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The Wild West of Supreme Court Employment Discrimination Jurisprudence

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THE WILD WEST OF SUPREME COURT EMPLOYMENT DISCRIMINATION JURISPRUDENCE

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I. INTRODUCTION

With respect to employment discrimination jurisprudence, the Supreme Court has decided that doctrine once thought clear is not and that rules once thought certain are not. In its last term, the Court decided a number of cases that suggest a significant rethinking of employment discrimination doctrine may be underway. It is not that any particular ruling of the Court was bizarre. However, taken together, the Court's recent decisions have made the substance of employment discrimination doctrine, as well as how that doctrine is made, unclear. Almost everything we thought we knew about employment discrimination is being rethought. Whether that is good or bad is not the subject of this Essay. That courts may be allowed to rethink fundamental issues of employment discrimination is the subject.

The Supreme Court's recent employment discrimination jurisprudence on the most basic issues of employment discrimination provides federal circuit courts the opportunity to rethink fundamental questions of discrimination, at least until the Supreme Court narrows the frontier for new doctrine. However, given that the Supreme Court has reopened avenues of doctrine that arguably had been foreclosed by prior cases, it is unclear that the Court is concerned with a relatively unbounded and somewhat undisciplined landscape of employment discrimination doctrine. The Fourth Circuit almost certainly is unfazed with a broad landscape on which it can paint new doctrine, as it has historically been open to novel thinking regarding employment discrimination doctrine. The

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Supreme Court's implicit invitation to reconsider doctrine has arguably given the Fourth Circuit the breadth to rethink basic employment discrimination concepts.

The Supreme Court has not merely decided issues that are at the edges of employment discrimination doctrine. In *Ricci v. DeStefano*,[1] *Gross v. FBL Financial Services, Inc.*,[2] and *AT&T Corp. v. Hulteen*,[3] three arguably disparate cases, the Court discussed some of the most basic questions regarding what the fundamental nature of employment discrimination is. Those cases decided issues regarding when past discrimination is allowed to project into the future,[4] what the natures of disparate treatment and disparate impact discrimination are,[5] and whether mixed-motives analysis applies to all areas of employment discrimination law.[6] By raising these issues and resolving them as the Court did, either without clarity or with a feigned clarity that does not exist, the Court provides courts of appeals, like the Fourth Circuit, the opportunity to create their own nuanced solutions to the basic employment discrimination doctrinal issues left unanswered by the Court. Just as important, the nature of the Court's exploration of issues invites courts of appeals to rethink any other basic question of employment discrimination doctrine that any court of appeals believes is not completely foreclosed by prior Supreme Court doctrine. Every hypothetical that Supreme Court doctrine has not reasonably foreclosed is a hypothetical that a court of appeals can decide anew. Given that, courts of appeals are the final arbiters for the vast majority of federal cases. Those courts will continue to have latitude to opine on whatever issues the Supreme Court does not explicitly reclaim. The Supreme Court may have neither the time nor the inclination to review the work of courts of appeals in this area. The Court has decided a number of employment and employment discrimination cases over its last few terms; it may be ready to take a break.[7] In addition, if the courts of appeals do not create circuit splits of sufficient import to gain the Court's attention, the Court may feel no need to review the work of the circuit courts.

To be clear, this Essay is not about criticizing the Supreme Court, even though there is much to criticize in the Court's opinions. It is about the freedom the Court is giving the Fourth Circuit and all circuit courts to rethink employment discrimination at its most basic level. Some might argue that this

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1. 129 S. Ct. 2658 (2009).
2. 129 S. Ct. 2343 (2009).
3. 129 S. Ct. 1962 (2009).
4. *See id.* at 1968.
5. *Ricci*, 129 S. Ct. at 2675.
6. *Gross*, 129 S. Ct. at 2350.
7. In addition to the three cases on which this Essay focuses, the Court has decided a number of other employment cases in its last few terms. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009); Ysursa v. Pocatello Educ. Ass'n, 129 S. Ct. 1093 (2009); Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn., 129 S. Ct. 846 (2009); Locke v. Karass, 129 S. Ct. 798 (2009); Meacham v. Knolls Atomic Power Lab., 128 S. Ct. 2395 (2008); Ky. Ret. Sys. v. EEOC, 128 S. Ct. 2361 (2008); Engquist v. Or. Dep't of Agric., 553 U.S. 591 (2008); Fed. Express Corp. v. Holowecki, 552 U.S. 389 (2008).

Essay merely explains what happens whenever a court decides close or controversial cases. Given strong arguments on both sides of an issue, any controversial decision will create an opportunity for appellate courts to make law, at least in the sense suggested by Justice Sonia Sotomayor.[8] However, the Supreme Court has not just made controversial decisions in areas in which the law was unclear. Rather, the Court has made decisions in areas in which the law was thought to be clear or made decisions in unconventional ways to reach somewhat problematic conclusions. This practice encourages lawyers to make arguments that most thought to have been foreclosed because the arguments can no longer be deemed frivolous. In short, the Supreme Court has created a wide-open Wild West of employment discrimination doctrine.

