workers depended became extravagantly wealthy and powerful. Power corrupts. The wealthy bought legislators to pass laws to help their businesses, and they financed the rise of the "corporate bar" to defend those laws in courts. The farmers and workers formed social movements to express their rage, and they had votes; so they did get some state laws passed to curb what they saw as corporate abuses. Eugene Debs, a railroad labor organizer from the farm state of Indiana, even began calling for socialism.

State judges friendly to the property rights of the powerful often found doctrines of "substantive due process" useful tools for overturning regulatory laws that they believed to be illegitimate, and possibly precursors to the rise of radical socialism in America, ending constitutional self-governance. Although the U.S. Supreme Court accepted the reasonableness of most state economic legislation in the post-Civil War period, by the late 19th century, with the Republican Party in the saddle and more than ever the party of business, many justices came to embrace economic forms of "substantive due process." The familiar landmark case in this development is *Lochner v. New York* (198 U.S. 45, 1905). There a 5-4 majority of the U.S. Supreme Court struck down a New York law, passed unanimously by the state's legislature, limiting the hours that bakery employees could work each day and week. Thereafter the Court would remain closely divided, but it still often used "economic substantive due process" as a rationale for striking down both state and federal regulatory laws up through the early New Deal.

Then in 1937, a Court facing sharp public critiques (and possible court packing) advanced by the popular president, Franklin D. Roosevelt, officially abandoned "economic substantive due process." Its demise began with *West Coast Hotel v. Parrish* (300 U.S. 397, 1937), which upheld a Washington state minimum wage law. All the pro-New Deal justices that FDR appointed during his long presidency came to profess ardent disdain for "substantive due process," and in leading law reviews, "Lochnerizing" became a pejorative term deriding all judicial efforts to protect non-explicit substantive rights as violations of due process clauses. At long last, it seemed, "substantive due process" had been entombed.

The Court, however, soon rolled away the stone. It seemed necessary to do so to govern justly and well. Many (not all) of the pro-New Deal justices appointed by FDR and his successor Harry Truman favored African American civil rights. In the 1950s, domestic and international political pressures combined to convince most American leaders outside the south that America's shameful system of Jim Crow segregation laws and practices was a huge liability, as well as unjust. In 1954, a unanimous Supreme Court famously struck down segregated schools in *Brown v. Board of Education* (347 U.S. 483, 1954). The justices did so on the basis of the equal protection clause of the 14th Amendment.

Therein lay a problem, however. The text of the 14th Amendment leaves no room for getting around the fact that it limits the states, not the national government. The national government was operating racially segregated schools in the District of Columbia. How could the Court ban segregation throughout all the land, except in the city where it sat? How could it expect its controversial ruling to win compliance, if it said to the nation, oh by the way, this doesn't apply to us?

Those legal circumstances posed a tremendous challenge to the Court as a governing institution. In this hour of need, it turned once again to its old friend, "substantive due process." Now, however, the doctrine did not (did not, did not, did not, the justices would insist) protect property rights. In Brown's companion case, *Bolling v. Sharpe* (347 U.S. 497, 1954), the Court ruled that the due process clause of the 5th Amendment, which does apply to the federal government, had an "equal protection" component that the District of Columbia violated when it operated racially segregated schools. Not because those schools were legislatively authorized, administered, or adjudicated in ways that violated established procedures, but because the substance of those segregation laws violated due process.

The *Bolling* ruling was, to put it politely, a stretch. In fact, this form of "substantive due process" was even more of a stretch than the old economic kind, because in addition to the doctrine's logical difficulties, this "equal protection" interpretation of "due process" did not have a long-developed set of lower court precedents upon which to build. Yet it was for a good governmental cause, and it worked. It completed the official repudiation of the constitutional legitimacy of segregation that the Court and most of the nation's leadership thought America needed. Because it worked, because it still works, it has endured ever since.

In fact, it has worked so well that in ensuing years, the Court has not been able to resist further expanding its use of substantive due process. In the case that established the implicit but officially fundamental "right of privacy," *Griswold v. Connecticut* (381 U.S. 479, 1965), Justice William O. Douglas was too much an old New Dealer openly to embrace "substantive due process" as the basis for the Court's ruling striking down state bans on contraceptives. He concocted a theory of privacy rights emergent from the "penumbras" of Bill of

Rights guarantees. However, some of his brethren like Justice John Marshall Harlan were willing to acknowledge that this was a "substantive due process" ruling; and over time, the Court's majority has acknowledged that "substance due process" is what the "right to privacy" really is.

From the standpoint of successful governance, moreover, those rulings, too, have largely worked. No one clamors today to ban all contraceptives, though some religious groups do not want to pay for them, and most Americans support gay rights, though some religious believers still resist. Only abortion rights remain intensely contested. The abortion battles, intense as they are, still are not enough to compel the Court to reconsider substantive due process. The doctrine is not well grounded in logic. It never has been, and its novel "privacy" version only heightens that reality. Substantive due process is, however, deeply embedded in American legal experience; and it became deeply embedded because the Court is a governing institution, and the doctrine has proved a useful instrument for the governing the Court has sought to do.

Coda. There is, however, one more thing that must be said, or at least that I wish to say. As a scholar not just of courts but of the American political system, I feel compelled to underline that it is a system that has become dangerously out of balance, in ways that make judicial doctrines like substantive due process even more concerning than they have been in the past. The Constitution constructs the American political system as a representative democracy. The system's democratic character means that the power of the people is placed first and foremost in the hands of their elected officials, not the appointees of those elected officials, not even the judicial appointees who comprise the third branch of government. Most of the Constitution's framers instead thought that the Congress, as the most elaborately representative of American national institutions, would be and should be the centerpiece of American self-governance. At many points in American history, it was. Its authority may have been greatest in the Reconstruction era, when the nation's accidental white supremacist president, Andrew Johnson, sought to prevent implementation of the mandates for racial equality in the 13th and 14th Amendments. However, even during FDR's New Deal, even during the Great Society of the 1960s, the major initiatives of American governance took the form of congressional legislation so sweeping and comprehensive that some laws, like the Social Security Act of 1935 and the Civil Rights Act of 1964, are rightly deemed by scholars to be "super statutes."

For much of the 21st century, however, political polarization, especially in Congress, has meant that the national legislature does not just fail to pass "super statutes." Apart from rare emergencies like the 2008 mortgage crisis and the 2020 Covid 19 crisis, Congress mostly fails to pass any major legislation at all. Just as nature abhors a vacuum, it is the nature of politics to abhor a power vacuum—and for good reason: many problems of governance need solutions

if people are to survive and thrive. When Congress does not provide legislative answers to those problems, when at best it passes vague laws that only pass the buck to the other two branches, American governance still occurs. But it chiefly takes place through regulations and other actions of executive agencies, often operating under presidential executive orders rather than statutory mandates. And much governance, in my view too much governance, comes to be done by courts. They govern more not, or not primarily, because judges are hungry for power, but because many judges rightly believe that if they don't do something, nobody else will. Because of congressional dereliction, the U.S. has moved with accelerating velocity over the last half century into extensive reliance on judicial governance, so that some scholars say we are in an era of "judicial supremacy."

Because the doctrine of "substantive due process" is not authoritatively defined but temptingly vague, it makes a terrific all-purpose tool for judges who for whatever reasons, whether ambition or a sense of civic duty, view "governance by judicial supremacy" as the right course for them and for the nation to follow today. Like all tools, like all weapons, the doctrine can be used for good or ill. One ill, however, inescapably occurs whenever it is deployed. When appointed life-tenure judges govern, the people's directly elected representatives do not. Perhaps the most paradoxical feature of the doctrine of "substantive due process," then, is that heavy judicial use of it undermines both the substance and the procedures of self-governance that are supposed to be the "due process" of American constitutionalism.

That is a very profound problem of modern American governance. It is not a problem courts can solve. The only way for the people's elected representatives to reclaim their rightful leading role in American self-governance is for the people's elected representatives to reclaim their rightful leading role in American self-governance. That, in the end, is logic of governance proclaimed in the law of this land. However, the life of the law has not been logic. It has been, and is always like to be, experience.

ARTICLE

AN INADEQUATE CONSTITUTIONAL JURISPRUDENCE: SUBSTANTIVE DUE PROCESS THROUGH THE LENSES OF CONTITUTIONAL THEORY

Jason Zhang, Columbia University

Introduction

Judicial restraint has long been a core tenet held by justices of the Supreme Court, pointing judges to adhere to stare decisis as often as possible and to defer to legislature. This practice finds roots dating back to the Constitution's creation, when the framers built in definitive limitations to confine the powers of the judicial branch as opposed to those of the executive and legislative branches. Indeed, it would take "an extreme blindness not to discern that judicial restraint is a bedrock principle of America's founding and that the faith of the framers lay at the end of the day with the organs of government more proximate to the people."[1] Despite this longstanding legal tradition, the Court has in recent eras embarked upon an affirmation of substantive due process, a doctrine under which "substantive" rights not explicitly guaranteed by the Constitution are derived from the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution. Under this policy, rights such as privacy in the use of contraception, same-sex marriage, and abortion have been ruled by the Court as "fundamental"[2] rights which necessitate the State to face a strict standard of judicial scrutiny when it desires to enact and enforce laws curtailing them.[3] This practice is a clear departure from judicial restraint, as it removes the power to decide which rights are fundamental from legislative bodies answerable to the people and places it instead in the hands of a small number of judges drawn in overwhelming large proportions from "society's law-trained elite."[4]

After an examination of the history of judicial restraint as well as major cases in the developmental history of substantive rights, this essay seeks to analyze substantive due process doctrine as it has interacted with judicial restraint under four major lenses of constitutional theory, as given in *Cosmic Constitutional Theory* by Judge Harvie Wilkinson III: originalism and textualism,

1 Judge Harvie Wilkinson III, *Cosmic Constitutional Theory*, 105 (2012).
2 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
3 *Id*. at 504.
4 United States v. Virginia, 518 U.S. 515 (1996).

political process theory, pragmatism, and livin constitutionalism[5]. It is near universally understood that no single theory is currently sufficient to "capture the Constitution" in its entirety.[6] Judge Wilkinson goes so far as to suggest that we "escape from theorizing"[7] entirely. However, even when considering the virtues and shortfalls of each theory as it applies to substantive due process, it is clear that the inference of substantive rights by the Court has created or will create threats to self-governance under the framework of any theory, or even no theory at all. It is therefore fair to say that, as seen by the development of substantive due process, the Constitution and our constitutional jurisprudence is inadequate to protect against any current or future lack of judicial restraint. Lacking adequate safeguards, an unelected and life-tenured judiciary has been and will continue to be able to impose its own views upon law using substantive due process. In this way, courts erode democracy by shrinking the roles of the people and the legislature, thereby providing opportunities for the emergence of oligarchy.

5 It is important to note that this essay seeks to examine whether rights the Court has ruled as "fundamental" are sanctioned by or compatible with the Constitution, and whether the reasoning of the justices in deciding cases using substantive due process (as opposed to using, for instance, equal protection analysis) is sound. It is clear, as Justice Thomas writes in his dissent in Lawrence v. Texas, 539 U.S. 558 (2003), that many of the laws contested in these cases are "uncommonly silly" and ought not to exist from a legislative perspective. See also, Obergefell v. Hodges, 576 U.S. 644 (2015), "the policy arguments for extending marriage to same-sex couples may be compelling" (Roberts, C.J., dissenting, joined by Scalia, J., and Thomas, J.). Therefore, this essay does not consider whether the Court was correct in striking down or upholding a particular law, but instead discusses whether it used a valid justification to do so. In other words, this essay focuses on the process by which substantive due process cases are decided rather than whether the outcomes were desirable in terms of social policy.

6 Wilkinson, *supra* note 1 at 5.

7 *Id*. at 115.

The Development of Substantive Due Process

The doctrine of substantive due process, from which the Court derives its powers to find and protect specific fundamental rights unrelated to procedure, is enforced against the federal government through the Fifth Amendment[8], and against the states through the Fourteenth Amendment[9]. From these, the Court has inferred a right that due process concerns not only procedural matters such as the right to counsel in criminal cases[10], but also in cases of "fundamental"[11] rights in which the very concept of due process embraces rights outside the scope of those enumerated by the first eight Amendments of the Bill of Rights. Such an idea of substantive, fundamental rights was first infamously seen in the Court's ruling in *Dred Scott v. Sandford*, in which the Court ruled that the Fifth Amendment's due process clause "placed on the same ground" and united the "rights of property" and the "rights of person."[12] Later, in the *Slaughterhouse Cases*, a similar theory of fundamental rights was outlined by Justice Field's dissenting opinion, in which he wrote that the "right of free labor" was "one of the most sacred and imprescriptible rights of man" and that this right to "make and enforce contracts" was one of the "privileges and immunities" protected by the Fourteenth Amendment against "abridgment by State legislation."[13] This understanding of a substantive right to contract would later be adopted by the Court in *Lochner v. New York*[14] and sustained until *West Coast Hotel Co. v. Parrish*, when the Court overruled precedent and decided that the "legislature has necessarily a wide field of discretion" in the regulation of the liberty to contract[15]. From this point on, the Court has proceeded to subject laws regulating economic rights such as the right of contract only to rational basis review[16]. On the other hand, it has imposed a strict

8 U.S. Const. amend. V, "No person shall be…deprived of life, liberty, or property, without due process of law."

9 U.S. Const. amend. XIV, "Nor shall any state deprive any person of life, liberty or property, without due process of law."

10 *See* Gideon v. Wainwright, 372 U.S. 355 (1963).

11 Poe v. Ullman, 367 U.S. 497 (1961), "It is not the particular enumerations of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather… those concepts which are considered to embrace those rights 'which are…fundamental'" (Harlan, J., dissenting).

12 Dred Scott v. Sandford, 60 U.S. 393 (1856).

13 Slaughterhouse Cases, 83 U.S. 36 (1872) (Field, J., dissenting).

14 Lochner v. New York, 198 U.S. 45 (1905), "From the protection of the Federal Constitution with undue interference with liberty of person and freedom of contract…[is] a valid exercise of the police power."

15 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

16 *See*, e.g. Adkins v. Children's Hospital, 261 U.S. 525 (1923), "This Court…has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."

scrutiny standard on statutes regulating various other, non-economic rights ;[17]the Court has inferred liberties such as a right to marry[18] and a broad right to privacy encompassing the right to use contraceptives[19] and the right to abortion[20]. In the development of such rights, the Court began with the formation of a concept of penumbras created by the "emanations from those guarantees [in the Bill of Rights] that help give them life and substance."[21] Later, this theory of substantive rights would be overruled by inferring fundamental rights from the Fifth and Fourteenth Amendment due process clauses instead; in *Roe v. Wade*, for example, the Court accepted the "concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause.[22] From there, the Court has consecutively developed and expanded this concept of substantive rights to its current form.[23] Since its inception in *Dred Scott*, substantive due process has evolved into a complex legal doctrine affirmed many times, prompting a discussion of the role which stare decisis, precedent, and other methods of judicial restraint have played in the Court's history.

17 After a brief era in which the Court refrained from ruling based on substantive due process entirely; see Wallace Mendelson, From Warren to Burger, 66 Am. Pol. Sci. Rev. 1226 (1972).
18 *See* Obergefell v. Hodges, 576 U.S. 644 (2015).
19 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).
20 *See* Roe v. Wade, 410 U.S. 113 (1973). Also see Planned Parenthood v. Casey, 505 U.S. 833 (1992).
21 *See* Griswold v. Connecticut, 381 U.S. 479 (1965), relying on Poe v. Ullman, 367 U.S. 497 (Harlan, J., dissenting).
22 Roe v. Wade, 410 U.S. 113 (1973).
23 *See*, e.g. Obergefell v. Hodges, 576 U.S. 644 (2015), "The fundamental liberties protected by [the Due Process] Clause include most of the rights enumerated in the Bill of Rights…[as well as] certain personal choices central to individual dignity and autonomy."

A History of Judicial Restraint

Judicial restraint is a cornerstone of American law. This idea that judges should refrain from exercising judicial power insofar as possible finds foundations in the Constitution, which provides for a weak judicial branch alongside the substantially more powerful legislative and executive branches of government. Article III of the Constitution, for instance, limits judges to cases in which they have jurisdiction or standing as provided by section II.[24] In doing so, the framers sought to limit judicial power: in Federalist No. 78, dedicated to an "examination of the judiciary department," Hamilton explicitly states that "the judiciary is beyond comparison the weakest of the three departments of power," so that it will be the "least dangerous to the political rights of the Constitution."[25] The framers, then, clearly intended the political rights granted by the Constitution to be the domain of the legislative and executive branches, which are closer to the people and therefore more accountable. No doubt, the framers feared that life-tenured and unelected judges provided for by the Constitution[26] would, if given the opportunity and the means, seek to affect these political rights as they saw fit, separate from the will of the people. Under the framers' vision of the Constitution, the "natural feebleness of the judiciary" would ensure that "liberty can have nothing to fear from the judiciary alone." [27] In sum, Hamilton writes that the judicial branch should "have neither force nor will, but merely judgment."