This Essay considers three cases decided in the Supreme Court's 2008–2009 term and notes some of the major issues that are left open for discussion after these cases; its purpose is not to catalog every issue that these cases raise. Taken together, these cases challenge employment discrimination doctrine in a fundamental way. This provides the Fourth Circuit in particular the opportunity to continue doing what it has often done—think creatively about employment discrimination doctrine. This is an observation, not a criticism of the Fourth Circuit. It suggests that the Fourth Circuit can make a difference. Of course, the Fourth Circuit's personnel will affect precisely how the Fourth Circuit's views will mesh with the Supreme Court's employment discrimination jurisprudence.

II. *AT&T CORP. V. HULTEEN*

At issue in *Hulteen* were time-of-service rules used by AT&T to calculate pension payments.[9] Before Congress amended Title VII to prohibit pregnancy discrimination, AT&T discriminated against women employees based on pregnancy in determining how leaves of absence would be credited for an employee's time of service.[10] The key issue in *Hulteen* was how the Court should characterize the use of discriminatory rules that were lawful in the past but prohibited by Title VII today.[11] Given that the use of such rules causes harm today, the time-of-service decisions flowing from the old rules could be considered current discrimination.[12] Conversely, decisions based on those rules

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8. Richard Lacayo, *A Justice Like No Other*, TIME, June 8, 2009, at 24, 28 ("During a panel discussion at Duke University four years ago, Sotomayor said the federal court of appeals is where 'policy is made,' the kind of statement that can get you tagged an 'activist' judge who tries to make law instead of interpret it. Sotomayor appeared to know that was the danger in the words she had let slip, because she quickly added, 'And I know that this is on tape, and I should never say that. Because we don't 'make law' . . . I'm not promoting it, and I'm not advocating it.'").

9. *See* AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1966–67 (2009).

10. *See id.*

11. *See id.* at 1966–68.

12. *See id.* at 1967–68.

could be thought to reflect lawful discrimination that has been projected into the future.[13]

Prior to the effective date of the Pregnancy Discrimination Act of 1978[14] (PDA), AT&T and its predecessor and subsidiary companies, like many companies of the time, treated pregnancy leave differently and less favorably than other types of medical leave.[15] The PDA's passage required that pregnancy leave be treated at least as favorably as other medical leave.[16] Since the effective date of the PDA, AT&T has given equal credit for pregnancy leave and other types of disability leave for time-of-service calculations.[17] However, AT&T's method of accruing time of service necessarily incorporates the time-of-service rules that were in place at whatever time the employee worked for AT&T.[18] AT&T uses that accrual of time of service to calculate pension benefits.[19] Consequently, female workers who took pregnancy leaves under the pre-PDA rules have accrued less time of service for pension purposes than male workers who worked the same number of hours over the same number of years.[20] Indeed, some female workers may have accrued less time of service than some male workers who worked fewer hours over the same number of years. The plaintiffs were current and retired employees who the pre-PDA time-of-service rules affected or will affect.[21] They sued AT&T, arguing that the continued use of pre-PDA time-of-service rules in calculating pension benefits was unlawful.[22]

The Court determined that AT&T's continued use of pre-PDA time-of-service rules to calculate pension payments is lawful.[23] It noted that at no time were AT&T's time-of-service rules unlawful.[24] That vision is consistent with the notion, challenged by Justice Ginsburg,[25] that the PDA amended Title VII rather than merely explained it.[26] In addition, the Court noted that AT&T's system of

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13. *See id.* at 1968.

14. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

15. *See Hulteen*, 129 S. Ct. at 1967.

16. *See* 42 U.S.C. § 2000e(k).

17. *Hulteen*, 129 S. Ct. at 1967.

18. *See id.* Some might argue that rather than treat AT&T's rules as passively accruing time of service, the Court should have deemed AT&T to calculate actively a worker's time of service at the time the pension is calculated. An active calculation is more likely to appear to reflect a decision today rather than the passive acceptance of the past discrimination.

19. *See id.* at 1966.

20. *See id.* at 1967.

21. *See id.*

22. *See id.*

23. *See id.* at 1966 (holding that there was no violation when a company "pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA, that gave less retirement credit for pregnancy leave than for medical leave generally").

24. *See id.* at 1970.

25. *See id.* at 1974–75 (Ginsburg, J., dissenting). The PDA was passed in response to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which had held, in the face of circuit courts decisions otherwise, *see id.* at 146–47 (Brennan, J., dissenting), that pregnancy discrimination was not sex discrimination under Title VII, *see id.* at 127–28 (majority opinion).