It is this "independent spirit" of judgment upon which the life tenure and unelected selection of judges depend: to guard the Constitution "against legislative encroachments," Hamilton writes, the "independence of the judges" must be preserved using such methods to remove any dependence they might have on their "popularity" with the people or on their "complaisance" with the branch which selected them.[29] Thus, an unelected and permanently-tenured judicial branch is fundamentally dependent upon the idea of a restrained judiciary which seeks only to adjudicate whether laws conform to the Constitution and not to impose their own conceptions of political rights. This awareness of the necessity of judicial restraint and the foundations from which it is built became even more important after the establishment of judicial review in *Marbury v. Madison*, which gave the court a substantial power to review laws passed by the legislative

24 U.S. Const. art. III, § 2, "cases" and "controversies," *see also*, Judiciary Act of 1789 § 13.
25 Alexander Hamilton, *The Federalist Papers no. 78* (1788)
26 *See* U.S. Const. art. III, § 1.
27 Hamilton, *The Federalist Papers no. 78.*
28 Hamilton, *The Federalist Papers no. 78*
29 Hamilton, *The Federalist Papers no. 78*, also see Hamilton, The Federalist Papers no. 78, "Periodical appointments…would, in some way or other, be fatal to their necessary independence."

branch and strike them down if deemed unconstitutional.[30] Regarding this power of the courts to "pronounce legislative acts void, because [they are] contrary to the Constitution," Hamilton again writes that it is essential for the courts to refrain from the "exercise [of] will instead of judgment," since the judicial branch may easily "on the pretense of a repugnancy [with the Constitution] substitute their own pleasure to the constitutional intentions of the legislature."[31]

Therefore, members of the courts must exercise restraint when sitting in judgment, binding themselves to "strict rules and precedents which serve to define and point out their duty in every particular case that comes before them."[32] In this manner, the underpinnings of judicial restraint can be seen in the framing of the Constitution itself: judges must hold a commitment to precedent and stare decisis—an unwillingness to overturn prior rulings—as well as to the exercise of judgment rather than will in order to leave the discussion of political rights to the people and their representatives.

Based on these foundations, the Supreme Court has over its history demonstrated a consistent and considerable commitment to judicial restraint. Courts have constantly first addressed issues of justiciability in their opinions,[33] and declined to hear cases in which they consider the plaintiffs to lack standing.[34] In some cases, justices have written dissents asserting that the Court lacks the knowledge or experience necessary to rule and should defer to other branches instead.[35] In Court opinions, justices continually refer to precedent and rely on stare decisis, and justices have at times also expressed an unwillingness to rule on politically sensitive issues so that the people might exercise their will.[36] Justices have also regularly considered the importance of limiting their rulings to the

30 Marbury v. Madison, 5 U.S. 137 (1803), "if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty…a law repugnant to the constitution is void…courts, as well as other departments, are bound by that instrument."

31 *Id.*

32 *Id.*

33 *See, e.g.* Poe v. Ullman, 367 U.S. 497 (1961), "We noted probable jurisdiction…"

34 *See, e.g.* Lujan v. Wildlife, 504 U.S. 555 (1992), under which the Court ruled that Defenders of Wildlife lacked standing to sue.

35 *See, e.g.* Korematsu v. U.S., 323 U.S. 214 (1944), "courts always will labor" in "limitation" when "examining the necessity for a military order," (Jackson, J., dissenting).

36 See, e.g. Frontiero v. Richardson, 411 U.S. 677 (1973), "There are times when this court… cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened…when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional practices," referring to the proposed Equal Rights Amendment under debate at the time (Powell, J., dissenting, joined by Burger, C.J., and Blackmun, J.).

narrowest grounds possible, ruling on Constitutional questions only as a last resort.[37] Although individual justices inevitably hold their own views on what exactly judicial restraint entails, the Court has in practice as well as in theory dedicated itself at least to a general notion of self-restraint whenever possible. Judicial restraint as a broad principle, steeped in history and tradition, therefore is and should be an uncontroversial practice of the judicial branch. In analyzing substantive due process as developed by the Supreme Court, considerations of judicial restraint will necessarily play a significant role in understanding how the inference of fundamental rights from the Constitution has affected and will affect Court history.

37 *See, e.g.* Citizens United v. Federal Election Comm'n, 588 U.S. 310 (2010), "Before considering whether Austin should be overruled, we first address whether Citizens United's claim… may be resolved on other, narrower grounds."

Four "Cosmic" Constitutional Theories

Acknowledging, then, the necessity of judicial restraint in Court holdings, substantive due process might now be examined via four major theories of the Constitution: originalism and textualism, political process theory, pragmatism, and living constitutionalism. Each theory seeks to provide a "cosmically" necessary and sufficient explanation of the Constitution.[38] It is clear that while each theory holds certain appeal, even their proponents would admit that they each also contain undeniable shortfalls. For instance, Justice Scalia (a notable proponent of originalism and textualism) once admitted that originalism is "not without its warts" but that of the "two evils" of "originalist and nonoriginalist approaches," originalism was the lesser.[39] Originalism and textualism, methods of interpreting the Constitution based upon the plain meaning of the text and on the original intent of the framers, holds appeal in that it limits judges from imposing their own views in holding them to the text and original public understanding of the Constitution as documented by founding documents and other historical documents of the time.[40] Thus a purportedly "neutral" system in its application of principles, this theory seeks to constrain judges using history.[41] However, justices on both sides of any issue can use the parts of history which support their case: in *District of Columbia v. Heller*, for instance, both Justice Scalia for the Court and Justice Stevens in his dissent cite historical material and rely on public meanings of words at the time of the framers.[42] Judges are not historians, and cannot reliably analyze history accurately, objectively, or with certainty—opening opportunities to impose their own views on law. [43]

Alternatively, political process theory focuses on ensuring democratic government functions correctly, leaving issues to the people and looking primarily at process. This idea, derived from footnote four of *U.S. v. Carolene Products Co.* and John Ely's *Democracy and Distrust*, aims to have courts intervene when the processes of democracy and political change are "chok[ed][44] off or when "discrete and insular minorities" suffer prejudice.[45]This theory gives weight to deference to democratic values and process, but in doing so allow the

38 Wilkinson, *supra* note 1.

39 Antonin Scalia, Originalism: The Lesser Evil Cincinnati Law Review 57 U. Cinn. L. Rev. 856, 862 (1988–1989).

40 Wilkinson, *supra* note 1 at 37–38, *also see* District of Columbia v. Heller, 554 U.S. 570 (2008), an originalist interpretation of the Second Amendment relying on, among other historical material, dictionary definitions published in 1773.

41 *Id.*

42 *Id*.

43 *Id*. at 46–50 and 52.

44 John Hart Ely, Democracy and Distrust 103 (1981).

45 U.S. v. Carolene Products Co., 304 U.S. 144 (1938).

judges to impose their own views of the law, this time disguised as ruling on process rather than substance.[47]

Pragmatism, on the other hand, avoids these issues of process versus substance and urges judges to rule based on the "effects the decision[s] [are] likely to have, rather than on the language of a statute or of a case, or more generally on a pre-existing rule."[48] Since courts often lack the means to gather data necessary to accurately weigh competing interests, and since the personal biases of judges can never be truly extinguished, pragmatism suffers the same weakness of other theories in its inability to enforce judicial restraint, instead focusing on "local rather than universal" solutions.[49] Pragmatism leaves judges to be conscious of judicial limits through an emphasis on realism, promoting the use of narrower grounds and empirical evidence when ruling.[50]

Finally, living constitutionalism embraces the idea that constitutional interpretation evolves with time. This theory, dependent upon the fact that values and ideals were different at the time of the framers than in the current age, urges judges to take contemporary values into account when ruling.[51] In doing so, living constitutionalism is able to promote modern values, helping those who may have been hurt by the laws of a previous era more quickly than if left to the democratic process. In doing so, it particularly advantages those minority segments of the people which are likely to never democratically force change. But even putting aside the claim that other theories and processes of Constitutional theory also look to remedy this issue, the fact remains that living constitutionalism poses other significant threats to democracy and self-government. The theory, Wilkinson, writes, "elevate[s] judicial hubris over humility…[and] intervention over restraint."[52] By taking the power from democratic processes, and ignoring traditional and textual limitations, living constitutionalism not only flouts self-democracy in the present, but also in the future; once a ruling is handed down over the protests of judicial restraint, future courts may use the case as precedent and justifiably continue the subsumption of power from the people.

Faced with the pitfalls of each theory, Judge Wilkinson argues for an "escape from theorizing," and a return to judges simply "knowing the limits of [their] knowledge," remembering that "good sense is more often displayed in collective and diverse settings than in a rarefied appellate atmosphere" and understanding

47 *Id*. at 77, paraphrasing Michael Klarman, political process theory in "distinguishing justifiable from unjustifiable disadvantaging [of discrete and insular minorities] quite plainly requires a substantive value choice."

48 *Id*. at 82, quoting Judge Richard Posner.

49 *Id.*

50 *Id.* at 84-86.

51 *Id.* at 12.

52 *Id*. at 19.

that the "language, structure, and history of law serve best as mediums of restraint rather than excuses for intrusion."[53] This sort of common-sense approach to judgment lacks the advantage of a theoretical structure but does hold appeal in its desire to return to the value of judicial restraint—in this sense, it might be seen as a "cosmic" theory itself. In conclusion, then, each theory is incomplete by itself and allows for instances of judicial overreach; however, viewing substantive due process through each theory and its advantages and weaknesses will provide insight into its effects on American jurisprudence.

53 *Id*. at 115.

Originalism and Textualism

Any analysis using an originalist or a textualist lens begins, of course, with the text itself. Currently, substantive due process relies on the Fifth Amendment due process clause as it relates to the federal government and the Fourteenth Amendment due process clause as it relates to the states[54] (although, for a period after Griswold v. Connecticut, the Court relied on penumbras derived from the Bill of Rights as a whole, before it embraced the current derivation from the due process clauses).[55] Many originalists believe that these amendments fail to provide a textual basis for the inference of substantive rights; Justice Thomas, for instance, agrees with Justice Scalia that "due process" refers only to matters of procedure and that the "Fourteenth Amendment's Due Process Clause is not a 'secret repository of substantive guarantees.'"[56]

However, as previously noted, originalist and textualist interpretations often suffer because judges are not historians and can misinterpret historical fact to support their personal views. Opponents, for instance, do find historical support for the inference of substantive rights, specifically from the Fourteenth Amendment. Ryan Williams, for instance, argues that although the general understanding of due process at the time of the ratification of the Fifth Amendment was indeed that of procedure,[57] this understanding had changed significantly by the time the Fourteenth Amendment was ratified. In fact, Williams writes, the understanding of the phrase "due process" had evolved in the years before the Fourteenth Amendment's ratification, such that state courts had begun to "accord substantive effect" to some decisions, beginning in North and South Carolinas and later in Tennessee and spreading to at least eleven additional states.[58] By ratification, courts in "at least twenty of the thirty-seven then-existing states had endorsed some version of substantive due process" while

54 U.S. Const. amend. V, *also* U.S. Const. amend. XIV.

55 Griswold v. Connecticut, 381 U.S. 479 (1965), "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside these fundamental rights specifically mentioned in the first eight constitutional amendments," followed by historical documentation of Madison's statements when proposing the amendment (Goldberg, J., concurring).

56 Perry v. New Hampshire, 565 U.S. 228 (2012) (Thomas, J., concurring), citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (Scalia, J., joined by Thomas, J., dissenting).

57 Ryan C. Williams, the One and Only Substantive Due Process Clause, 120 Yale L. J. 408, 454 (2010), stating that state constitutions, state statutes, the (relatively sparse) legislative history of the Fifth Amendment, and post-ratification judicial decisions and treatises support the fact that "the early understandings of 'due process of law' is largely supportive of the traditional view that the Due Process Clause of the Fifth Amendment was originally understood either not to constrain the legislature at all, or, at most, to limit the legislature's discretion in prescribing certain modes of judicial procedure."

58 *Id*. at 461–463.

courts in only two states …had explicitly rejected a substantive [due process interpretation]."[59] However, state court decisions are plainly insufficient, so Williams turns to the legislative history of the Fourteenth Amendments, in which he admits that "references to the Due Process Clause…were relatively uncommon."[60] Despite this, Williams infers from selected legislative debates and the Supreme Court's decision after the Fourteenth Amendment that at least some form of substantive due process was understood from the due process clause in the time of the Fourteenth Amendment.[61] However, due to the sparse nature of references to the due process clause in the Amendment's legislative history, Williams' argument suggests at most that understandings of the due process clause were mixed at the time, not that the ratifiers of the Fourteenth clearly intended it to refer to substantive rights. Furthermore, Williams' analysis of Court decisions after ratification is incomplete, since he fails to realize that some Courts may not have grounded their decisions regarding substantive due process on the intentions of the writers and ratifiers of the Fourteenth Amendment. Other authors make a similar error. For instance, Ira C. Lupu writes that "despite a lack of persuasive linkage with structural or textually identified values...naked judicial judgment" can in fact be informative of the meaning of the Fourteenth Amendment,[62] using cases such as *Maher v. Roe* and *Moore v. City of East Cleveland* to examine how the Court has defined fundamental liberties.[63] upu and Williams confound the original meaning of the Fourteenth Amendment with the Court's historical tradition of interpretation[64] —which is valuable, to be sure, but wholly different from the Amendment's text and original meaning. In fact, the only evidence Lupu finds "within the document" itself is in its incorporation of the Bill of Rights using due process, relying again on Court decision (*Duncan v. Louisiana*),[65] and within the "constitutional structure and the values that structure

59 *Id*. at 469–470.

60 *Id*. at 477.

61 *Id*. at 477-494.

62 Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 1032–1033 (1979).

63 *Id*. at 1003–1023.

64 Regarding the acceptance of due process as Court tradition, Cass R. Sunstein writes that defenses of due process as a tradition of the Court may be flawed because of "systematic bias," or because the "many minds [which produce a tradition] may not have reached their judgments independently," instead joining a "cascade" in which they base their judgments on the "actual or apparent judgments of others," likely preceding them in the tradition. See Cass R. Sunstein, Due Process Traditionalism, 106 Mich. L. Rev. 1543, 1556, 1570 (2008). In any case, traditions flowing from Court precedent are only of indirect relevance in an originalist and textualist analysis grounded in the actual text and original meaning of the Constitution.

65 On the topic of incorporation of the Bill of Rights, in fact, others have found that "no relation—historical, linguistic, or logical" exists between the standard imposed by Court precedent regarding incorporation of the Bill of Rights and the "specific provisions…of the Bill of Rights; in fact, "at bottom, it is difficult even to ask meaningfully whether…the Bill of Rights is incorporated in

implies."[66]

A true analysis of the due process clauses using an originalist or textualist lens will rely on the language of the Amendments itself, which clearly (if not definitively) suggests that the Amendments did not intend to create substantive rights. John Harrison, for instance, breaks down several readings of the due process clauses which might imply substantive due process, deeming each of them unpersuasive.[67] This implication that the due process clauses lend little textualist and originalist support to substantive due process is also common throughout the dissents of originalist and textualist judges in cases concerning substantive due process. For instance, in his dissent to the Court's opinion in *Planned Parenthood v. Casey*, Justice Scalia writes that "the Constitution says absolutely nothing" about bigamy, which is "not…a liberty specially 'protected' by the Constitution," and that the Court's opinion is "permeat[ed]" by "a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law."[68] Alternatively, take Justice White's dissent in *Roe v. Wade*, in which he writes that "nothing in the language or history of the Constitution" supports the Court's judgment in which it "fashions and announces a new constitutional right for pregnant mothers."[69]

For these justices, the inability to find support for substantive due process in the Constitution amounts to judicial legislation and creation of policy, a power reserved for the legislative body and specifically proscribed by the framers for fear that it will be used to regulate liberties.[70] Indeed, commentators have remarked that the Court's opinions on substantive due process were acts of "judicial hubris," which "makes judges into unelected and unremovable superlegislatures."[71] Thus, while it is possible that common public understandings of due process were mixed as to its implication of substantive rights, there is little to base substantive due process on originalist and textualist understandings of the Constitution.

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66 Lupu, *supra* note 56, at 1031. But see Peter J. Rubin, Square Pegs and Round Holes, 103 Colum. L. Rev. 834 (2003), stating that substantive due process is "in deep tension with the structural rules governing claims of federal rights under the Fourteenth Amendment."

67 *See* John Harrison, *Substantive Due Process and the Constitutional Text,* 83 Va. L. Rev. 493, 493–555 (1997).

68 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

70 *See* Hamilton, *The Federalist Papers no.* 78, "liberty…[has] every thing to fear from [the judiciary's] union with either of the other departments."

71 *See* Nelson Lund and John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 Mich. L. Rev. 1555 (2004). Moreover, regarding Lawrence's attempt to articulate a "text-based theory of constitutional liberty" by basing a "presumption of liberty" within "the nation's traditions" itself, the authors find the textual evidence unsatisfactory since a "list of the 'rights of others,'" upon which such a presumption depends, "cannot be found anywhere in the Constitution, and they are by no means self-evident."

69 Roe v. Wade, 310 U.S. 113 (1973).

Political Process Theory

Having tested substantive due process on an originalist and textualist basis and finding it to have few roots in the text and original meaning of the Constitution itself, it might be of use to consider whether the adoption of substantive rights in opposition to the guidance provided by the framers in fact creates dangers to democracy, as Judge Wilkinson previously claimed. To do so, an approach based on political process theory might be used to analyze if and how substantive due process has hindered minority groups from participation in the political market or caused discrimination against them, or otherwise disturbed the processes of normal democracy (keeping in mind that under this theory judges have opportunities to disguise rulings on substance as rulings on process).[72] Political process theory places weight on the duty of the courts to ensure democratic government functions openly and transparently and on protecting the interests of minorities, allowing Court intervention only in these cases. Ely in Democracy and Distrust supports the discovery of a substantive component in the Fourteenth Amendment from its privileges and immunities clause instead of the due process clause, regarding it as a "delegation to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding."[73] In this regard, the Court's recent cases embedding substantive due process under the due process clause is a departure from Ely's political process theory, although the Court has embraced substantive rights such as contraception and marriage, some of which are endorsed by Ely.[74] The question is therefore whether or not this partial departure in fact creates problems with the normal processes of democracy.

A compelling argument exists that Court decisions involving substantive due process were actually instances of proper judicial review, in line with the tenet of judicial restraint, handed down so as to preserve democracy and prevent prejudice against minorities. After all, precedent suggests that "the right to due process sometimes entails a right to judicial process and especially to judicial review of constitutional questions."[75] In cases such as *Buck v. Bell*, where the

72 Arguments that substantive due process has actually prevented prejudice against minority groups and helped their participation in democracy are extremely forceful and will be addressed in the later sections on living constitutionalism.

73 Brian Boynton, "*Democracy and Distrust" after Twenty Years: Ely's Process Theory and Constitutional Law from* 1990 to 2000, 53 Stan. L. Rev. 397, 401–402 (2000), quoting Ely.

74 *Id*. at 427.

75 Richard H. Fallon Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 367 (1993), citing *Webster v. Doe*, 486 U.S. 592 (1988) and *Crowell v. Benson,* 285 U.S. 22 (1932).

Court upheld sterilization of the "feeble minded,"[76] *Bowers v. Hardwick*, in which the Court upheld laws against sodomy, [77] and *Pace v. Alabama*, under which the Court affirmed anti-miscegenation laws,[78] to name a few, groups of "discrete and insular minorities"[79] such as the intellectually disabled and those in same-sex and interracial relationships were subject to prejudice from which they were hard-pressed to recover via the political market. In such cases, the creation of substantive rights seems to be the only way to combat prejudice, especially considering Bowers' reasoning that the "the law…is constantly based on notions of morality" and therefore it is unreasonable for "moral choices… to be invalidated under the Due Process Clause" unless a fundamental right is involved.[80] After all, as Justice Kennedy writes in *Lawrence v. Texas*, the framers understood that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[81] But the notion that creating substantive rights is the correct way of preventing this variety of oppressive laws is misguided. What is clear in cases like Bowers is that the ruling in Carolene that "prejudice against discrete and insular minorities… may call for a correspondingly more searching judicial inquiry" (such as strict scrutiny) was disregarded by the Court and therefore such cases were decided unjustly.[82] However, what is not clear is why substantive due process is an appropriate remedy to past instances of the Court's failure to properly perform judicial review.

In fact, the case against using substantive due process to resolve such failures is clear in that the creation of substantive rights hinders the democratic process, against the prescriptions of political process theory. This is continually made clear by dissenting justices in these cases. Justice Scalia, for instance, writes in *U.S. v. Virginia* that "the people may decide to change [tradition] through democratic processes; but the assertion that [tradition] has been unconstitutional through the centuries is not law, but politics-smuggled-into-law."[83] In *Romer v. Evans*, Scalia similarly laments that the Court has not left the issue of the rights of same-sex couples "to be resolved by normal democratic

76 Buck v. Bell, 274 U.S. 200 (1927).
77 Bowers v. Hardwick, 478 U.S. 186 (1986).

78 Pace v. Alabama, 106 U.S. 583 (1883).
79 U.S. v. Carolene Products Co., 304 U.S. 144 (1938).
80 Bowers v. Hardwick, 478 U.S. 186 (1986).
81 Lawrence v. Texas, 539 U.S. 558 (2003). *Also see*, Hamilton, *The Federalist Papers no. 78*, "individual oppression may now and then proceed from the courts of justice."
82 U.S. v. Carolene Products Co., 304 U.S. 144 (1938).
83 U.S. v. Virginia, 518 U.S. 515 (1996) (Scalia, J., dissenting).

means" and instead hastily ended a "Kulturkampf" best left to the people.[84]

This idea, that an unelected and life-tenured Court of nine justices[85] has prematurely ended a policy debate concerning the entire people, is echoed in cases such as *Obergefell v. Hodges*. In his dissent, Chief Roberts writes, "nowhere is the majority's extravagant conception of judicial supremacy more evident than in its description—and dismissal—of the public debate" and that "it is demeaning to the democratic process to presume that voters are not capable of deciding an issue of this sensitivity on decent and rational grounds."[86] These judgments clearly violate principles of judicial restraint[87] and allows the Court to take powers belonging to the people[88] and their elected officials in the legislature, and in doing so prevents democracy from functioning effectively. [89] Thus, although substantive due process may provide an adequate solution to any future cases which affirm prejudice against minorities as in *Bowers*, it also carries with it a substantial danger of abridging democratic processes and giving the power to decide policy issues to the courts. In this way, the use of substantive due process might be seen by political process theory as a method of disguising a ruling on substance as a ruling on process: when the Court attempts to create substantive rights to protect minorities and the processes of democracy, it also rules on substantive issues. Instead, to prevent future instances of a failure to invalidate unjust laws like in *Bowers*, solutions without these risks, such as appeals to equal protection,[90] can be used instead.

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84 Romer v. Evans, 517 U.S. 620 (1996) (Scalia, J., dissenting). *Also see* Jay Michaelson, *On Listening to the Kulturkampf*, or, *How America Overruled Bowers v. Hardwick, Even Though Romer v. Evans Didn't*, 49 Duke L. J. 1559 (2000), where Michaelson convincingly argues that *Romer* had "no effect on the debates regarding gay marriage" (what Scalia refers to as a "Kulturkampf"). But what is at issue here is not merely whether any particular debate is affected by the ruling, but whether the Court's decision can be used as precedent for a future Court to decide to end debate by ruling on a different issue which *would*, in that case, affect the debate.

85 *Also see* John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 Mich. L. Rev. 747, 753 (2017), in that Scalia "feared" that Court outcomes would reflect "little more than the morality or conscience of five justices," in effect "tak[ing] power from 'the legislature and giv[ing] it to the courts'" (quoting Scalia).

86 Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, C. J., dissenting, joined by Scalia, J., and Thomas, J.).

87 *See* note 34, referencing *Frontiero v. Richardson*.

88 *See* Obergefell v. Hodges, 576 U.S. 644 (2015), "The Court's accumulation of power does not occur in a vacuum. It comes at the expense of the people" (Roberts, C. J., dissenting, joined by Scalia, J., and Thomas, J.).

89 *See* Obergefell v. Hodges, 576 U.S. 644 (2015), "The Court is not a legislature," and "allowing unelected federal judges to select which unenumerated rights rank as 'fundamental'…raises obvious concerns about the judicial role" (Roberts, C. J., dissenting, joined by Scalia, J., and Thomas, J.).

90 Appeals to Equal Protection are discussed in the following section on pragmatism.

Pragmatism

Thus, it is reasonable to conclude that the creation of substantive rights may result in substantial threats to democracy and self-governance by giving courts the power of the people to decide on policy issues. An approach evaluating substantive due process using pragmatism may help determine whether any feasible alternatives exist. To begin, it is clear that cases involving substantive due process unquestionably contain a pragmatic element. Judges who rule based on the effects of their decisions, after all, no doubt seriously consider in these cases the clearly prejudicial effects of many of the statutes in question. However, contrary to the core principles of pragmatism, these rulings creating substantive rights frequently forgo ruling on a narrow and local basis. Brian Hawkins argues that the "narrow view of the Due Process Clauses and [the] similarly restricted approach to interpreting them" of *Washington v. Glucksberg*[91] prevails to this day in practice over the broader approach of *Lawrence v. Texas*, despite the fact that *Lawrence* "overturned the *Glucksberg* Doctrine in theory."[92] Admittedly, *Glucksberg*'s use of history and tradition in determining which rights are fundamental and therefore entitled to be considered under substantive due process addresses a key weakness of pragmatist constitutional theory (that pragmatist rulings are insufficiently based on constitutional test or precedent), in that the *Glucksberg* test conforms to the Fourteenth Amendment's original meaning.[93]However, the fact remains that since substantive due process creates positive rights[94] which are universal by definition, it necessarily rules on a broad basis. Thus, according to pragmatist theory, the use of substantive due process

91 Washington v. Glucksberg, 521 U.S. 702 (1997), "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed" and that "our Nation's history, legal traditions, and practices… provide the crucial 'guideposts for responsible decision making' that direct and restrain our exposition of the Due Process Clause."

92 Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process since Lawrence v. Texas*, 105 Mich. L. Rev. 409 (2006).

93 *See* Steven G. Calabresi, *Substantive Due Process after Gonzales v. Carhart*, 106 Mich. L. Rev. 1517 (2008).

94 *See, e.g.* Louis Henkin, *Privacy and Autonomy*, 74 Colum. L. Rev. 1410, 1411 (1974), "the 'right to privacy' recognized by the justices" have brought "little new protection for what most of us think of as 'privacy'—freedom from official intrusion. What the Supreme Court has given us, rather, is something essentially different and farther-reaching, additional zone of autonomy, of presumptive immunity to governmental regulation." *See also* Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 87 Cal. L. Rev. 751 (2009), "today, fundamental rights trump the general welfare…courts define unenumerated [fundamental] rights in positive terms." *Also see* Kenji Yoshino, *A New Birth of Freedom?*: Obergefell v. Hodges, 129 Harv. L. Rev. 147 (2015), in which Yoshino documents the Court's "swift shift" in *Obergefell* "from negative to positive rights."

allows judges the opportunity to impose their own views on the law. This is particularly true considering courts can rule in these cases using equal protection analysis instead to produce similar local outcomes using narrower reasoning. In *Griswold v. Connecticut*, for instance, equal protection was one of four doctrines other than substantive due process under which the case could have been decided.[95] Later, regarding the decision in *Roe v. Wade*, then-Judge Ginsburg offered her belief that the Court "ventured too far in the change it ordered" in creating a substantive right to privacy; instead, she would have preferred a ruling based on equal protection analysis of sex-based discrimination, which would have decided *Roe* on narrower grounds.[96] Similarly, Justice O'Connor in *Lawrence v. Texas* based her concurring judgment on the Fourteenth Amendment's Equal Protection Clause.[97] Indeed, it is clear that most cases decided by the Court based on substantive due process could have relied instead on an equal protection claim (although the Court in some of these cases would have needed to adopt a more flexible test for equal protection).[98] Even when the Court explicitly considers equal protection arguments, it elects to rule under substantive due process as well, such as in *U.S. v. Windsor* and *Obergefell v. Hodges*,[99] eschewing a pragmatist desire to decide using narrow and local standards. Decisions using equal protection in these cases would have resulted in narrower, negative rights against governmental intrusion[100] while maintaining the same outcomes in each case. Instead, by using substantive due process, the Court has created broad, positive rights antithetical to pragmatism and to judicial restraint.

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95 Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 221–222 (1965).

96 Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation* to Roe v. Wade, 63 N.C. L. Rev. 375 (1985).

97 Lawrence v. Texas, 539 U.S. 558 (2003).

98 *See*, e.g. Tinsley E. Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 Duke L. J. 143 (1997), analyzing substantive due process cases decided by the Burger Court if instead decided on an equal protection basis.

99 *See*, e.g. U.S. v. Windsor, 570 U.S. ___ (2013), "the liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws;" *and* Obergefell v. Hodges, 576 U.S. 644 (2015), "the right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." It is clear in this case that equal protection analysis alone would have been sufficient for the Court to decide as it does.

100 *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 880 (1986), "The equal protection clause is regarded today as a general prohibition of discriminatory state action that largely functions, like most of our constitutional provisions, to prohibit active governmental aggression."

Living Constitutionalism

Having failed a pragmatic analysis due to the existence of equal protection as a narrower alternative, perhaps substantive due process would fare better when examined through living constitutionalism. It is possible that using this theory to explore the precise benefits of substantive rights will allow the advantages of substantive due process to outweigh the weaknesses. Indeed, living constitutionalism's espousal of the idea that constitutional interpretation evolves with time and ought to include contemporary values seems to wholeheartedly embrace the Court's creation of substantive rights based on modern value judgments.

It is certainly true that an adoption of substantive rights under living constitutionalism would help prevent prejudice against minority groups and facilitate their access to the political market. Democratic processes do not move "swiftly enough for advocates of quick, complete change,"[101] minority groups would continue to suffer concrete and significant prejudices during that long process under statutes like those invalidated by many of the Court's substantive due process cases. Cases like *Griswold* in striking down bans on contraceptive use[102] or like *Romer* in rejecting discrimination against "homosexual, lesbian, or bisexual" individuals[103] provide at least a significant short-term benefit to minority groups suffering discrimination, saving them from waiting for the slow movement of democratic self-governance. However, it is also true that ruling in these same cases on the narrower grounds of equal protection would have provided a similar short-term relief: as previously discussed, applying equal protection analysis to these cases would have likely yielded similar outcomes as when using substantive due process, by denying government the ability to discriminate against minority groups.

Meanwhile, these same short-term benefits when derived from substantive due process also carry significant disadvantages unassociated with equal protection: the absolute preference of Court-designated "fundamental" rights over other rights. The nature of substantive issues as positive rights means that the government is compelled to ensure them, rather than be prohibited from interfering with them (as under equal protection).[104] Nowhere can this be seen more clearly than in the very first case of substantive due process, *Dred Scott v. Sandford*, in which the Court preferenced the due process right of "property" of

101 Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, C. J., dissenting, joined by Scalia, J., and Thomas, J.), quoting Ginsburg, *Some Thoughts on Autonomy in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375 (1985).

102 Griswold v. Connecticut, 381 U.S. 479 (1965).

103 Romer v. Evans, 517 U.S. 620 (1996).

104 *See* notes 86 and 91, discussing substantive due process as creating positive rights and equal protection as creating negative rights, respectively.

a slaveowner[105] over the rights of a man "born under Constitution and laws."[106] This might be the most flagrantly insidious case where the Court preferenced certain rights over others in its application of substantive due process, but in fact many other cases are comparable in this respect. *Lochner v. New York*, for instance, heralded an age of cases in which the substantive "right of contract between employer and employees"[107] was preferred over the rights of workers to labor in sanitary working conditions.[108] And more recently, *Obergefell v. Hodges* preferenced the substantive right to same-sex marriage over the "freedom to exercise religion."[109] The preference of the Court for issues it determines "fundamental" is troublesome beyond its status as an unelected Court of merely nine justices. Even without considering the antidemocratic element of the Court, this preferencing system undoubtedly allows for the violation of non-preferenced rights—of slaves, workers, religious groups, and so on—through the prioritization of rights that the Court deems more fundamental.

Furthermore, the unlimited and vague nature of the substantive due process doctrine leads to a potentially endless number of fundamental rights which can be inferred by the Court. From its initial use to produce substantive economic rights in the *Lochner* era, the Court has since produced many further rights, including the right to abortion,[110] to use contraception,[111] to interracial[112] and same-sex[113] marriage, and to manage a child's education.[114] Since no precise textual basis exists for such substantive rights, future Courts could develop a potentially unlimited roster of these rights, especially considering a theory of living constitutionalism under which interpretations of the Constitution evolve with contemporary value judgments. Kenji Yoshino takes this potentially unlimited scope of substantive due process, especially as evidenced by the "sweeping statement"[115] of *Obergefell v. Hodges*, as a shift which would lend "new legitimacy" to substantive rights.[116] The Court's ruling in Obergefell, he writes, is a "new birth of freedom" as well as a "new birth of equality."[117]

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105 Dred Scott v. Sandford, 60 U.S. 393 (1856).
106 *Id*. at 531 (McLean, J., dissenting).
107 Lochner v. New York, 198 U.S. 45 (1905).
108 *Id*. at 71 (Harlan, J., dissenting, joined by White, J., and Day, J.).
109 Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, C. J., dissenting, joined by Scalia, J., and Thomas, J.).
110 Roe v. Wade, 410 U.S. 113 (1973).
111 Griswold v. Connecticut, 381 U.S. 479 (1965).
112 Loving v. Virginia, 388 U.S. 1 (1967).
113 Obergefell v. Hodges, 576 U.S. 644 (2015).
114 Pierce v. Society of Sisters, 268 U.S. 510 (1925).
115 Kenji Yoshino, A New Birth of Freedom?: Obergefell v. Hodges, 129 Harv. L. Rev. 147 (2015).
116 *Id*. at 166.
117 *Id*. at 179.

Yoshino argues that *Obergefell* "opened new ground" in the debate on substantive due process jurisprudence by adopting the "open-ended common law approach widely associated with Justice Harlan's dissent in *Poe v. Ullman*" and rejecting the test for fundamental rights it established in *Washington v. Glucksberg.*[118] By breaking from the Glucksberg test and using tradition in a "less rigid role," departing from the "level of specificity" required by *Glucksberg*,[119] and embracing substantive due process as creating positive rights, Yoshino believes that the Court has become "textually grounded" in its interpretation of liberty and, by using a liberty analysis in *Obergefell* as opposed to an equality analysis, is more poised to protect "*true* equality interests" by requiring government to "level up."[120] But although Yoshino accounts for the short-term liberties which might be protected by such a continual inference of new substantive rights, he fails to consider its potential long-term ramifications to democracy. In constantly drawing the power to create such rights away from legislature and the people, the Court would effectively be causing a large-scale erosion of democratic self-governance, as discussed above using political process theory. Moreover, he fails to account for the possibility that the substantive rights created by future Courts will be dependent on the Court's compositions; a Court consisting wholly of justices nominated by politically conservative presidents will create different rights than one of justices nominated by politically liberal presidents. Should this be the case, it would serve as yet another example of the breakdown of normal democratic policies; the Court's dependence on other political branches[121] would cause it to exercise will rather than judgment due to substantive due process' lack of foundation in Constitutional text, contrary to its independent nature as envisioned by the framers.[122]

The vague definitions of substantive rights in the Court's jurisprudence provides analogous grounds for worry. Justice Black in his dissent to *Griswold v. Connecticut* complains of the "broad, abstract, and ambiguous concept" of privacy as determined by the majority opinion, in that it is easily "shrunken in meaning" or alternatively expanded so as to "easily be interpreted as a

118 *Id*. at 148–149.
119 *Id*. at 164–166.
120 *Id*. at 173–174.
121 *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. Chi. L. Rev. 859, 860, 866, 905 (2009), in which Strauss argues and cites Court precedents which support that the increasingly "modernizing" nature of the Supreme Court's value judgments and Constitutional interpretation, present in modern Court cases in general and in substantive due process cases in particular, has prompted the Court in many ways to show "an intense concern with public opinion, and in particular with the trends in popular opinion," leading to the "fact that the courts will inevitably conform to public opinion to a substantial degree."
122 *See* Hamilton, *The Federalist Papers no. 78*, regarding the "necessary independence" of the Courts.

constitutional ban" in most instances.[123] Other substantive rights suffer from similar vagueness; the precise circumstances under which a substantive right to abortion exists, for instance, took one meaning in *Roe* (no state interest at all during the first trimester of pregnancy) and yet another in *Planned Parenthood* (no state imposition of an undue burden).[124] Such lack of precision allows judges to impose their own views upon the law based on their understanding of substantive rights. Thus, both the theoretically unlimited and vague nature of substantive rights has the potential to undermine the nature of the judicial branch as an independent and neutral adjudicator of law. This fact, coupled with the preference that substantive due process doctrine gives to Court-determined fundamental rights over other rights, more than outweighs the significant short-term benefit of quick relief given by substantive due process to minorities suffering prejudice and who lack the means to participate in normal democracy, especially considering that the negative rights given by equal protection analysis can provide similar benefits but without the weaknesses suffered by the positive law of substantive rights.