26. *See Hulteen*, 129 S. Ct. at 1967 (majority opinion).

calculating time of service for pensions "is part of a bona fide seniority system [that is protected by] § 703(h) of Title VII."[27] Simply, AT&T's use of prior rules constitutes a lawful projection of prior lawful discrimination into the future rather than the unlawful continuation of discriminatory behavior.[28] The dissenters argued that regardless of the legality of the prior time-of-service rules when they were in place, using them to calculate current pension benefits is current discrimination that violates Title VII.[29]

The *Hulteen* Court reexamined the interaction between two previous Supreme Court cases[30]: *International Brotherhood of Teamsters v. United States*[31] and *Bazemore v. Friday*.[32] Those cases define the boundary between the lawful projection of the effects of past discrimination into the future and the unlawful continuation of prior lawful discrimination. In *Teamsters*, the Court allowed the effects of past discrimination to project into the future by permitting an employer to retain a seniority system that reflected prior discriminatory decisions that had been lawful at the time the decisions were made.[33] Curing the effects of past discrimination would have harmed other workers who had been aided by past discrimination.[34] Such harm tends to occur because certain aspects of seniority systems, such as a rehire preference based on seniority, produce a zero sum game. Indeed, § 703(h)'s protection of seniority systems is at least in part predicated on concern for the existence of a zero-sum game in this context.[35]

Conversely, in *Bazemore*, the Court ended the effects of prior discrimination involving a discriminatory pay system.[36] That pay system had been based on race discrimination that had been lawful before Title VII's passage.[37] However, once Title VII made the discrimination embedded in the system unlawful, the system itself had to be dismantled because the Court deemed it to constitute current discrimination that violated Title VII.[38] The Court in *Hulteen* ended the

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27. *Id.* at 1966 (citing 42 U.S.C. § 2000e-2(h) (2006)).

28. The Court distinguished cases like *Hulteen* from cases that would be covered by the Lilly Ledbetter Fair Pay Act. *See id.* at 1972–73 (citing Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5–6 (to be codified at 42 U.S.C. § 2000e-5(e))). That law was passed in 2009 to guarantee that past discrimination that continued to affect a worker's pay or benefits could be remedied even if the discriminatory act that triggered the violation occurred outside of Title VII's statute of limitations. *See* Lilly Ledbetter Fair Pay Act § 2(1). The Court noted that that the Ledbetter law focuses on the effects of illegal discrimination that project into the future while *Hulteen* focuses on the effects of past legal discrimination that project into the future. *See Hulteen*, 129 S. Ct. at 1972–73.

29. *See Hulteen*, 129 S. Ct. at 1975 (Ginsburg, J., dissenting).

30. *See id.* at 1969–70, 1972 (majority opinion).

31. 431 U.S. 324 (1977).

32. 478 U.S. 385 (1986).

33. *Teamsters*, 431 U.S. at 352–53.

34. *See id.*

35. *See id.*

36. *Bazemore*, 478 U.S. at 395–96 (Brennan, J., concurring in part).

37. *See id.* at 390–91.

38. *See id.* at 395–96 ("Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII, regardless of the fact that this pattern was

reexamination of the cases by minimizing the implications of *Bazemore*, suggesting that if the employer conduct complained of in *Hulteen* was not unlawful at the time it was undertaken, the employer's continued use of the effects of that conduct would not invariably violate Title VII.[39] The issue is worthy of a little more discussion.

It is unclear what interest the Court sought to protect in *Hulteen*. Seniority systems are protected by § 703(h) in part to protect one innocent worker from losing some of his benefits in favor of another innocent worker.[40] However, in *Hulteen*, changing how time of service would be calculated would simply result in the employer paying more to some female employees in pension benefits. Certainly, that may have an effect on the total payout of pension benefits for the future; however, that is little different than the effect of requiring that employers pay African-American workers in *Bazemore* fairly once Title VII was in place. Paying African-American workers more than they had been paid under the prior discriminatory scheme may have diminished the amount of money the company could pay others in the short term and possibly in the long term. However, doing so was necessary to stop the continuation of the unlawful effects of lawful prior discrimination.

How AT&T calculates time of service is a choice on its part.[41] It is a choice to perpetuate past lawful discrimination and to allow it to project into the future. In *Hulteen*, the Court allowed discrimination that is embedded in AT&T's time-of-service rules to stand.[42] Consequently, AT&T can pay different pensions to two people who are similarly situated except with respect to pregnancy leave—a basis on which an employer can no longer discriminate—without being deemed to discriminate on the basis of sex.[43] It is unclear whether allowing AT&T that choice is consistent with the goals of Title VII. By its decision, the Court arguably invites courts of appeals to rethink the goals of Title VII in this context, if not more broadly.