123 Griswold v. Connecticut, 381 U.S. 479 (1965) (Black, J., dissenting).

124 Roe v. Wade, 410 U.S. 113 (1973), *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Conclusion

After an investigation of substantive due process as seen under the Constitutional theories of originalism and textualism, political process theory, pragmatism, and living constitutionalism, it is clear that the doctrine is an instance of overreach contrary to the tenet of judicial restraint, which has slowly developed through the collective actions of multiple courts and justices. It is evident through these lenses that substantive due process contains no textualist or originalist basis in the Constitution and allows the Court to assume the democratic and legislative power to decide on policy issues. Furthermore, when deciding cases based on substantive due process, the Court often rules broadly (forgoing the alternative of narrower equal protection analysis) and vaguely (allowing the potentially unlimited development of future substantive rights), outweighing the short-term benefits to minority groups—which could also be achieved using equal protection analysis—by creating a significant long-term danger that will prefer the rights of some parties over the rights of others. By using substantive due process to assume the power of the legislature to decide policy, the Court, unelected and life-tenured, subverts the processes of normal self-governance.

Even a no-theory common-sense approach would likely reveal the anti-democratic nature of substantive due process; it does not require "cosmic" constitutional theory to understand that while there is no doubt that many of the laws in the cases in question were unjust and should not have existed as a matter of legislative social policy, the reasoning used by the Court to rule on these laws matters as much, if not more, than the rulings themselves. The judicial branch simply lacks the Constitutional authority to imbue in itself the power to infer substantive rights. This power belongs to the people and their elected representatives in the legislature. If justices were to consider Wilkinson's principle that "good sense is more often displayed in collective and diverse settings than in a rarefied appellate atmosphere"[125] and follow his call to embrace a more plain and self-disciplined commitment to restraint, they would mourn the Court's judgments regarding substantive due process thus far, which have taken various issues out of the spheres of political debate and legislative action and enshrined them as unquestionable Constitutional law based on the opinion of a majority of merely nine justices. Doing so has created numerous irreversible threats to the processes of democracy and self-governance, and potential further development of substantive due process by future Courts threatens to exacerbate these dangers and move the country even further towards the predictable ending point: an oligarchy led by judicial decisions and supported by members of the the elite, amongst which members of the judiciary often rise.

125 Wilkinson, *supra* note 1 at 115.

Even if future Courts decide not to advance the slow encroachment of substantive due process on self-governance, they would still find themselves limited in any effort to roll back substantive rights as they currently stand. Just as judicial restraint advises against substantive due process, it also discourages overturning the precedents supporting it—especially since many precedents affirm and uphold the doctrine. A large body of existing cases means that stare decisis will allow future justices only to determine whether they will expand substantive due process further, not whether they can limit currently existing substantive rights. Thus, in any conceivable scenario, "the imperial judiciary lives,"[126] and our existing Constitution, jurisprudence, and accepted legal traditions can do little to weaken it.

126 *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

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ARTICLE

THE NEED FOR A UNITARY EXECUTIVE: *MORRISON V. OLSON* REVISITED

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Abstract

The conventional view of the president's executive powers is one of skepticism and caution. Scandals implicating presidents in crime and abuses of power have tarnished the legacy of the executive branch, creating a general distrust toward the office among Americans. This perception of the executive branch and president, however, is undeserved. Following the Supreme Court's ruling in *Morrison v. Olson* and Associate Justice Antonin Scalia's lone dissent, the premise of a unitary executive and the unitary executive theory have become increasingly accepted interpretations of presidential power. Rather than describe the unitary executive theory, this article will argue that a unitary executive is necessary for maintaining an effective and efficient constitutional government. By revisiting and expanding upon the arguments made against the majority's decision in *Morrison*, this article will analyze the implications of the case on modern American government and the state of the unitary executive.

Associate Justice Elena Kagan has said "we live in today an era of presidential administration." Now more than ever, a unitary executive is needed. The current administration has proven to be one of the least unitary in modern history and, as a result, has been ineffective. Today, one can no longer look to Congress for efficiency either. Working to achieve a unitary executive requires an interpretation of the Constitution that vests not some, but all executive power in the president, in order to progress toward an effective constitutional government.

I. Introduction

In its 1988 ruling on the famous case *Morrison v. Olson*, the Supreme Court held that the Ethics in Government Act of 1978 (EGA) was constitutional.[1] The act created, among other provisions, a process for appointing an independent counsel to investigate the president, free from outside restrictions that would impede its investigatory powers. The call for an independent prosecutor who could investigate presidential wrongdoing followed the Watergate scandal, where President Nixon fired executive branch officials in an effort to remove Special Prosecutor Archibald Cox.[2] As a result, Congress passed the EGA to eliminate the ability of a president to remove a special prosecutor without rein.[3] The EGA established a special court, comprising three judges from the Circuit Court of Appeals, to appoint a special prosecutor if the attorney general found that allegations of presidential wrongdoing warranted an investigation. The prosecutor, formally the "Office of Independent Counsel," would be appointed without direction from the president being investigated, and could only be removed by Congress or the attorney general under very limited circumstances.[4] *Morrison v. Olson* brought into question both the constitutionality and legitimacy of this act, setting a precedent that would significantly alter the president's ability to control the executive branch.

The case arose in 1982, following the Environmental Protection Agency's (EPA's) refusal to produce documents related to the EPA-administered Superfund program for the House of Representatives. The House of Representatives had requested the documents during an investigation into the program, based on concerns that the EPA had improperly politicized it.[5] At the order of President Ronald Reagan, EPA Administrator Anne Gorsuch withheld documents and was held in contempt of Congress as a result. The president argued that the documents contained "enforcement sensitive information," and thus could not be turned over.[6] Congress called Theodore Olson, assistant attorney general for the Office of Legal Counsel, to testify before the House Judiciary Committee on the matter. The committee later reported that Olson gave "false and misleading testimony" and directed the attorney general to appoint an

1 FEDERAL JUDICIAL CENTER, MORRISON V. OLSON (1988).
2 Jim Mokhiber, *A Brief History of the Independent Counsel Law*, PBS FRONTLINE (May, 1998), https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html.
3 Ethics in Government Act of 1978, 28 U.S.C. § 596 (1978).
4 *Supra* note 2.
5 Sheldon Gilbert, *Morrison v. Olson Oral Argument Rewind: Everything Old Is New Again*, FEDERALIST SOC'Y (May 4, 2018), https://fedsoc.org/commentary/blog-posts/morrison-v-olson-oral-argument-rewind-everythingold-is-new-again.
6 Morrison v. Olson, 487 U.S. 654 (1988).

independent counsel for the investigation of Olson and others who testified.[7] After Alexia Morrison was named independent counsel, Olson filed suit, arguing an independent counsel infringed the separation of powers by creating an autonomous "fourth branch" of government with prosecutorial powers reserved for the executive branch.[8]

The Supreme Court ultimately ruled that the EGA's allowance for an Office of Independent Counsel was constitutional. In the majority opinion, Chief Justice William Rehnquist explained that the office did not violate the separation of powers because it was under control of the attorney general, an executive branch officer, and was therefore constitutionally granted the prosecutorial powers it exercised.[9] Though *Morrison* was a near-unanimous decision by the Court, Associate Justice Antonin Scalia's dissent has remained an important analysis of the theory of the unitary executive. This theory suggests that the executive branch is controlled from the top down and that the president is granted "not some of the executive power, but all of the executive power" by Article II of the Constitution, as Scalia famously remarked.[10] With time, Scalia's opinion has become increasingly accepted among scholars.[11] Rather than describe the unitary executive theory itself, this article will argue that a unitary executive is necessary to maintain an effective and efficient constitutional government. By broadening the arguments made against the majority decision in Morrison, this article will demonstrate the effect of the case on modern American government and the unitary executive.

7 *Id*. at 655.

8 Richard J. Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government,* 1988 SUP. CT. REV. 1, 1-41 (1988).

9 *Supra* note 6, at 669-70.

10 *Id*. at 699.

11 Nick Bravin, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 9 COLUM. L. REV. 1103, 1103-44 (1998).

II. Interpreting the Majority Opinion

A. The Appointments Clause Argument

Before defining potential faults in *Morrison* majority opinion, terms that were frequently used in the case must be clarified. Both the appellant and appellee relied on the distinction between a principal officer and an inferior officer, as outlined in the Appointments Clause of the Constitution.[12] Per this clause, a principal officer is an official appointed by the president with the advice and consent of the Senate, while an inferior officer is an official who may be appointed by the president alone, by courts of law, or by heads of departments without congressional approval.[13] The parties disagreed on whether the independent counsel was a principal or an inferior officer, which the majority went on to establish. Olson argued that the counsel was a principal officer and therefore under complete control of the president, whereas Morrison argued she was an inferior officer and could be appointed by an entity other than the president. The majority agreed with Morrison. In the majority opinion, Chief Justice Rehnquist specified that the independent counsel was an inferior officer because she could "be removed by the attorney general indicat[ing] that she is, to some degree, 'inferior' in rank and authority."[14] Indeed, Rehnquist was correct in finding that the attorney general had authority over counsel; however, two issues arise from this conclusion. First, if the independent counsel is inferior, in what way is she "independent"? On the surface, it is difficult to argue that an independent counsel is a truly inferior officer. As mentioned earlier, Rehnquist defined an inferior officer as "'inferior' in rank and authority."[15] When interpreting the meaning of "independent," however, Rehnquist did not consider how this may have prevented the counsel from being "inferior" to another entity. By claiming that the independent counsel was an inferior officer, the majority suggested that independence does not require insubordination, which, as seen in the other branches of government, is untrue. As Congress and the Supreme Court are independent of the president, one is not inferior to the others. The second issue in the majority's opinion is that it assumes the power the attorney general holds over the counsel is meaningful. Since the independent counsel could only be removed under extremely narrow circumstances defined by the EGA, it would have been unlikely for the attorney general to find reason to remove the counsel under the requirements of the statute.[16] That being the case, the attorney general—and by extension the president—had minimal ability to remove the

12 *Supra* note 6, at 670-73.
13 Tuan Samahon, *The Inferior (Subordinate) Officer Test and the Officer/Non-Officer Line, in* YALE J. ON REG. (2018).
14 *Supra* note 6, at 670-73.
15 *Id*. at 672.
16 *See supra* note 1.

counsel. This raises concerns over the autonomy of the counsel under this statute, and again brings into question the majority's holding that the independent counsel was an inferior officer. Even if the attorney general had found cause to remove the counsel, the political risks associated with doing so would be insurmountable. If president Reagan's attorney general had removed the counsel under the standards set by the statute, the political backlash would likely have allowed additional Congressional investigations, a widened scope for the counsel's investigation, and possible impeachment.[17] Thus, it is doubtful that an independent counsel is "inferior" by any definition of the term.

The majority also suggested that the independent counsel was an inferior officer because the "appellant's office is limited in jurisdiction."[18] Again, this claim is technically correct, but like the suggestion that the attorney general maintained some control over the counsel, it is misleading. The attorney general could limit the scope of the investigation, but the counsel remained largely unchecked in other areas, despite the Court's claim that its jurisdiction was limited. Take, for example, the independent counsel led by Kenneth Starr in 1992. Though the counsel was appointed to investigate real estate investments of then-President Bill Clinton and First Lady Hillary Clinton, he instead produced a report that found the president had engaged in "sexual relations."[19] This report resulted in the president's impeachment, as he lied under oath when responding to its findings.[20] This investigation, known as Whitewater, did not prove any wrongdoing related to the Clintons' real estate developments, which was the original matter the counsel was appointed to investigate.[21] Even Rod Rosenstein, who was at the time working in the Office of Independent Counsel under Starr, said "nobody thought [the investigation] was efficient."[22] The investigation instead expanded beyond the Whitewater controversy, as Starr was allowed to investigate other areas of the administration soon thereafter.[23] It could be said

17 Kevin M. Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate's Wake*, in PRESIDENTIAL POWER STORIES 402 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

18 *Supra* note 6, at 672.

19 *The Starr Report*, WASH. POST (1998), https://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/icreport.htm.

20 BILL OF RIGHTS INSTITUTE, THE IMPEACHMENT OF BILL CLINTON, https://billofrightsinstitute.org/elessons/the-impeachment-of-bill-clinton/.

21 *Whitewater: Case Closed*, CBS NEWS (Sept. 20, 2000), https://www.cbsnews.com/news/whitewater-case-closed/.

22 Aruna Viswanatha & Scott Calvert, *Russia Probe Looms Large for New Justice Deputy*, WALL ST. J. (Apr. 17, 2017), https://www.wsj.com/articles/russia-probe-looms-large-for-new-justice-deputy-1493199001.

23 Ken Thomas, *Starr Memoir Recounts Lewinsky Role in Clinton Investigation*, ASSOCIATED PRESS (Sept. 5, 2018), https://apnews.com/0879ec90c60f4a0ab0056899b026152a/Starr-memoir-recounts-Lewinsky-role-in-Clinton-investigation.

if it were not for the majority's ruling in Morrison, the independent counsel led by Starr may not have existed or have been allowed to investigate well beyond its original intent and scope. The Morrison majority's claim that Independent Counsel Alexia Morrison was an inferior officer because of her "limited jurisdiction" was incorrect, so long as the limits of her jurisdiction could be expanded. This was certainly possible, as the special court created under the EGA permitted Starr to expand the scope of the Whitewater investigation into other potential crimes.[24] Though the Supreme Court was correct in finding that there were technical limits to the investigation in *Morrison*, it was misleading to claim that it was actually limited. The ability for an independent counsel to expand its investigation with permission from the special court suggests that the appellee was correct to claim the counsel was not truly limited, and therefore not an inferior officer.

The counsel was arguably not an inferior officer, but beyond these concerns are questions of its legitimacy. Even if the majority was correct in declaring the counsel an inferior officer, the Appointments Clause may be interpreted to suggest that the special court created under the EGA could only make judicial appointments, not executive ones. The majority recognized that the counsel was an executive appointment by explaining she was an inferior officer.[25] Under the majority's interpretation, the counsel was subject to the control of the attorney general, an officer of the executive branch, making the counsel an executive officer. If that were the case, there would be a question of whether the special court was allowed to make the appointment of the independent counsel, as that activity would be extrajudicial. A court of law cannot appoint heads of departments, but it can appoint staff attorneys, which the president cannot do.[26] There are clear limits to who can appoint whom under the Appointments Clause. If heads of departments are appointed by the executive branch and not by courts of law, would the special court created under the EGA have the power to appoint an independent counsel that is clearly an executive officer? The majority may have ignored this limitation on courts of law in making appointments, which would have rendered the EGA unconstitutional. If the independent counsel could not be appointed by an entity outside of the executive branch, then she held office unconstitutionally and illegitimately.

B. The Separation of Powers Argument

The majority's opinion in Morrison overlooked several violations of the separation of powers outlined in the Constitution. Moreover, the Court set a precedent that suggests an independent counsel is above the president and in creating the EGA, Congress exceeded its authority in order to limit executive

24 *Id*.
25 *Supra* note 6, at 670-73.
26 U.S. Const. art. II, § 2, cl. 2.

powers. Conceptually, these arguments can be broken down to clarify how the EGA's Office of Independent Counsel infringed presidential authority. The majority interpreted the act not to be a violation of the separation of powers because it did not "impermissibly interfere with the president's authority under Article II."[27] The independent counsel clearly took on prosecutorial powers in investigating the president, however.[28] It is widely accepted that criminal prosecutions under federal law are the responsibility of the executive branch, under Article II of the Constitution.[29] And, if one accepts that prosecutorial powers are a purely executive function, then the counsel could only be acting constitutionally if she were part of the executive branch. As discussed previously with respect to the Appointments Clause, an independent counsel is an extension of the executive branch, a fact supported by the majority in Morrison. It follows that the counsel was acting constitutionally by exercising prosecutorial powers then, since she was a part of the executive branch. Article II, Section III of the Constitution stipulates that it is solely the role of the president, however, "to take care that the laws be faithfully executed."[30] The text does not indicate that it is the role of the president to act in cooperation with the entirety of the branch; it provides that the president alone must exercise prosecutorial power. The majority interpreted this to mean that prosecution is merely an executive function, and that it can be practiced by other entities in the branch, which supports their understanding that the counsel did not "impermissibly interfere" with presidential authority.[31] That being said, the counsel undeniably took on executive powers. Given that the president is granted these powers, perhaps exclusively, in Article II, the existence of the counsel undermines the separation of powers between the president and other branches of government. Limiting the president's ability to prosecute restricts him or her from fully exercising the executive powers granted by the Constitution. Beyond this, the majority's ruling allowed the counsel to take inherently executive actions while being widely unaccountable. It was established earlier that although the independent counsel was removable by the attorney general, this was only under extremely narrow circumstances that made removal nearly impossible. In addition to having prosecutorial powers delegated to the president and attorney general, the counsel was able to exercise those powers relatively unchecked.[32] In Morrison, the appellee argued that even if the president declared certain information should be withheld from the counsel due.

27 *Supra* note 6, at 602.

28 Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers Intent*, 99 YALE L.J. 1069, 1088 (1990).

29 *See supra* note 26.

30 U.S. Const. art. II, § 3.

31 *Supra* note 6, at 602.

32 Adrian Vermeule, *Morrison v. Olson Is Bad Law*, LAWFARE (June 9, 2017), https://www.lawfareblog.com/morrison-volson-bad-law.

to legitimate national security concerns, the counsel could still demand those documents.[33] The attorney general had no power to remove the counsel if she did so, because that would not constitute "good cause" for removal, under the majority's interpretation. This is a worrisome precedent: a largely unaccountable independent counsel could jeopardize national security without restraint. While it was unlikely that the counsel would have put national security at risk, which has not happened since the majority's ruling, the potential for such is concerning.[34] This also violated several principles of the separation of powers. As mentioned previously, Congress delegated executive powers to the counsel and the counsel was so independent as to be unaccountable. Under the majority's ruling, checks and balances did not extend to the counsel, creating potential dangers for effective constitutional government.

Of course, it is important to address the arguments of the appellant in *Morrison*. Notably, how can the president be trusted to exercise his or her prosecutorial powers while being investigated for wrongdoing? This conflict of interest is understandable. Indeed, if a president committed a crime, he or she would likely be motivated to conduct an investigation that ends in exoneration; however, the Constitution provides a range of other checks that Congress and the Supreme Court can exercise on the president, among them the power of impeachment.[35] Additionally, the Court has held in prior cases that there are exceptions to the president's liability for charges of misconduct. Congressional oversight, a check on executive power, was established in *United States v. Nixon*, well before *Morrison*, and the court "unequivocally rejected the idea that the president is immune from all compulsory judicial process."[36] In *Nixon v. Fitzgerald*, the Court ruled that the president cannot be charged with civil damages for official acts while in office.[37] In this case, a counsel would be unnecessary, even if civil damages had occurred. The Court ruled later in *Clinton v. Jones* that the president can be charged with civil damages incurred before taking office.[38] Arguably, an independent counsel would be unnecessary in this case as well.

These cases provide support for the argument that an independent counsel is not necessary to investigate a president. Well before the EGA established the Office of Independent Counsel, checks on the president's power, such as the potential for investigation, existed and worked effectively. Congress' practice of congressional oversight allows investigation into the president without violating the separation of powers. In *Bowsher v. Synar*, the Court held that

33 *Supra* note 6, at 708.
34 *Id*.
35 U.S. Const. art. II, § 4.
36 United States v. Nixon, 418 U.S. 683 (1974).
37 Nixon v. Fitzgerald, 457 U.S. 731 (1982).
38 Clinton v. Jones, 520 U.S. 681 (1997).

"Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[39] Despite issues that may arise from executive investigation of itself, it was outlined in *Bowsher* that this is an executive function Congress cannot practice. Yet, the EGA created the Office of Independent Counsel that did exactly that. Congressional oversight is a power of the legislative branch that may be used to hold the president accountable. Prosecution, however, cannot be granted to an independent counsel by Congress without undermining the separation of powers.

39 Bowsher v. Synar, 478 U.S. 714 (1986).

III. Interpreting Scalia's Dissent

Justice Antonin Scalia's dissent in *Morrison* is perhaps one of his most famous, controversial, and often cited. It was among the Court's first descriptions of the unitary executive theory.[40] Though seemingly radical when written, this theory has become progressively more accepted in legal circles. Indeed, Justice Elena Kagan noted that Scalia's dissent was "one of the greatest dissents ever written and every year it gets better."[41] With the current bipartisan rejection of the majority opinion in *Morrison*, it is worth discussing Justice Scalia's dissent, which informs current legal theories on the constitutionality of a unitary executive. Scalia's dissent can be broken down into two arguments: that the Framers intended a unitary executive and that there are specific misinterpretations by the majority in *Morrison*.

Before analyzing the substance of Scalia's dissent, one must understand the legal theory behind Scalia's interpretation of the case, known as originalism. In constitutional law, originalism is the interpretation of legal texts based on the original meaning and intent of the author or authors.[42] Justice Scalia's dissent is founded upon a strict reading of Article II's assertion that "the executive Power shall be vested in a president of the United States."[43] As will be explained, Scalia understood this phrase to mean all executive power, not some, per his earlier quote.[44] His interpretation of the text was based on his belief that the Framers intended to place executive power solely in the president. To evidence this, Scalia referred to *Federalist Paper No. 70*, where Alexander Hamilton wrote "that unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[45] From this, Scalia and other originalists conclude that the Framers intended to place executive power in the hands of one person, the president. Hamilton does make the case for this in describing an effective executive branch. And, because Hamilton states the intention of the Constitution was to create a more powerful executive with the "proceedings of one man [the president] in a much more eminent degree,"[46] one

40 Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1355 (2012).
41 *Supra* note 32.
42 Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OFCONSTITUTIONAL INTERPRETATION 12 (Grant Huscroft & Bradley W. Miller eds., 2011).
43 U.S. Const. art. II, § 1, cl. 1.
44 *Supra* note 6, at 699.
45 THE FEDERALIST NO. 70 (Alexander Hamilton).
46 *Id*.

can infer that Article II similarly reflected the intention of placing power in the executive. In his dissent, Scalia elaborated on this point, writing "the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power."[47] This reiterated his position that the Framers intended to establish a unitary executive, and that the *Morrison* majority should have interpreted the case with this in mind. If they had, it is likely that they would have understood the independent counsel as Scalia did: a division of executive power that the Framers advocated against. It is difficult to envision the counsel as anything but such a division of power. As the independent counsel was a part of the executive branch and exercised prosecutorial powers held by the president, the office by its very nature divided executive power, which Scalia argued the Framers did not intend. The Framers, Scalia ultimately suggested, supported a unitary executive.

Moreover, Scalia took issue with several components of the majority opinion, including the presumption that the Office of Independent Counsel was limited. Chief Justice Rehnquist argued that the counsel was under control of the executive branch because, as previously mentioned, the attorney general could remove the counsel for "good cause."[48] The appellee, however, noted that proper grounds for removal were so limited that removing the counsel was almost inconceivable.[49] Scalia, supporting this point, wrote "the decisions regarding the scope of that further investigation, its duration, and, finally, whether or not prosecution should ensue, are likewise beyond the control of the president and his subordinates."[50] Not only did Scalia reject the majority's assertion that the counsel was not "beyond the control" of the executive branch, but he made another point: if the counsel was beyond the control of the executive branch, to whom was she accountable?[51] Only the attorney general had the ability to remove the counsel, and unless the attorney general were to take the unlikely action of removing the counsel, the counsel would remain unaccountable. Neither Congress nor the special court had the power to remove the counsel.[52] The independent counsel had no need to limit her investigation or fear removal, raising the concern that she could have extended her investigation far beyond her appointment, as the Starr Counsel later did. [53]

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47 *Supra* note 6, at 699-700.
48 *Id*. at 669-70.; *See supra* note 3.
49 *See supra* note 1.
50 *Supra* note 6, at 704.
51 *Id*. at 704.
52 *See supra* note 1.
53 *Morrison v. Olson Dissent: A Suit About Power*, JRANK, https://law.jrank.org/pages/25257/Morrison-v-Olson-Dissent-Suit-About-Power.html.

Scalia also made an argument similar to that of the appellees: the majority's opinion undermined the separation of powers. To address this, Scalia wrote in his dissent:

> It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation of powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the president of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that, since the statute vests some purely executive power in a person who is not the president of the United States, it is void.[54]

It was held by Scalia and, in time, reaffirmed by a number of other legal scholars that prosecution is an executive power, as previously explained. This would imply that by exercising purely executive powers, the independent counsel violated the separation of powers. Scalia's argument is very similar to the appellees'; however, by claiming the counsel "is void," he implied that the statute establishing the Office of Independent Counsel drew on exclusively presidential powers, rendering it illegitimate.[55] The majority, in declaring the statute constitutional, ignored the contravention of constitutional government that Scalia saw as a risk to the unitary executive.

54 *Supra* note 6, at 706.
55 *Id*.

IV. The Importance of a Unitary Executive

In *Morrison*, the underlying point in Scalia's dissent and the appellees' argument was that the unitary executive was essential to functioning government. This was iterated by Hamilton in *The Federalist No. 70*, which described what an effective executive branch looks like: a president who is granted full executive powers, with prosecutorial powers unencumbered.[56] Some academics dispute the theory of a unitary executive by suggesting that a centralized power, such as the president in the executive branch, does not exist in other branches.[57] Congress, being a bicameral legislature, is certainly not unitary. The Supreme Court, composed of nine justices with contrasting interpretations of the Constitution, is similarly not unitary. Regardless, it is not commonly held that the design of another branch should apply to another.[58] Each branch is granted constitutional powers that the others are not, and each branch is constructed so as to exercise its powers effectively and, more importantly, constitutionally. In *The Federalist No. 70*, Hamilton explained that "a feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."[59] He recognized that the executive's constitutional powers would be exercised more efficiently under a vertically integrated structure, organized from the president downward. Though it may seem challenging for constitutional government to include a powerful executive, the Framers understood the importance of efficiency. Congress is, especially in the present day, inefficient.[60] This begs the question: what would a divided, inefficient executive branch look like? If the executive branch had the inefficiency of Congress, characterized by gridlock and general delay, this could create disastrous foreign policy. Moreover, passing legislation would be nearly impossible. Both of these points are exemplified by the Trump administration, an arguably non-unitary and especially inefficient executive.[61]

As the unitary executive is vertically integrated and features a president

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56 *Supra* note 45.

57 Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 1314-49 (2006).

58 CORNELL LEGAL INFORMATION INSTITUTE, SEPARATION OF POWERS AND CHECKS AND BALANCES, https://www.law.cornell.edu/constitution-conan/article-1/section-1/separation-of-powers-and-checks-and-balances.

59 *Supra* note 45.

60 Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/ 2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html.

61 Susan Hennessy & Benjamin Wittes, *The Disintegration of the American Presidency*, ATL. (January 21, 2020), https://www.theatlantic.com/ideas/archive/2020/01/trump-myth-unitary-executive/605062/.

who exercises his or her Article II powers with minimal scrutiny, the Trump administration diverges from this model in multiple ways. Since taking office, the president's prolific use of Twitter and nontraditional rhetoric have created one of the least unitary executive branches in modern history.[62] Statements from the president that in past administrations would have been considered official have been repeatedly contradicted and dismissed by cabinet officials. In July of 2018, following a summit with North Korean leader Kim Jong Un, the president published a Tweet suggesting that North Korea was "no longer a threat."[63] That Sunday, Secretary of State Mike Pompeo directly contradicted the president in stating that North Korea "remains a nuclear threat."[64] Senior cabinet members voicing opinions that contradict the president's is difficult to imagine in an effective, functioning government. In *Morrison*, there was no question that president Reagan's policies were carried out by executive departments at his direction, and that this was constitutional.[65] Often in past administrations, policy was coordinated between the president and department heads so as to avoid any inefficiency in implementation.[66] As discussed prior, this is a feature of a unitary executive that the Framers intended. The current administration, however, fails to follow the unitary executive structure, leading to confusion and contradiction within the executive branch. As a result, American foreign policy has become incoherent, with adverse implications such as the earlier miscommunication about relations with North Korea.[67] Reestablishing a unitary executive is necessary to remedy this. Active coordination between cabinet officials and the president must be restored and the president's decisions must be final, in order to avoid contradiction within the executive branch.

Justice Scalia recognized in his Morrison dissent that a unitary executive was not only constitutional, but useful for effective governance.[68] Effective government is not characterized by cabinet officials openly disagreeing with the

62 *Id*.

63 Veronica Stracqualursi & Stephen Collinson, *Trump Declares North Korea "No Longer a Nuclear Threat"*, CNN (June 13, 2018), https://www.cnn.com/2018/06/13/politics/ trump-north-korea-nuclear-threat/index.html.

64 Felicia Sonmez & Toluse Olorunnipa, P*ompeo Says North Korea Remains a Nuclear Threat, Contradicting Trump*, WASH. POST (Feb. 24, 2019), https://www.washingtonpost.com/politics/pompeo-says-north-korea-remains-a-nuclear-threat-contradicting-trump/2019/02/24/c70892d8-384c-11e9-a2cd-307b06d0257b_story.html.

65 Richard W. Waterman, *The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory*, 39 PRESIDENTIAL STUD. Q. 5, 5-9 (2009).

66 *Id*.

67 David Nakamura, *Trump Upended Three Decades of U.S. Strategy with North Korea, but the Gamble Has Failed to Pay Off*, WASH. POST (Jan. 2, 2020), https://www.washingtonpost.com/politics/trump-upended-three-decades-of-us-strategy-with-north-korea-but-the-gamble-has-failed-to-pay-off/2020/01/02/fd9afa84-2d79-11ea-bcb3-ac6482c4a92f_story.html.

68 *Supra* note 6, at 699.

president and disputing what he or she claims certain policies to be.[69] The Hamiltonian view of the president that Justice Scalia advocated avoids these problems. Unfortunately, the Trump Administration has not followed this model, becoming less vertically integrated and increasingly inefficient. Restoring the power and efficiency of government must begin with not only recognizing the constitutionality of the unitary executive, but also with creating an executive that is unitary. Unity is necessary for accountability, and reestablishing a unitary executive would more effectively hold the president accountable for his actions, strengthening American constitutional government.

69 *Id*.

V. The Supreme Court and Unitary Executive Today

A. Expiration of the Independent Counsel Act

Though *Morrison v. Olson* remains useful for understanding the unitary executive theory and challenges to its application, Title VI of the Ethics in Government Act—which established the Office of Independent Counsel disputed in the case—expired in 1999, representing progress toward a unitary executive.[70] Moreover, the act's expiration effectively rescinded Congress' ability to authorize an independent counsel who might restrain presidential power.[71] *Morrison* and the ensuing Whitewater investigation nonetheless serve as important reminders of the implications of undermining presidential authority. Further, Scalia's dissent is often cited by academics and judges today and has increasingly been accepted as correct.[72] It is possible that without Scalia's dissent to address the flaws in the majority's opinion, the EGA would not have been allowed to expire. The concerns Scalia raised, specifically that the independent counsel possessed purely presidential powers and that her investigation was not limited in scope, encouraged Congress to allow the act to expire.[73]

Following the expiration of the act, the Office of Independent Counsel was replaced with the Office of Special Counsel.[74] Under current regulation, the attorney general, rather than Congress, has the ability to authorize a special counsel when an investigation by the Department of Justice may present a conflict of interest.[75] The ability of the attorney general to appoint the counsel is critical to restoring the unitary executive, since it restores power for regulating investigation to the executive branch; however, this does not solve the problem entirely. There appear to be very few limits on the authority of a special counsel. For instance, there are no time restrictions on a special counsel's investigation aside from "annual reporting requirements for budgetary purposes," which raises concerns about the scope of special counsels' investigations.[76] Much like Starr's investigation, a modern special counsel investigation can continue for an indefinite amount of time. Although the attorney general can still remove the special counsel, this is unlikely given the associated political risks, as seen with

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70 *Supra* note 2.

71 Phil Helsel, *"Special Counsel" Less Independent Than Under Expired Watergate-Era Law*, NBC NEWS (May 18, 2017), https://www.nbcnews.com/news/us-news/ special-counsel-less-independent-under-expired-watergate-era-law-n761311.

72 *Supra* note 41.

73 *Id*.

74 General Powers of a Special Counsel, 28 C.F.R. § 600 (1999).

75 Powers and Functions of the Office of Special Counsel, 5 U.S.C. § 1212 (2017).

76 CONGRESSIONAL RESEARCH SERVICE, SPECIAL COUNSELS, INDEPENDENT COUNSELS, AND SPECIAL PROSECUTORS: INVESTIGATIONS OF THE EXECUTIVE BRANCH BY THE EXECUTIVE BRANCH (2017).

the previous independent counsel.[77] Fear of political retribution could force a president to allow a special counsel investigation to continue despite threats it may pose to the separation of powers.[78] Limitations on removing the counsel, similar to those in Morrison, remain as well. The attorney general can remove the special counsel only for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause."[79] This may explain why proponents of a unitary executive continue to take issue with special counsels, despite improvement from the expiration of the EGA.

A greater issue is the constitutionality of a special counsel. Since *Morrison v. Olson*, the Supreme Court has not taken up a case concerning the existence of a special counsel, and has set no precedent as a result.[80] Arguably, the special counsel still retains many of the purely executive powers that independent counsels enjoyed, and restrictions on special counsels, specifically, have not been defined.[81] It is important that the Court recognize the mistakes of the majority in Morrison, and in the future take care not to grant another entity powers reserved for the executive.