III. *RICCI V. DESTEFANO*

This case involved the procedures that the New Haven, Connecticut fire department used to create promotion lists for their officer ranks—lieutenants and captains.[44] The creation of the promotion lists had multiple parts.[45] Candidates

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begun prior to the effective date of Title VII. The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated.").

39. *See* AT&T Corp. v. Hulteen, 129 S. Ct. 1962, 1972 (2009).

40. *See Teamsters*, 431 U.S. at 352–53.

41. The employer's prerogative to make seemingly odd seniority rules may be best reflected in *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608–11 (1980), which allowed a seniority system in which workers who worked fewer weeks had far more seniority than workers who worked many more weeks.

42. *See Hulteen*, 129 S. Ct. at 1973.

43. *See id.* at 1976 (Ginsburg, J., dissenting).

44. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).

took a written test that accounted for 60% of their final score.[46] Candidates also were given an oral examination that accounted for 40% of their final score.[47] The combined score created a ranked list that was effective for two years.[48] Whenever an officer position in the department became vacant, one of "the top three scorers on the [respective] list" had to be chosen to fill the position.[49] The results of the tests and the "rule of three" were such that no African-Americans were eligible for immediate promotion to lieutenant or captain.[50]

When it became clear that the test had a racially disparate impact, the city had to decide whether or not to certify the results and use the promotion lists.[51] That decision was fraught with peril. If the city used the results, some group of minority firefighters would likely sue, claiming the process had a disparate impact on them.[52] Conversely, if the city declined to certify the results, the group of firefighters who stood to be promoted if the promotion lists were certified would likely sue.[53] After reviewing the situation, the city declined to certify the results, and a group of firefighters quickly sued.[54] By the time the suit reached the Supreme Court, the case was well-known, even outside of legal circles.[55]

The key questions in *Ricci* were why the city refused to certify the results and whether its justification was lawful.[56] The city argued that it could decline to certify the results because the results yielded a racially disproportionate impact.[57] The plaintiff firefighters argued that the city intentionally discriminated against them because of their race.[58] The minority firefighters, who likely would have sued the city had the city certified the results, were not parties to the litigation.[59] Consequently, the Supreme Court decided the certification issue without formally hearing from a group of firefighters with a unique point of view on the issue.[60]

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45. *See id.* at 2665. In addition to the parts of the promotions process mentioned, there were eligibility requirements to compete for promotions. *See id.* (noting that candidates had to have experience in the department, a high school diploma, and other training to take the tests).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 2666.

51. *See id.* at 2665.

52. *See id.* at 2664.

53. *See id.*

54. *Id.*

55. *See, e.g.*, Adam Liptak, *Justices to Hear White Firefighters' Bias Claims*, N.Y. TIMES, Apr. 10, 2009, at A1 (providing a factual summary of the case and discussing several legal issues involved in the case).

56. *See Ricci*, 129 S. Ct. at 2664.

57. *See id.* at 2674–75.

58. *See id.* at 2664.

59. *See id.*

60. An African-American firefighter has now filed suit against the City of New Haven. *See* Amended Complaint for Damages and Injunctive Relief, Briscoe v. City of New Haven, No. 3:09cv1642 (D. Conn. Nov. 2, 2009), 2009 WL 5184800.

The Court's decision focused on whether minority firefighters would have won a disparate impact case against the city had they brought one.[61] In considering that question, the Court focused on the quality of the written test and the ability of the minority firefighters to argue against the eventual rank-order list of promotions.[62] After considering these issues, the Court seemed to suggest that the testing procedure was a good method to determine merit.[63] It then decided that the city had an insufficient basis to believe that any disparate impact claim that minority firefighters could have filed would have succeeded.[64] That conclusion led the Court to decide that the plaintiffs must win because declining to certify the results of the process based on the test's disproportionate racial impact constituted disparate treatment under Title VII.[65] Indeed, the Court indicated that for the city to have appropriately declined to certify the results, it would have needed a "a strong basis in evidence to believe it [would] be subject to disparate-impact liability if it fail[ed] to take the race-conscious, discriminatory action."[66]

In discussing how the written test was developed, the Court appeared to believe that the work expended on devising the written test yielded an excellent test.[67] Indeed, the Court seemed to suggest that the test actually tested merit.[68] Consequently, the rejection of the test results would seem to be a rejection of merit in favor of disparate treatment. Of course, little reason exists to believe that any exam tests merit perfectly and accurately differentiates each candidate based on merit. The most the Court could have fairly suggested is that the test appeared to be a pretty good or very good test.