B. Special Counsel Independence and Integrity Act

Despite general acceptance of Scalia's unitary executive theory in *Morrison*, Congress may be reviving the Office of Independent Counsel. In April of 2018, four senators—Cory Booker (DNJ), Chris Coons (D-DE), Lindsey Graham (R-SC), and Thom Tillis (R-NC)—sponsored the Special Counsel Independence and Integrity Act (SCIIA) in order to protect Special Counsel Robert Mueller.[82] Among the provisions of the bill, it is stated that the special counsel "must be provided written notice that specifies the reason for removal; and may file an action to challenge the removal not later than 10 days after notice was provided."[83] The bill also "allows a special counsel to challenge the removal in federal court."[84] Both of these clauses represent profound challenges to the unitary executive and a potential return to the Ethics in Government Act of 1978, despite the bill not having received a full vote in the Senate.[85] Similarly to *Morrison*, this act raises several constitutional questions. First, if a federal court refuses the attorney general's request to remove the special counsel, is the court

77 *Supra* note 65.
78 *Id*.
79 *Supra* note 76.
80 Adam Liptak, *Supreme Court Won't Hear Company's Appeal in Mueller Subpoena Case*, N.Y. TIMES (Mar. 25, 2019), https://www.nytimes.com/2019/03/25/us/politics/supreme-court-mueller-subpoena.html.
81 *See supra* note 74.
82 Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2018).
83 *Id*.
84 *Id*. at sec. 1.
85 *See supra* note 82.

exercising unconstitutional extrajudicial powers? The independent counsel in *Morrison*, which was appointed by a court of law, was argued to have been unconstitutional because the special court established under the EGA was delegating executive powers, while not part of the executive branch.[86] The SCIIA presents the same issue between the court and the counsel, though with a different relationship between them. The bill allows the attorney general to appoint the special counsel, which is an advancement toward the unitary executive; however, the bill would grant a court of law final authority in removing a special counsel, echoing the unconstitutionality of *Morrison*.[87] The special counsel is an officer of the executive branch, but the bill would give a court greater authority than the attorney general in the special counsel's removal. This would undoubtedly be an exercise of extrajudicial power.

The above raises another question: Does the special counsel have a constitutional right to challenge his or her removal by the attorney general, and thus by the president by extension? Although in *Morrison* it was ruled that an inferior officer could challenge his or her removal and could not be removed without "good cause," it has yet to be established whether a special counsel is an inferior officer like the independent counsel in *Morrison*.[88] In *United States v. Germaine*, the court held that in order to be an officer of the United States, principal or inferior, the position of the person in question must be "continuing and permanent."[89] Despite the potential for a special counsel investigation to be of indefinite length, it is not considered permanent because it can nonetheless be suspended.[90] Furthermore, the office is not continuing, because under current law the counsel is terminated once the investigation has concluded.[91] In *Germaine* it was determined that if the person or entity in question did not occupy a "continuing and permanent" position, he or she was an employee, not an officer, of the United States.[92] Considering this, it is likely that a special counsel has the constitutional right to challenge his or her removal. This does not indicate whether a special counsel is an inferior or a principal officer, however. *Germaine* would likely render a special counsel an employee of the United States, because the office is not "continuing and permanent," which would allow challenges to his or her removal by the attorney general.[93] That is not necessarily an advancement for constitutional government. While it is constitutional for a special counsel to challenge his or her removal under the proposed SCIIA, this

86 *Supra* note 6, at 704.
87 *See supra* note 83.
88 *Supra* note 6.
89 United States v. Germaine, 99 U.S. 508 (1878).
90 *Supra* note 82, at sec. 2.
91 *Id*. at sec. 1
92 *Supra* note 89.
93 *Id*.

does not change the fact that the counsel still exercises executive power. By exercising that power, the special counsel is subject to the same scrutiny and questions of constitutionality raised by Scalia in *Morrison*.

Considering that Article II stipulates "the Executive power shall be vested in a president," the special counsel faces the same challenge to its legitimacy as the independent counsel in *Morrison*. Since the appointment of a special counsel is based on the need for a "criminal investigation of a person or matter," the counsel undoubtedly exercises prosecutorial powers by pursuing such investigations.[94] Moreover, prosecutorial powers are an executive function. It follows that if Article II is to be applied correctly, then the executive power of prosecution must be "vested in a president."[95] The special counsel's relative independence from the president conflicts with this interpretation. A special counsel cannot be removed by the president, only the attorney general.[96] And although the president can instruct the attorney general to remove the counsel, there is neither a guarantee that this would be done nor that the president would avoid political retribution from Congress. In effect, the existence of a special counsel replicates the unconstitutionality of the independent counsel in *Morrison*; it erodes purely presidential powers by vesting them in another officer. The SCIIA only further removes special counsels from executive control. As previously mentioned, the SCIIA would grant the special counsel the ability to challenge his or her removal and would allow a federal court, beyond the executive branch, to determine whether that removal was warranted.[97] This bill presents a worrisome reversion to the Office of Independent Counsel under the EGA. Though Senate Majority Leader Mitch McConnell expressed that "we'll not be having this [bill] on the floor of the Senate," it is entirely possible that a piece of legislation resembling the SCIIA could be proposed when a future special counsel is appointed.[98] Potential expansions to the Office of Special Counsel under the SCIIA continue to challenge the existence of a unitary executive. In order to support the United States' constitutional government and allow a unitary executive, the SCIIA and similar legislation must be avoided.

94 Grounds for Appointing a Special Counsel, 28 C.F.R. § 600.1 (1999).

95 *Supra* note 43.

96 Conduct and Accountability, 28 C.F.R. § 600.7 (1999).

97 *See supra* note 82, at sec. 2.

98 Rebecca Shabad, *McConnell Slams Door on Mueller Protection Bill: "We'll Not Be Having This on the Floor of the Senate"*, NBC NEWS (Apr. 18, 2018), https://www.nbcnews.com/politics/congress/mcconnell-slams-door-mueller-protection-billwe-ll-not-be-n866856.

VI. Conclusion

Despite general acceptance of the late Justice Antonin Scalia's dissent in *Morrison v. Olson*, an interpretation of executive power as the Framers intended, the unitary executive has become increasingly threatened. The majority's decision in *Morrison* led to an expansion of the Office of Independent Counsel, ultimately resulting in the Whitewater investigation and the impeachment of President Bill Clinton.[99] Legal scholars and judges from both sides of the aisle have since begun to revisit *Morrison* and embrace Scalia's lone dissent.[100] Although the unitary executive has progressed from a marginal idea to a popular theory, current special counsels and congressional scrutiny may leave the United States with weaker and less efficient executives. The effects of a weak executive can be seen in the current presidential administration, and they are anything but favorable.

No one is above the law in our constitutional system. More specifically, no president is above the law. It is equally important to recognize that the Constitution vests executive powers in the president, however. Among these powers is that of prosecution, a purely executive function. It may be tempting to view the president with skepticism and to divert prosecutorial power to other entities, but the efficiency of our constitutional government relies on a unitary executive, a president with complete control of the executive branch. By honoring the intentions of the Framers and promoting a unitary executive, today's trend toward inefficient and dysfunctional government can be reversed.

99 *See supra* note 20.
100 *See supra* note 41.

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ARTICLE

AFFIRMATIVE ACTION IN EDUCATION AND EMPLOYMENT: THE DIVERSITY RATIONALE AT WORK

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Introduction

Workplace initiatives to further equality are increasingly subsumed under the banner of diversity. "Diversity" can be understood instrumentally, as a means to other social goods. But it is an exalted concept primarily because it connotes a commitment to broad social inclusion, which to many is an end in itself. The quest for diversity has taken center stage in the domain of affirmative action, for which diversity has become a crucial underpinning. In recent years, efforts to pursue diversity in a variety of forms have incited much controversy, with opponents condemning affirmative action as a form of reverse discrimination. The debate over affirmative action thus hinges on a clash of two fundamental values: diversity and non-discrimination. This clash manifests in all realms of our civic life, in our educational system, our labor markets, and in the public sphere where we engage with each other as citizens. While it has repeatedly affirmed its applicability to higher education, the Supreme Court has yet to consider whether the diversity rationale similarly justifies affirmative action in employment. This paper examines *Bakke*'s impact on the workplace to assess how—and to what extent—*Grutter*'s expanded conception of diversity might influence an employer's ability to make race-conscious employment decisions, first under the Equal Protection Clause of the Constitution and then under Title VII of the Civil Rights Act of 1964.

I. *Bakke* In Time: The Bedrock of Affirmative Action Jurisprudence

On June 28, 1978, the United States Supreme Court decided its first case on the subject of affirmative action in higher-education admissions. At issue in *Regents of the University of California v. Bakke* (1978) was the policy of the medical school of the University of California at Davis to reserve 16 of 100 places in each entering class for minorities. After twice being denied admission, a white applicant sued the university, alleging discrimination in violation of the Constitution's Equal Protection Clause. In a 5-4 decision written by Justice Lewis Powell, the Court ruled that universities may consider race in admissions, but only on a case-by-case basis alongside other factors and only for the purpose of educational diversity.[1] To reach this ruling, Powell applied a strict scrutiny standard to the University's race-based affirmative action policy. He determined that a law must be "precisely tailored to serve a compelling interest" in order to pass the test of strict scrutiny.[2] Powell rejected the University's claim that general "societal discrimination" constituted such an interest. In his view, it was too amorphous a basis for imposing racial preferences absent illegal discrimination by the university itself.[3] Powell further noted that the Court had "never approved preferential classifications in the absence of proved constitutional or statutory violations."[4]

However, Powell ultimately broke with this judicial tradition of reserving preferential classifications for redressing violations of the law. While acknowledging the gravity of *Bakke*'s Equal Protection claim, Powell simultaneously weighed the University's first amendment right to academic freedom, as defined by Justice Frankfurter:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[5]

In this context, Powell reasoned that a diverse student body is part and parcel of a university's overall educational mission.[6] Having thus deemed the school's diversity interest sufficiently "compelling" under strict scrutiny, Powell turned to assess whether its affirmative action program was "narrowly tailored"

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1 *See* Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
2 *Id.* at 299.
3 *See Id.* at 307.
4 *Id.* at 302.
5 *Id.* at 312 (quoting Sweezy v. New Hampshire 354 U.S. 234, 263 (1957) (Frankfurter, F., concurring)).
6 *See Id.* at 313.

to serve that end.[7] He determined that the use of racial quotas is *per se* unconstitutional because it fails to "consider all pertinent elements of diversity in light of the particular qualifications of each applicant" and it fails to "treat each applicant as an individual in the admissions process."[8] Therefore, the University's quota program was invalid, since race had been the determinative factor, rather than a mere contributing factor, in filling the sixteen reserved spots.

While Justice Powell's opinion emerged from a fractured court, its influence reverberated throughout subsequent cases on affirmative action in the workplace. *Bakke* not only set the precedent that race-conscious decisions can be lawful, but also prescribed the means and manner of assessing their legality. In light of this doctrinal development, we might rightly expect post-Bakke cases on affirmative action in admissions to have similar ripple effects in the realm of employment. But the story has not been quite so straightforward. Before considering the fate of the diversity rationale in the workplace, it's worth examining *Bakke*'s influence on employment law in the adjudication of both equal protection challenges, as in *Wygant v. Jackson Board of Education* (1986), and Title VII claims, as in *United Steelworkers of America v. Weber* (1979) and in *Johnson v. Transportation Agency* (1987).

In *Wygant*, the Court struck down an affirmative action program requiring teacher layoffs to be made on the basis of seniority, as long as the percentage of terminated minority teachers was never greater than the percentage of remaining minority teachers. The school board asserted a twofold interest in (1) providing minority faculty role models for its minority students in order to (2) mitigate the effects of societal discrimination.[9] Finding that the layoff provision violated the Equal Protection Clause, Powell's plurality opinion stated that "[r]acial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination" (i.e. strict scrutiny) (emphasis added).[10] Although such distinctions are usually deemed suspect because they have historically been used to disadvantage minorities, Powell cited *Bakke* as the basis for applying strict scrutiny to this case, even when the ethnoracial distinctions in question favored minorities. In other words, the plurality refused to recognize a distinction between invidious discrimination and benign discrimination. Justice O'Connor's concurrence also cited *Bakke* in rejecting such a distinction, stating that a "governmental agency's interest in remedying 'societal discrimination'… cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."[11] In determining that the plan failed strict scrutiny, the Court relied on Bakke for the proposition that while minority status may factor into

7 *Id.* at 314-315.
8 *Id.* at 317-318.
9 *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).
10 *Id.* at 273 (quoting *Bakke*, 438 U.S. 265, 291).
11 *Id.* at 288.

employment decisions, it cannot be the determinative factor. This was the fatal defect in *Wygant*. *Bakke* thus guided not only the *Wygant* Court's decision to subject affirmative action programs to strict scrutiny, but also its rationale for evaluating whether such plans reflect a compelling interest and are precisely tailored.[12]

In addition to directing the Court's analysis of constitutional claims, *Bakke* also had a discernible impact on Title VII jurisprudence. However, as evidenced in *Weber* and *Johnson*, the Court's statutory analysis of affirmative action somewhat diluted the rigor of *Bakke*'s requirements for the workplace. This reflects the traditional view that courts have taken in interpreting the Equal Protection Clause to be more restrictive than Title VII as applied to employers.[13] Title VII prohibits employers from discriminating "because of ... race, color, religion, sex, or national origin."[14] The statutory language makes no explicit exception for the "affirmative" use of race. On its face, the statute thus poses a problem for the implementation of affirmative action in the workplace context. As it is, however, the Court has turned a blind eye to this natural textual interpretation of Title VII.

In both *Weber* and *Johnson*, the Court ruled that Title VII did not invalidate all preferential employment decisions. In *Weber* specifically, the Court upheld an affirmative action plan that would reserve half of the openings in a training program for black employees until the percentage of black craftworkers in the company equaled the percentage of blacks in the local labor market.[15] Previously, the company had hired only applicants with craft work experience, but most blacks lacked such experience because they had been excluded from craft unions. The training program was thus established to "integrat[e] blacks into the mainstream of American society" by opening job opportunities "in occupations which have been traditionally closed to them."[16] The Court emphasized that this intent mirrored Title VII's specific purpose of remedying past discrimination against minorities and did "not unnecessarily trammel the interests of the white employees."[17] In accordance with the *Bakke* ruling, the Court upheld the program on the grounds that it would exist only as a temporary measure to redress a pattern of identifiable employment discrimination—not societal discrimination.[18] However, the Court also deviated from the stringency of *Bakke*'s strict scrutiny standard. The Court adapted *Bakke*'s test for narrow

12 *Id.* at 284 n.8.
13 Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. Chi. Legal F. 95, 117 (2014).
14 42 U.S.C. § 2000e-2(a)(1) (1994).
15 *See* Steelworkers v. Weber, 443 U.S. 193 (1979).
16 *Id.* at 202-203.
17 *Id.* at 208.
18 *See id.*

tailoring in its less exacting Title VII analysis of whether a plan "unnecessarily trammels" the rights of the majority.[19] Whereas *Bakke* was firm in its condemnation of a quota system, *Weber* vindicated its use. Whether through a numerical floor in *Bakke* or a percentage in *Weber*, the programs at issue in both cases set aside a certain amount of space for minorities to the exclusion of all other applicants.

The Court also partially embraced *Bakke*'s general dictates in *Johnson*. There, the Court upheld an affirmative action program that "authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates"[20] for workforces that revealed a "manifest imbalance" in workers. While *Weber* adopted *Bakke*'s "compelling interest" standards and loosened its "narrow tailoring" requirements, the *Johnson* Court followed and flouted the opposite prongs. Refusing to define in statistical terms what constituted "manifest imbalance," the Court simply endorsed the plan as "resembl[ing] the 'Harvard Plan' approvingly noted by Justice Powell in [*Bakke*], which considers race along with other criteria in determining admission to the college."[21] The program did not "unnecessarily trammel" the rights of the majority, the Court reasoned, because minority status was merely a "plus" factor in a holistic individualized analysis.[22] This rationale bore great resemblance to *Bakke*'s test for narrow tailoring, which prohibited explicit quotas and the treatment of race as a decisive factor in race-conscious decisions. At the same time, the *Johnson* Court did not abide by Powell's emphatic repudiation of the societal discrimination theory. Under *Johnson*'s dictates, an employer may use affirmative action to remedy minority underrepresentation in a historically segregated profession, regardless of whether this underrepresentation stems from the employer's own actions. In denying the need for evidence of prior discrimination by the employer, the *Johnson* Court held that a history of societal discrimination would—and did—suffice.[23]

As things now stand, jurisprudentially, Title VII tolerates affirmative action programs that have a remedial purpose which do not "unnecessarily trammel" the rights of the majority. The Court has yet to consider whether the statute is similarly permissive of plans that are not grounded in a remedial justification. The Court had agreed to address this issue when it granted certiorari in *Taxman v. Board of Education* (1996) before the lawsuit was settled and the case dismissed. *Taxman* involved the affirmative action program of a school board that, in the interest of maintaining racial diversity, preferred minority teachers over equally qualified majority teachers when making layoff

19 *Id.* at 195.
20 Johnson v. Transportation Agency, 480 U.S. 616, 622 (1987).
21 *Id.* at 638.
22 *See id.* at 638-639.
23 *See id.* at 667.

decisions.[24] The Third Circuit rejected the school board's diversity rationale. It viewed the rulings in *Weber* and *Johnson* as narrow exceptions to Title VII's explicit ban on employment discrimination; those exceptions were justified only because they furthered the remedial purpose of the statute itself.[25] In its opinion, the court noted limitations to *Bakke*'s influence in the workplace:

> "While we wholeheartedly endorse any statements in these [Equal Protection] cases extolling the educational value of exposing students to persons of diverse races and backgrounds, given the framework in which they were made, we cannot accept them as authority for the conclusion that the Board's non-remedial racial diversity goal is a permissible basis for affirmative action under Title VII."[26]

The *Taxman* court suggested that the permissibility of affirmative action varies according to whether the question presented is one of a constitutional dimension or a mere statutory one. It also suggested that context matters, that an affirmative action program in an educational context is not *ipso facto* applicable to a program in an employment setting. In assessing the extent to which the Court's diversity rationale can be generalized to employment settings, *Taxman* raised a critical distinction: the First Amendment framework of academic freedom, which underpins a university's diversity interest, does not apply in the workplace. But the Court has also expanded the meaning of diversity in cases succeeding *Bakke*, slowly drifting from its preeminent concern over "educational value." *Grutter v. Bollinger* (2003), the first of such cases, has largely dictated the Court's interpretation of educational diversity to this day. The range of legal justification for affirmative action in employment may very well expand alongside *Grutter*'s expanded reading of the diversity interest. As the legacy of *Bakke* indicates, it would not be the first time the jurisprudence of affirmative action in education and employment converged.

24 Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).
25 *Id.* at 1558.
26 *Id.* at 1561.

II. The Evolution of the Diversity Interest

In *Grutter*, the Court upheld the constitutionality of the University of Michigan Law School's affirmative action program on the grounds that it treated race as one factor among many, sought to achieve a diverse student body, and reviewed each applicant on an individual basis.[27] In her majority opinion, Justice O'Connor echoed Justice Powell's opinion in *Bakke*, ruling that universities have "a compelling interest in attaining a diverse student body," grounded in the First Amendment's protection of educational autonomy.[28] This appeal to Bakke, however, was but a brief exposition of *Powell*'s First Amendment theory—a theory that O'Connor never explicitly adopted. Instead, the Court shifted its focus to several benefits of diversity that extend well beyond campus grounds, and thus cannot be so easily subsumed under the notion of "educational autonomy."[29] Together, these two groups of interests range from properly academic interests such as "preparing [students] as professionals"[30] to broader societal goals such as realizing "the dream of one Nation, indivisible."[31]

The former type of interest reflects a university's basic educational mission to provide quality learning experiences. To this end, the *Grutter* Court held that student body diversity would make classroom discussion "livelier, more spirited, and simply more enlightening.[32] It reaffirmed Powell's opinion in *Bakke* that learning, the primary object of higher education, would be improved through "'wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[33] To substantiate this point, the Court repeatedly appealed to *amicus curiae* briefs filed by the military and numerous corporations supporting affirmative action in public universities. The Court insisted that the "benefits [of a diverse classroom] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[34] Indeed, the amicus briefs filed on behalf of 65 companies argued that "individuals who have been educated in a diverse setting are more likely to succeed, because they can make valuable contributions to the workforce."[35] Alongside this corporate demand was the military's professed need

27 Grutter v. Bollinger, 539 U.S. 306 (2003).
28 *Id.* at 328.
29 *Id.* at 330.
30 *Id.*
31 *Id.* at 332.
32 *Id.* at 330.
33 *Id.* at 324 (quoting Bakke, 438 U.S. 265, 313).
34 *Id.* at 330.
35 Brief for Amici Curiae 65 Leading American Business in Support of Respondents at 7, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

for "racially diverse officer corps in a racially diverse educational setting" in order "to fulfill its principle mission to provide national security."[36] With these post-graduation interests in mind, the Court upheld the university's diversity interest insofar as it "promotes learning outcomes and better prepares students for an increasingly diverse work force."[37]

The groundwork behind the Court's diversity rationale thus began to shift. In *Bakke*, the Court's recognition of any post-graduation benefit of diversity was confined to a single line.[38] Within *Bakke*'s First Amendment framework, the permissibility of affirmative action was coextensive with the promotion of genuine viewpoint diversity. Universities could only legitimate race-based decisions insofar as they facilitated the "robust exchange of ideas"[39]—an internal campus benefit. By extending this interest in viewpoint diversity to U.S. businesses and the military, the *Grutter* Court effectively muted Bakke's First Amendment argument, for those institutions cannot reasonably lay claim to the same constitutional right.

From the professional realm to civic society, the Court would look even further beyond *Bakke*'s focus on the pedagogical value of diversity. The Court might well have treated the "real" professional needs of the global marketplace and the military as a kind of limiting principle to rein in affirmative action. But the Court did the opposite. The Grutter rationale centered not on the putative First Amendment value of viewpoint diversity in the classroom, but rather on a series of extra-constitutional policy interests. These interests, unlike those esteemed in *Bakke*, apply to society at large. In promoting "cross-racial understanding" and deconstructing racial stereotypes, the Court stated that educating a diverse body of students would sustain the country's "political and cultural heritage," strengthen the "foundation of good citizenship," and generate the institutional openness needed "to cultivate a set of leaders with legitimacy in the eyes of the citizenry."[40] The Court thereby revealed its preeminent concern with social integration. The boundaries of affirmative action widened considerably, and the robustness of "diversity" as an operational concept intensified.

This point is worth emphasizing. If one recalls, Powell's opinion in *Bakke* granted that if there were a clear societal advantage to be gained from affirmative action, like improving healthcare in underserved communities, such a benefit might very well be a compelling interest that would justify affirmative action. The problem, according to Powell, was that the university had not demonstrated that its affirmative action program would, in fact, benefit

36 Grutter, 539 U.S. at 331.
37 *Id.* at 308.
38 Bakke, 438 U.S. at 314.
39 *Id.* at 313.
40 Grutter, 539 U.S. at 332.

underserved communities.[41] In this regard, *Grutter*'s novelty lies not in permitting societal benefits to be a compelling interest, but in dispensing with *Bakke*'s requirement of strong evidence that such benefits would be achieved. Contrasting with the uniquely educational benefits attributed to diversity in *Bakke*, *Grutter*'s rather theoretical considerations spanned far beyond cultivating a certain educational "atmosphere" within universities in order to better "learning outcomes." It encompassed broader, hazier societal concerns, especially the legitimacy of democratic self-government. Democratic public culture, according to the Court, required the active participation of an educated, multifaceted citizenry. In this sense, the Court considered benefits to diversity far removed from academia, not the least of which was the "openness and integrity"[42] of American institutions and "cross-racial understanding."[43] Therefore, instead of relying on a university's intrinsic investment in its educational experience alone, the *Grutter* Court also anchored its diversity justification in the extrinsic, and notably, less concretely measurable benefits of democratic legitimacy and social integration.

Since *Grutter*, courts have adopted its diversity rationale to uphold the race-conscious admissions policies of two other universities. In *Fisher v. University of Texas* (2013), the Court referenced *Grutter* 54 times, in contrast to just 18 citations of *Bakke*.[44] Reaffirming *Grutter*'s expanded conception of diversity, the *Fisher* Court deemed diversity a compelling state interest in terms of both specific educational interests, including "enhanced class-room dialogue," and generic societal goals, including the "lessening of racial isolation and stereotypes."[45] The broad scope of the latter interests has become all the more patent in the latest effort to bring the issue of affirmative action back to the Supreme Court. In a case now on appeal to the First Circuit, *Students for Fair Admissions, Inc. v. Harvard* (2019), a federal district court ruled that Harvard's undergraduate admissions program did not violate the equal protection of Asian-American applicants.[46] The court repeatedly appealed to the full spectrum of *Grutter*'s concerns, including "racial understanding, breaking down stereotypes, advancing learning outcomes, and preparing students for a diverse workforce and society."[47] But perhaps most indicative of the court's reverence for Grutter's policy views was its approval of the Harvard president's panegyric on diversity:

41 Bakke, 438 U.S. at 310.
42 *Id*.
43 *Id.* at 330.
44 *See* Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013).
45 *Id.* at 6.
46 Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 261 F. Supp. 3d 99 (D. Mass. 2017).
47 *Id.* at 97.

> "To the institution, it makes for not just an enhanced learning environment but for the opportunity to be unparalleled in their standing because they offer something that is so *indispensable for society*… And so it's with great conviction that I say that we must continue to offer diverse undergraduate education to our young people to save our nation."[48]

Grutter's socially oriented diversity rationale has extensive implications. That the benefit of diversity in education can be distilled into an effort to "save our nation" makes this abundantly clear.

48 *Id.* at 129-130.

III. Diversity in Public Employment

It has been observed that in evaluating employment discrimination claims, courts have paid considerable deference to employer decision-making.[49] Because this deference is not grounded in any asserted constitutional right, however, it is likely more limited in nature than the judicial deference to universities. Indeed, in striking down an employer's affirmative action program, *Taxman* distinguished the singularity of a university's first amendment right to educational autonomy. While "educational value" of diversity was presumed to be inappropriate in the workplace in *Taxman*, *Grutter* resuscitated the diversity justification by shifting away from *Bakke*'s focus on the academic setting to illuminate broader societal benefits to diversity. Justice Scalia even said as much in his caustic dissent:

> "If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a 'critical mass' that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, particularly appropriate—for the civil service system of the State of Michigan to do so."[50]

Validating Scalia's concerns to an extent, the *Grutter* Court's policy diversity analysis has already influenced the realm of public employment. In *Petit v. City of Chicago* (1998), the Seventh Circuit considered a race-conscious promotions policy that the Chicago Police Department enacted to have more blacks and Hispanics at the rank of sergeant. In the majority opinion, the court quoted extensively from *Grutter*, ending its opening paragraphs with *Grutter*'s assertion that "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[51] Just as the *Grutter* Court believed that a diverse university would promote both cross-racial understanding and civic legitimacy, the Seventh Circuit ruled that increasing diversity at the sergeant rank would "internally ... chang[e] the attitudes of officers" and "set the proper tone in the department and to earn the trust of the community."[52] In short, the *Petit* court sought to enhance the public's perception of law enforcement officials and institutions, which it believed would harmonize relations among "a racially and ethnically divided major American city like Chicago."[53] To this end, the court also exhibited the same "degree of deference"[54] to the employment decisions of police

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49 Chad Derum & Karen Engle. *The Rise of the Personal Animosity Presumption in Title VII and the Return to 'No Cause' Employment*, 81 Tex. L Rev. 1117 (2003).

50 Grutter, 539 U.S. at 347-348.

51 Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (quoting Grutter, 539 U.S. at 332).

52 *Id.* at 1115.

53 *Id.* at 1114.

54 *Id.* at 1114 (quoting Grutter, 539 U.S. at 328).

executives as had previously been given to universities. It did not demand any evidence that the department's racial preferences would, in fact, address community problems. In this somewhat unfounded capacity, the *Petit* court granted police officers the same "special niche"[55] that universities supposedly occupied, but without any constitutional basis for its deference. The Seventh Circuit had followed right in step with the Grutter Court in training its eyes almost exclusively on an ideal of social integration.

As *Petit* suggests, the *Grutter* Court's embrace of diversity as a compelling state interest in higher-education admissions paves the way for similar arguments to be made in many other areas of public employment. For instance, if students stand to benefit so much from exposure to "widely diverse people, cultures, ideas, and viewpoints,"[56] and if diversity among societal leaders imbues American democracy with much-desired legitimacy, a state's compelling interest in diverse student bodies would then seemingly justify a corresponding interest in diverse faculties at public universities. Justice O'Connor expressed a hint of sympathy for this idea in her *Wygant* concurrence. While stating that the school board's asserted goal of "providing 'role models'" did not satisfy the compelling interest prong of the test for strict scrutiny, O'Connor noted that such a goal "should not be confused with the very different [but unasserted] goal of promoting racial diversity among the faculty."[57] Moreover, as *Petit* indicates, there is no reason the diversity justification should be confined entirely within university walls. If the Court believes that universities occupy a special niche in American society, the same can easily be said of the military. That the *Grutter* majority had invoked the military's need for a racially diverse officer corps speaks volumes in this regard. But here, it is important to distinguish between two kinds of societal benefits. One kind – a direct societal benefit – is the ability of a public entity to do its job. In *Petit*, this involved the police's job to maintain order; in a military context, this would involve a soldier's job to protect national-security interests. From another angle, the Court has also a preoccupation with more indirect societal benefits, many of which can be subsumed under its ideals of democratic legitimacy and societal integration. The contours of indirect societal benefits are far more amorphous, and would seem to impose few limits on affirmative action in public employment.

Notably, however, the Court's argument linking diversity with societal improvement seems to apply more directly to some sectors of public employment than others. Falling in the former category are public school professors, police officers, and military members, all of whom take on the mantle of a societal leader in one way or another. Their special status flashes in neon lights when

55 Grutter, 539 U.S. at 329.
56 *Id.* at 330.
57 Wygant, 476 U.S. at 294.

companies offer discounts for teachers and veterans, or when parents tell young children not to trust any stranger but a police officer. Through diversifying workforces that occupy such important places in American society, the Court showed a keen interest in strengthening American democracy, especially through legitimizing societal leadership. Indeed, all of the aforementioned figures play prominent, highly visible, and often-esteemed roles in guiding or protecting civic life. But would the Court's diversity justification apply equally in professions lacking similar characteristics? Frankly, neither the state's interest in bettering pre-professional learning outcomes, nor its interest in the visible inclusiveness of American institutions, seem to extend to many state apparatuses. Agencies like the United States Postal Service play a critical role in facilitating civic life, but neither their operations nor their members attract much attention. Thus, the degree to which they achieve workforce diversity would not seem to have much sway on the public perception over institutional openness and civic inclusivity. If ever confronted with an employer's diversity justification, the Court will most likely account for the broad range of professions, and judge the particular employment context accordingly. Justice O'Connor put it most succinctly in her *Grutter* concurrence: "context matters."[58]

58 Grutter, 539 U.S. at 327.

IV. Diversity in Private Employment

Context matters not only between education and employment settings, but also between public and private employment. In establishing any affirmative action program, public employers must adhere to both the Constitution and Title VII, whereas private employers are subject only to statutory constraints. Thus, even if the Court were to embrace diversity as a compelling state interest for public employers, the fate of the diversity justification in private employment would remain an open question. In doubting that an employer's "non-remedial racial diversity goal is a permissible basis for affirmative action under Title VII,"[59] the Third Circuit in *Taxman* noted that thus far, race-conscious classifications under Title VII have only been upheld for the purpose of redressing past discrimination, either by a specific employer or by society at large. While this appears to sound the death knell for any further expansion of the diversity justification, the traditional relationship between Title VII and the Equal Protection Clause might just advance the cause of diversity.

As previously noted, courts have generally interpreted the equal protection standard to be more exacting than Title VII, both in determining whether employers have committed unlawful discrimination and in setting the scope of legitimate affirmative action plans.[60] Indeed, the *Johnson* Court noted, "The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."[61] With the Court's repeated affirmation of *Grutter*'s diversity rationale, however, an anomalous situation now exists under the law. Title VII is more restrictive of employers than the Equal Protection Clause. This is because private employers, restricted to the implementation of remedial plans, cannot invoke any of the societal interests legitimized in *Grutter* as a basis for affirmative action. As such, *Grutter*'s ultimate impact on private employment will depend on whether the Court reaffirms or renounces the traditional relationship between Title VII and the Equal Protection Clause.

If the Court were to embark on its former path by incorporating the Grutter approach into its Title VII analysis, it would not be deviating from any binding precedent. Neither *Weber* nor *Johnson* unequivocally found remedial purposes to be the only statutorily permissible form of affirmative action. Thus, one cannot definitively rule out the possibility of affirmative action in private employment. As the private employer most closely resembles public universities,

59 Taxman v. Bd. of Educ., 91 F.3d at 1561.
60 Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. Chi. Legal F. 95, 117 (2014).
61 Johnson, 480 U.S. at 642 n.6.

it is easy to see why private universities would adopt such a plan. In that sense, private primary or secondary education institutions could reasonably assert the same diversity interest. While courts might not give as much deference to their academic freedom, no one would dispute that teachers, along with professors, take on the mantle of societal leaders.

Outside the immediate realm of education, the Chicago Police Department's purpose and plan in *Petit* seems to extend quite naturally to private employers such as private hospitals. Physicians also play a leading role in promoting health within the community, and increasing the diversity of health professions has been linked to enhancing cross-cultural understanding and building community trust, especially among minority patients distrustful of an inequitable American health care system.[62] Beyond professions that so intimately interact with civilian life, any private employer that competes "in today's increasingly global marketplace"[63] may also lay claim to affirmative action plans under the *Grutter* rationale. We must not forget that *Grutter*'s argument for diversity explicitly appealed to the business interests of corporate America.

On the other hand, the *Grutter* Court's partial departure from the First Amendment framework of *Bakke* also provides an argument against integrating constitutional and statutory doctrines. While Justice Thomas's dissent in *Grutter* denied that "the First Amendment authorizes a public university to do what would otherwise violate the Equal Protection Clause,"[64] all constitutional amendments are to be equally respected in the eyes of the Court. The *Bakke* majority at least perceived a veritable conflict of constitutional rights and thus required it to balance two interests of theoretically equal weight. However, employers outside the academic setting could not reasonably lay claim to the same constitutional right. Even if the *Grutter* Court had unanimously embraced Powell's interpretation of the First Amendment, employers would only be able to, at the very most, justify their affirmative action plans under the part of the *Grutter* rationale, exalting societal benefits to diversity—the part with no clear constitutional basis. Moreover, diversity in private employment seems less plausibly linked to public perceptions of democratic legitimacy. More so than public sector employees, private sector employees tend to share the aforementioned characteristics of USPS workers. They are less visible in the public eye and less representative of the general population. Private employers and employees of for-profit companies tend to cater to the interests of their shareholders rather than society at large. In weighing an employee's right to equal protection against a broad theory of societal improvement, the Court

62 Raynard Kington et al., *Increasing Racial and Ethnic Diversity Among Physicians: An Intervention to Address Health Disparities?*, in The Right Thing to Do, The Smart Thing to Do: Enhancing Diversity in the Health Professions (2001).

63 Grutter, 539 U.S. at 330.

64 *Id.* at 363.

arguably has less reason to assimilate diversity into existing Title VII analysis.