However, even if the written test was perfect, it was combined with an oral examination and the "rule of three" to create the actual conditions for promotions.[69] Consequently, a significant issue embedded in the ranking process was how the written test and oral examination were weighted.[70] The oral examination was deemed a legitimate part of creating the promotion lists, comprising 40% of the applicant's total score.[71] Consequently, what weight it was given is important. Apparently, a heavier weighting for the oral examination would have led to a more diverse pool of promotable candidates.[72] However, the Court deemed the weighting of the written test and oral examination to be a factor the city could not change or consider because it had been agreed to in the

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61. *See Ricci*, 129 S. Ct. at 2677, 2681.
62. *See id.* at 2678–81.
63. *See id.* at 2681.
64. *See id.*
65. *See id.*
66. *Id.* at 2677.
67. *See id.* at 2665–66, 2681.
68. *See id.*
69. *Id.* at 2665.
70. *See id.* at 2679.
71. *See id.* at 2665–66.
72. *See id.* at 2679.

collective bargaining agreement between the union and the city.[73] The Court's position is understandable given that it asked whether a minority firefighter would win a disparate impact case against the city. However, the real question was supposed to be whether the city had intentionally discriminated against the plaintiffs. Whether a different weighting of the test and interview could have led to a more diverse officer corps would seem relevant to whether the city might have a nondiscriminatory reason to reject the promotion lists based on the weighting and why it might look for alternative ways to create its promotion lists.

Nonetheless, the Court held that if a case in favor of disparate impact liability were strong, the city would likely have a right to refuse to certify the results to avoid the claim.[74] If a case in favor of disparate impact liability were weak, the city would have no justification to refuse to certify the results. Indeed, the Court noted that a city engages in disparate treatment discrimination when it considers declining to certify test results based on the fact that minorities suffered disparate impact under the process.[75] To avoid disparate treatment liability, the city must believe that it must intentionally discriminate by declining to certify the results to avoid unintentionally discriminating by certifying the results.[76] The Court's belief that the written test was a good judge of merit and its rejection of the import of the weighting issue suggest that a pretty good written test may often be a complete defense to a disparate impact claim.

In deciding the case, the Court argued against a straw man disparate impact case that the Court suggests would have been made by minority firefighters had they actually sued.[77] Of course, the Court tore the hypothetical minority plaintiff's argument down. This style of argumentation is troublesome as the minority firefighters' arguments supporting a disparate impact case would have been different than those made by the city in defending this case. The city was defending its right to decline to certify the results of a test.[78] That triggers the general argument that the test used was a pretty good test, but not good enough to overcome the disparate impact. That argument may not have carried the day, but it is sensible to make to suggest that the city had not wasted taxpayer money on a poor test.

Focusing on what minority firefighters would have argued had they sued obscured arguments made regarding the city's prerogative as an employer to manage its use of the tests.[79] The Court appeared unwilling to hear arguments

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73. *See id.*
74. *See id.* at 2664.
75. *See id.*
76. *Id.* at 2677.
77. *See id.* at 2681.
78. *See id.* at 2665.
79. The Court recently provided significant support to the concept of employer prerogative. *See* Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2155 (2008) ("To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.").

suggesting that an employer can decline to certify test results when the employer believes that the test is pretty good, but not good enough to ignore the fact that the results have a substantial disparate impact.[80] This is problematic, as the city would seem to have the prerogative to explore alternatives to a test yielding a significant racially disproportionate impact without being deemed to have discriminated intentionally. Indeed, given that Title VII's disparate impact test contemplates that an employer might need to explore alternative selection procedures whenever faced with results yielding a disparate impact,[81] it is odd that the employer's prerogative to look for less discriminatory alternatives is arguably limited to those situations where it is clear that the test that created the disproportionate impact is substandard.[82] However, that would seem to be the case given that an employer must be likely subject to disparate impact liability in order to reject test results and explore alternatives.

Ironically, had minority firefighters brought a disparate impact claim, they would have been free to make every argument the city made in this case and then some the Court did not make with any force in its straw man. Those firefighters would have been free to argue as forcefully as possible that the test itself was a poor test, that the weighing of the written test and oral test was a poor way to create a promotion list, and that there were less discriminatory alternative tests that were equally as good as the test used. More importantly, the putative plaintiffs would have been quite motivated to support their arguments with solid evidence. This is not to suggest that the city prepared or argued the case poorly. Rather, it is to argue that the city's litigation interests were different than the litigation interests of minority firefighters would have been.

The way the court reached its conclusions with respect to the hypothetical disparate impact claim that could have been brought is problematic. Knocking down a straw man that is unsupported by fact is troubling in that the party that would have made the argument and supported it with evidence did not actually litigate the case. The Court may have believed that the city's test was a great test, but the people who had reason to destroy the test's validity are those who would likely make the best arguments against the test and against how it was used. The Court's straw man fell in part because the Court did not consider how it could have been most forcefully defended. The problem with the Court's method is that it gives circuit courts an improper approach to use when deciding issues that are fundamental to the nature of the disparate impact cause of action.

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80. *See Ricci*, 129 S. Ct. at 2676.

81. *See id.* at 2678 ("That is because the City could be liable for disparate-impact discrimination only if the examinations were not job related and consistent with business necessity, or *if there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt*." (emphasis added)).

82. *See id.* at 2677 ("[T]he record makes clear there is no support for the conclusion that respondents had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.").

The Court's conclusions with respect to disparate treatment doctrine are no less interesting. It deems the employer to be engaging in disparate treatment discrimination if the employer considers the fact that the test it planned to use had a disparate impact and seeks to blunt the impact.[83] The Court treats the attempt to blunt the impact as an attempt to treat the winners, who must be of a different racial makeup than the losers for there to be a disparate impact, poorly because of their race.[84] The employer has engaged in disparate treatment whether or not the disparate impact is actionable. However, the employer has a defense to the disparate treatment claim if the disparate impact has a "strong basis in evidence."[85]

The Court's position becomes even trickier when one considers the desire to diversify the officer ranks of the fire department. Claims of discrimination will arise presumably regardless of the reason the city wants to diversify its officer ranks, though defenses may have different contours depending on the justification offered. Attempting to guarantee that no racially identifiable group gain an advantage based on test scores that may or may not reflect merit now qualifies as intentional discrimination against that group rather than an attempt not to engage in disparate impact discrimination.[86]

Of course, the Court's discussion of intentional discrimination is somewhat odd in the context of an employer trying to avoid using a test that has a disparate impact. Fixing a test's disparate impact may have little to do with the race of the winners. Even if one were to argue that helping minorities in this situation hurts nonminorities, when the harm stems from the desire to have an officer corps that reflects the rank and file of the organization and to ensure equality by avoiding tests that have a disproportionate impact, the "help" is unrelated, from an intent perspective, to any harm that befalls the nonminorities. The argument is particularly nettlesome when the people being "helped" are already woefully underrepresented in the command structure.

Without additional discussion, the Court appears to suggest that mere race consciousness is not far removed from disparate treatment.[87] This would reopen some very interesting questions about whether the *McDonnell Douglas Corp. v. Green*[88] test ought to have new life. For years, that test has been viewed as substantively irrelevant and almost dead.[89] However, the need to allow fact finders to infer discrimination from race consciousness might have new

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83. *See id.* at 2673.

84. *See id.*

85. *See id.* at 2677.

86. *Cf. id.* at 2682 (Scalia, J., concurring) (suggesting that disparate impact may be inherently in tension with equal protection).

87. *See id.* at 2674–75 (majority opinion).

88. 411 U.S. 792 (1973).

89. *See* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 88 (2004).

resonance in the wake of *Ricci*.[90] *Ricci* could be thought to imply that race consciousness coupled with an adverse decision often proves disparate treatment. That, of course, is a vision that the Supreme Court seems to have rejected a number of years ago.[91]

IV. *GROSS V. FBL FINANCIAL SERVICES, INC.*[92]

Gross v. FBL Financial Services, Inc. is a simple case with significant implications. The case was a fairly standard Age Discrimination in Employment Act[93] (ADEA) case in which evidence suggested that the defendant may have used age and other factors in reassigning and effectively demoting the plaintiff.[94] The trial court provided jury instructions consistent with a form of mixed-motives liability.[95] The court instructed the jury that if age was a motivating factor in the employer's decision to demote the plaintiff, then the plaintiff should win unless the employer proved that it would have made the same decision without regard to the plaintiff's age.[96]

The mixed-motives issue, which the Court has faced in other contexts,[97] is tricky. However, the issue is at the heart of employment discrimination doctrine. This case revolves around the central trigger of age discrimination liability—the "because of" clause.[98] The "because of" clause deems it unlawful to engage in certain employment related actions because of the employee's age.[99] One cannot adequately solve the questions of what "because of" means or how one should treat a mixed-motives case until one determines the nature of what discrimination is. The *Gross* Court arguably does not do so in any fashion that has been recognized in the past twenty years or so. Of course, the Court's position is the law with respect to the ADEA even if that makes the ADEA

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90. The *McDonnell Douglas* test is unlikely to regain its prominence. However, the argument for its revival does exist. *See, e.g.*, Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 515 (2008) (noting that *McDonnell Douglas* is still viable because it "provides uniformity to disparate treatment law").

91. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 508–512 (1993) (holding that the fact finder must believe the employee's explanation of intentional discrimination because the employee has the ultimate burden of persuasion).

92. 129 S. Ct. 2343 (2009).

93. 29 U.S.C. §§ 621–634 (2006).

94. *See Gross*, 129 S. Ct. at 2347.