V. Restrictive Provisions of Title VII

As noted above, an acceptance of the diversity justification within Title VII jurisprudence could lead to a profusion of corporate affirmative action programs. It is worth noting, however, that the 1991 Civil Rights Act amended Title VII to provide that "business necessity may not be used as a defense against a claim of intentional discrimination."[65] This provision appears to confine the business interests that *Grutter* invoked to the context of constitutional claims. Another provision of Title VII introduces a narrow exception to presumed illegality of employment discrimination. Under the bona fide occupational qualification (BFOQ) exception, employers may discriminate on the basis of religion, sex, or national origin when its business demands so necessitate, and when the particular characteristic is an actual qualification for performing the job.[66] Noticeably absent from this list of characteristics is race. Congress could have easily listed race as a potential BFOQ, but it did not. Most likely, Congress did not believe the instrumental advantages of racial classifications warranted an exception to Title VII's generally nondiscriminatory impact and remedial focus. Paired with Title VII's literal text, which issues a more categorical ban on discrimination than does the Constitution, this congressional intent provides a strong argument against diversity-based affirmative action in private employment. But in *Johnson*, its most recent case on affirmative action under Title VII, the Court demanded that the employer "articulate a nondiscriminatory rationale for its decision."[67] In subsequently upholding its affirmative action plan, the Court suggested that affirmative action is not always synonymous with intentional discrimination. This apparent distinction between the nondiscriminatory nature of lawful affirmative action and the discrimination within the meaning of Title VII serves as life support for the employment-diversity rationale.

65 42 U.S.C. § 2000e-2(k)(2) (2000).
66 *Id.* § 2000e-2(e).
67 Johnson, 480 U.S. at 617.

Conclusion

Education and employment are both dominant spheres of civic society—this much is certain. But because private employers are not constitutionally constrained, the Court will have to distinguish between public and private employers in applying its societal-benefit theory. In doing so, the Court will necessarily distinguish constitutional claims from statutory ones to determine the reach of *Grutter*'s diversity rationale. Unique to Title VII are its remediation-focused legislative history and its heavy presumption against intentional discrimination. Under these statutory constraints, any form of diversity-based affirmative action may elicit cries of judicial legislation. But this does not mean that clearing such programs under equal protection standards will be much easier. Although post-*Bakke* decisions on affirmative action in admissions have downplayed *Bakke*'s First Amendment framework, this constitutional interest remained as some sort of doctrinal foundation. The asserted employment benefits of diversity, however, are not rooted in any such principle.

In predicting the fate of affirmative action in America, courts have repeatedly expressed confidence in the *temporary* nature of such preferential programs. The district judge in the Harvard case has had the last word to date:

> "The rich diversity at Harvard and other colleges and universities and the benefits that flow from that diversity will foster the tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete."[68]

Sixteen years into Justice O'Connor's prediction that race-conscious admissions would be defunct in twenty-five years, the end of such policies is nowhere in sight. It causes one to wonder whether the undeniably broad goal of societal improvement is *too* broad. As the Harvard president's speech seems to suggest, the Court's vision of social integration is arguably just as amorphous as the societal discrimination interest that Powell so emphatically rejected. That American society continues to reckon with the vestiges of past discrimination evinces an unfortunate reality: perfect equality can never be assured in any sector of society. Under these conditions, *Grutter*'s diversity rationale appears to lack any logical stopping point. This alone should give us pause when considering its extension to employment, which affects more people for a greater portion of their lives than does higher education. Regardless, *Grutter*'s ultimate influence on employment-law jurisprudence is very much an open question. Given the increasing scrutiny affirmative action has attracted in recent years, however, one can expect the Supreme Court to weigh in soon, keeping the issue alive well past *Bakke*'s 25-year anniversary.

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68 Harvard College, 261 F. at 129.

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42 U.S.C. § 2000e-2(a)(1) (1994).

42 U.S.C. § 2000e-2(k)(2), 2000e-2(e) (2000).

ARTICLE

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

Steven Rome, Yale University

"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

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.

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.

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 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?

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 lbecause it illuminates the charged connection between race, opportunity, and merit that extends far beyond the confines of employment law.

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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.

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 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, fair for groups. The definition of legitimacy, I find, entails this tension between

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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.

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, Justice Kennedy invoked the concept of legitimacy. *Ricci v. DeStefano*, 557 U.S. 557 (2009), 585.

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 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 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

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

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," T*he 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.

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 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, "unwieldy, costly, and time-consuming," and, further, it fails to achieve compliance when the mechanism of

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11 Rothstein, "Creating Political Legitimacy," 312.

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.

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 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

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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 Tracey L. Meares & Peter Neyroud, *Rightful Policing* 12 (2015).

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 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

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 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.

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 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.

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"

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.

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 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

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.

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.

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.

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

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 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 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

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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.

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.

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.)

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%

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 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.

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 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,

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

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.

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 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 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 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.

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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.

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 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

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 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).

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 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

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).

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.

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]

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 with 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

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 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-Caulcon, "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.

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-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.

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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 single handedly 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. Ricci said the examination "wasn't some IQ test or something that could be biased. It was the Department's rules and regulations, it was the Department's standard operating procedures."[55] 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.[56] He "absolutely" believed that a written test can be completely objective and free of bias.[57] Therefore, the only thing that could explain the 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."[58] 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 his ensuing success on the job does not prove that the test was the most legitimate means of filling the lieutenant and captain vacancies. Additionally, the presumption that written test questions are unimpeachably objective is dubious. As psychology professor Janet Helms testified at a Civil Service Board hearing,

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 Interview with Frank Ricci (Oct. 9 2019).

56 *Ibid*.

57 Interview with Frank Ricci (Nov. 20 2019).

58 Ricci, *supra* note 55.

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.[59] 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, lieutenants, and their supervisors, rode with and observed on-duty officers, and issued job-analysis questionnaires to current chiefs, captains, and lieutenants.[60] The questionnaires asked for input on both the importance of particular tasks to performing the job successfully and the frequency with which the incumbents performed those tasks.[61] In Justice Kennedy's view, "There is no genuine dispute that the examinations were job related and consistent with business necessity."[62] 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.[63]

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… 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."[64] Fifteen years later, exactly what caused this yawning gap that resulted in no African Americans scoring highly enough to receive a promotion from the original 15 listed vacancies is still not "clear." However, 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

59 Helms said that any test, particularly a written one, would favor whites over racial minorities. *Ricci v. DeStefano*, 557 U.S. 557, 571–2 (2009). See also *City of New Haven Civil Service Board In re: Fire Captain and Lieutenant Promotional Examinations*, Verbatim Report of Proceedings (Mar. 11 2004), 46, 55, available at http://img.slate.com/media/1/123125/123087/2208015/2219585/Exhibit%20C.pdf.

60 *City of New Haven Civil Service Board In re: Fire Captain and Lieutenant Promotional Examinations*, Verbatim Report of Proceedings (Feb. 11, 2004), 19, available at http://img.slate.com/media/1/123125/123087/2208015/2219585/Exhibit%20C.pdf.

61 *Ibid*.

62 *Ricci v. DeStefano*, 557 U.S. 557, 587-588 (2009).

63 *Id* at 565–66.

64 Interview with John DeStefano Jr. (Oct.18 2019).

experts"—those who participated in the job analysis study—and believes that the vendor should have spent more time observing the Fire Department.[65] I/O representatives spent just two days for their "job analysis visit," according to Noelia Marcano, a New Haven official.[66] In addition, the City's contract with I/O barred the company from consulting the New Haven Fire Department as it designed the examinations in an effort to achieve impartiality.[67] 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.[68] 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 $500—and difficult.[69] 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."[70] Boise Kimber, the polarizing black reverend, said that he believed white firefighters already knew the answers and expressly shared them with each other—an accusation as of yet unfounded in the record.[71]

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.[72] Bridgeport, for instance, 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

65 Interview with Tina Burgett (Oct. 30 2019).
66 Verbatim Report of Proceedings, *supra* note 60, at 66.
67 *Id*. at 24.
68 *Ricci v. DeStefano*, 557 U.S. 557, 613-614 (2009). However, an I/O representative testified that at least one question was removed from the exam after test-takers challenged its relevance. All candidates received credit for that question. See *Ricci v. DeStefano*, 557 U.S. 557, 588 (2009). *See also* Verbatim Report of Proceedings, *supra* note 60, at 43.
69 William Kaempffer, *Fire Exams Flawed*, Lawyer Says, New Haven Register, Jan. 23 2004, A3.
70 *Ricci v. DeStefano*, 557 U.S. 557, 613–14 (2009).
71 Interview with Boise Kimber (Oct. 16 2019).
72 *Ricci v. DeStefano*, 557 U.S. 557, 4 (2009) (Justice Ginsburg dissenting opinion)

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."[73] 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.[74] 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.[75] 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.[76] However, Patrick Egan, the union president, called for a "third-party professional" to carry out a "validation study": "That's the law. That's what's fair."[77] 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.[78] The commissioners did, however, solicit the opinions of outside experts on the tests and read through the questions themselves.[79] 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.

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73 *Ricci v. DeStefano*, 557 U.S. 557, 614–16, 632 (2009). *See also Fire Captain and Lieutenant Promotional Examinations*, Verbatim Report of Proceedings, Mar. 11 2004, 16, available at http://img.slate.com/media/1/123125/123087/2208015/2219585/Exhibit%20C.pdf.

74 *Griggs v. Duke Power Co.*, 401 U.S. 424, 425-426 (1971).

75 Interview with Stephen Librandi (Oct. 28 2019).

76 Verbatim Report of Proceedings, *supra* note 60, at 16-19.

77 *City of New Haven Civil Service Board In re: Fire Captain and Lieutenant Promotional Examinations*, Verbatim Report of Proceedings, Feb. 5, 2004, 12–13, available at.

78 Rule IV, Section 1, *City of New Haven Civil Service Rules, City of New Haven* (2007), 14, available at https://www.newhavenct.gov/civicax/filebank/blobdload.aspx?blobid=23424.

79 Verbatim Report of Proceedings, *supra* note 77, at 15.

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-1980s and has long expressed a preference for written as opposed to oral tests.[80] 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. 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."[81] Others have expressed skepticism of the union's sincerity on this point; *Briscoe v. City of New Haven*, an offshoot case from *Ricci*, 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 him to be ranked 23rd on the promotional list for lieutenant.[82] 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.[83] 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.[84] Notwithstanding the *Briscoe* case, the seemingly arbitrary 60/40 distribution and the failure of any

80 *City of New Haven Civil Service Board In re: Fire Captain and Lieutenant Promotional Examinations*, Verbatim Report of Proceedings, Mar. 11 2004, 28, available at http://img.slate.com/media/1/123125/123087/2208015/2219585/Exhibit%20C.pdf.

81 Ricci, *supra* note 57.

82 *Briscoe v. City of New Haven*, 967 F. Supp. 2d 563 (2013).

83 *Ibid*. *See* 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. *See also* 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/. 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 an 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.

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

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."[85] Moreover, Justice 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."[86] This may perhaps be true, but the white-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."[87] 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."[88] 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 [sic] judgment tests […] can be developed and designed, customized within organizations, that demonstrate dramatically less adverse impact that are very well-received by candidates."[89] Such assessments "test the ability to apply

85 *Id* at 589.
86 *Ibid*.
87 Ricci, note 57 (Nov. 20 2019).
88 *Ibid.*
89 *Fire Captain and Lieutenant Promotional Examinations*, Verbatim Report of Proceedings, (Mar. 11 2004), 22-23.

their knowledge as opposed to just memorize and give the correct answer from a multiple choice."[90] Ricci counters that there is no way to artificially create the "stress of where your life is on the line."[91] 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.[92] 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."[93] 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.'"[94] 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 own legitimacy would be justified in valuing social skills.[95] 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. This specifically violated the tenet of neutrality as 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

90 *Ricci v. DeStefano*, 557 U.S. 557, 571, 615–16 (2009); *Ibid*.

91 Ricci, *supra* note 57.

92 Interview with Thomas Ude Jr. (Oct. 23 2019). *See Kelly v. New Haven*, 275 Conn. 580 (Conn. 2005), which limited the number of candidates eligible for consideration for a promotion when rounding is used.

93 Emily Bazelon, *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.

94 *Ibid*.

95 Tom R. Tyler and E. Allan Lind, *Relational Model of Authority in Groups* 141 (1992).

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 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."[96] 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 that 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.[97]

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,"

96 DeStefano Jr., *supra* note 64.
97 *Id*.

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."[98] 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.[99] 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.[100] New Haven's racial decision-making alarmed the Supreme Court's majority. 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.[101] Justice Kennedy disagreed: "Counsel, [New Haven] looked at the results, and it classified the successful and unsuccessful applicants by race."[102] Chief Justice Roberts echoed this concern. 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 individuality. To Ricci, it was "insulting": "The problem is they're not looking for the best firefighter. They're just looking at people as what color they are."[103] As Professor 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."[104] The *appearance* of race playing a central factor, regardless of the reality, strained perceptions of the legitimacy and fairness of the non-certification decision.

The crux of the City's legitimacy problem was the timing of the 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

98 Ricci, *supra* note 55.
99 *Ibid*.
100 Verbatim Report of Proceedings, *supra* note 77, at 10-11.
101 *Ricci v. DeStefano*, 557 U.S. 557, 39 (oral arguments, April 22, 2009), accessed at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/07-1428.pdf; See also Eliza Presson, *Argument Preview: Ricci v. Destefano*, SCOTUSblog, April 16, 2009, accessed at https://www.scotusblog.com/2009/04/argument-preview-ricci-v-destefano/
102 *Id* at 35.
103 Ricci, *supra* note 57.
104 Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases* (2011), 1334–1335.

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."[105] 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."[106] 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, Justice 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, Justice 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 expectation not to be judged on the basis of race."[107] 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.[108]

Legitimacy and social cohesion help to explain Justice 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 Professor 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."[109] 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

105 Kimber, *supra* at note 70.
106 Burgett, *supra* note 65.
107 *Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). Emphasis added.
108 Oral Argument, *supra* note 101.
109 Siegel, *supra* note 104.

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 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."[110] 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.[111] "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."[112] 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

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110 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. *See also* 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.

111 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* 120 F. Supp. 3d 178 (D. Conn. 2015); Emily Brazelon, T*he 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.

112 Burgett, *supra* note 65.

dealings."[113] The *Ricci* plaintiffs, however, argued that the City used disparate impact law only as 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."[114] 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.[115]

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?"[116] 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 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."[117] 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

113 Kimber, *supra* note 70.

114 Ricci, *supra* note 55.

115 *Id.*.

116 Burgett, *supra* note 65. In fact, the Board held five public meetings, though not all were open to public comment.

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

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.[118] 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."[119] 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."[120] 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 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."[121] 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

118 DeStefano Jr., *supra* note 64. *See also* Kimber, *supra* note 70.
119 *Ricci v. DeStefano*, 557 U.S. 557 (2009), 640–41.
120 DeStefano Jr., *supra* note 64.
121 Verbatim Report of Proceedings, *supra* note 77, at 24.

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 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."[122] 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.[123]

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."[124] 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

122 DeStefano Jr., *supra* note 64.
123 *Ibid*.
124 Ricci, *supra* note 55.

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.[125] 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.[126] 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 for 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."[127] In *Ricci*, 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. As DeStefano said, "This is a core issue for the community of, 'What does this government look like, is it representative of *us*?' 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*?"[128] One black firefighter noted in an interview in 2009 that when black children peek into her firehouse to marvel at the trucks, the black

125 Siegel, *supra* note 104.
126 Ricci, *supra* note 55; see also Kimber, *supra* note 70.
127 *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).
128 DeStefano Jr., *supra* note 64.

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."[129] She expressed her outrage: "How dare you 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?"[130] Madison and Guilford are two nearly all-white suburbs east of New Haven. Frank Ricci lives in Wallingford, another demographically homogeneous suburb. Legitimate government encourages the development of strong social networks and civic participation; when people respect and trust their institutions, they are more 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.

129 Emily Brazelon, *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.

130 *Ibid*.

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.[131] 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 Professor 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

131 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. Burgett, *supra* note 64. *See also* Ude Jr., *supra* note 89 and DeStefano Jr., *supra* note 63.

job-relevance but have dramatic racial disparate impact can estrange minority applicants."[132] 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."[133] 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."[134] 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.[135] Strange bedfellows as they are, Boise Kimber and Frank Ricci agree on the benefits of aggressive outreach and recruitment.[136]

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 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

132 Siegel, *supra* note 104.
133 Ricci, *supra* note 57.
134 *Ibid*.
135 DeStefano Jr., *supra* note 64.
136 Kimber, *supra* note 70. *See also* Ricci, *supra* note 55.

for the fire service.[137] 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*.

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."[238] 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.'"[139] 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."[140] 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

137 Ricci, *supra* note 57.

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

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

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

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 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 Professor Siegel suggests, the central question was whether disparate impact law "even[ed] the playing field, or tilt[ed] it."[141]

The extensive literature on legitimacy has thus far overlooked the role and relevance of history.[142] 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.[143] The legitimacy gap will therefore persist, driving apart Americans on a whole range

141 Reva B. Siegel, *Raci-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, Alabama Law Review 66, No. 3 (2015), 663.

142 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. Tracey L. Meares & Peter Neyroud, *Rightful Policing* (2015), 12. But this concept does not fully capture the fundamental differences in historical memory and interpretation on display in *Ricci*.

143 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_ 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.

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 Americans are still writing and rewriting the *Ricci* story in their fierce debates about racism, diversity, and affirmative action. Indeed, the debates will not end—and more *Ricci*s will emerge—unless Americans engage with each other in a deeper conversation about how, and especially when, the story started.

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