95. *See id.*

96. *Id.*

97. *See, e.g.*, Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that where the plaintiff demonstrates that an employer's consideration of constitutionally protected conduct was a motivating factor in a discharge, the employer can try to establish by a preponderance of the evidence that it would have taken the same action even without considering the constitutionally protected conduct).

98. *See Gross*, 129 S. Ct. at 2350.

99. 29 U.S.C. § 623(a)(1) (2006).

inconsistent with other employment discrimination statutes.[100] Indeed, the Court's position is the law regardless of what other courts and Congress may have said or thought over the past generation.

The mixed-motives issue is not new.[101] The point to mixed-motives cases, even outside of the employment discrimination area, is that there can be multiple causes, some legitimate and some illegitimate, for a single action.[102] However, the question remains: how should a fact finder determine whether an action was taken because of discrimination when multiple causes exist?[103] At least three possible solutions exist in the context of the ADEA (as well as in the context of other discrimination cases). First, "because of" may require but-for causation.[104] Second, "because of" may mean that age was a significant or substantial factor and the defendant cannot prove it would have made the same decision in the absence of age as a factor.[105] Third, "because of" may mean simply that age was a motivating factor in the decision regardless of whether the decision would have been the same in the absence of considering age.[106] Each possibility has support—shades of each were found in *Price Waterhouse v. Hopkins*.[107] Congress inserted a form of the motivating-factor formulation into Title VII through the 1991 Civil Rights Act.[108]

In *Price Waterhouse*, the mixed-motives issue arose when Price Waterhouse, a large accounting firm, used sex stereotyping and sex-based evaluation to deny Ann Hopkins's partnership bid.[109] Though some partners evaluated Hopkins inappropriately, some legitimate reasons were also given for holding her

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100. *Compare* 42 U.S.C. § 2000e-2(m) (permitting mixed-motive analysis when considering race, color, religion, sex, or national origin discrimination under Title VII), *with Gross*, 129 U.S. at 2350 (stating that the ADEA does not authorize a mixed-motives claim).

101. *See, e.g.*, Fuller v. Phipps, 67 F.3d 1137, 1140–43 (4th Cir. 1995) (considering a proposed mixed-motive jury instruction and determining that it was not warranted), *abrogated by* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

102. *See* Chambers, *supra* note 89, at 89–90 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 231, 234–35 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994)).

103. The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (2006).

104. *See Price Waterhouse*, 490 U.S. at 281–82 (Kennedy, J., dissenting).

105. *See id.* at 259–60 (White, J., concurring) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)).

106. *See id.* at 241 (plurality opinion).

107. 490 U.S. 228, 241 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994); *id.* at 259–60 (White, J., concurring); *id.* at 281–82 (Kennedy, J., dissenting).

108. Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)).

109. *See Price Waterhouse*, 490 U.S. at 235–36 (plurality opinion).

partnership bid.[110] The question was what to do about the convergence of acceptable grounds and unacceptable grounds for denying partnership.[111] The dissenters argued for the but-for causation model, claiming that the phrase "because of" could only mean but-for causation.[112] They suggested that if the action asserted to be discriminatory would not have occurred but for the decisionmaker's use of sex, the action can be said to have happened because of sex discrimination.[113] Conversely, if the action would have occurred regardless of the sex discrimination, the action could not have occurred because of sex.[114] The argument is that even when multiple motives exist—some lawful and some unlawful—the unlawful motive had to be a but-for cause of the action for liability to exist.[115]

The plurality opinion and concurring opinions took different positions. Justices O'Connor and White, concurring separately, each viewed the mixed-motives formulation as triggering a shifting of the burden of persuasion to the defendant.[116] Once the illegitimate motive was found to have played a significant or substantial role in the decision, the burden of persuasion would shift to the defendant.[117] Shifting the burden means only that the risk of nonpersuasion falls on the defendant. Practically speaking, the plaintiff is not thought to have proven its case, but its case is strong enough that the defendant ought to lose if it cannot convince the fact finder that it did not discriminate.[118]

The four-judge plurality asserted that after a plaintiff demonstrates that an illegitimate motive was a motivating factor for the ultimate decision, "the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[119] This affirmative defense arises when the plaintiff is thought to have proven its case.[120] If the defendant does not prove the affirmative defense, the plaintiff wins.[121] However, proof of the affirmative defense yields a verdict for the defense and no Title VII violation.[122]

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110. *See id.* at 234–35.

111. *See id.* at 237–38.

112. *See id.* at 281–82 (Kennedy, J., dissenting).

113. *See id.* at 285.

114. *See id.*

115. *See id.*

116. *See id.* at 259–60 (White, J., concurring in the judgment) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)); *id.* at 261 (O'Connor, J., concurring in the judgment).

117. *See id.* at 259 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment).

118. *See id.* at 276–77 (O'Connor, J., concurring in the judgment).

119. *Id.* at 244–45 (plurality opinion) (footnote omitted).

120. *See id.* at 258.

121. *See id.*

122. *See id.*

Ultimately, Congress spoke on the mixed-motives issue in the Title VII arena with its motivating-factor formulation in the Civil Rights Act of 1991.[123] Congress deemed the use of an illegitimate factor—race, color, religion, sex, or national origin—as a motivating factor to be an unlawful employment practice that violates Title VII.[124] However, the Act allows the employer to prove that it would have made the same decision anyway.[125] Proof that the same decision would have been made reduces the amount of liability to which the defendant is exposed.[126]

Given the options available to the Court in *Gross*, it picked the one with arguably the least support. That hardly bothered the Court. The Court argued that it did not need to choose any of the motivating-factor-focused analyses advocated in *Price Waterhouse* and expressed in the Civil Rights Act of 1991 because the ADEA's "because of" clause had not historically been interpreted to include mixed-motive claims and it was not altered by passage of the Civil Rights Act of 1991.[127] The Court may not be wrong, but it took an unorthodox path. It seems to have suggested that it was writing on a blank slate rather than overwriting the work of prior Courts. The Court's substantive position throws open issues that some might have thought were foreclosed.

The quarrel is about the fundamental nature of causation and discrimination in all settings. The Court seems to assert that it is not the use of discriminatory factors that is the problem under employment discrimination statutes. Rather, it is the action that occurs as a result of the use of discriminatory factors. With respect to Title VII, the Civil Rights Act of 1991 rejected that approach.[128] The Act states that the mere use of illegitimate factors as motivating factors in the decision making process violates Title VII.[129] Arguably, it should take more than a claim that the Civil Rights Act of 1991 did not explicitly apply to the ADEA for the Court to suggest that its holding did not stray from its prior doctrine.

The *Gross* Court simply asserted that mixed-motives doctrine does not exist under the ADEA.[130] It did so in the context of interpreting what "because of" means.[131] That intepretation is as fundamental a decision about the nature of discrimination and causation as exists. This decision may apply only to the ADEA, but the issue arises in a number of other areas. The case suggests that courts of appeals should consider how they deal with multiple-motives cases in all contexts in which Congress has not commanded the solution.

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123. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m) (2006)); Chambers, *supra* note 89, at 92–94.

124. *See* 42 U.S.C. § 2000e-2(m).

125. *See* Civil Rights Act of 1991 § 107(b)(3) (codified at 42 U.S.C. § 2000e-5(g)(2)(B)).

126. *See id.*

127. *See* Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2348–50 (2009).

128. *See* 42 U.S.C. § 2000e-2(m).

129. *Id.*

130. *Gross*, 129 S. Ct. at 2350.

131. *See id.* at 2350–51.

V. CONCLUSION

Through *AT&T Corp. v. Hulteen*, *Ricci v. DeStefano*, and *Gross v. FBL Financial Services*, the Supreme Court has reopened fundamental issues of employment discrimination doctrine. In these cases, the Court has questioned what unlawful discrimination is. It has questioned when past unlawful discrimination can lawfully project into the future. It has reexamined what constitutes disparate treatment and intentional discrimination. It has rethought what proof of disparate impact entails. It has questioned whether the explicit use of an illegitimate factor in employment decision making is itself unlawful. The Court's decisions suggest that it is not terribly concerned about inconsistencies in doctrine.

There is an irony in the Court's rethinking of doctrine. In a number of cases, the Court's interpretations of employment discrimination statutes have been thought so inappropriate that Congress has amended statutes to fix the Court's interpretation. The Lilly Ledbetter Fair Pay Act, the Americans with Disabilities Act Amendments of 2008,[132] the Civil Rights Act of 1991, and the Pregnancy Discrimination Act of 1978 are all examples of congressional action enacted in the face of the Court's employment discrimination decisions. The disagreement between Congress and the Court regarding the meaning of statutory language may be resolved by Congress through amendment. However, when the Supreme Court implicitly invites the circuit courts to rethink core employment discrimination principles, unless Congress is primed to react immediately to circuit court decisions, it will be the Court's responsibility to respond first.

Allowing courts of appeals to rethink basic issues of discrimination may be problematic if the courts of appeals misinterpret the Supreme Court. This occurred in the wake of the Court's reinterpretation of *McDonnell Douglas Corp. v. Green* in *St. Mary's Honor Center v. Hicks*.[133] The Court's language in *Hicks* suggested that it wanted to gut the *McDonnell Douglas* test.[134] A number of circuit courts took the implications of *Hicks* and applied them.[135] The result was *Reeves v. Sanderson Plumbing Products, Inc.*,[136] in which the Supreme Court had to explain what it meant to say *Hicks*;[137] arguably, that did not

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132. Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C. and 29 U.S.C.).

133. 509 U.S. 502 (1993). For an extended discussion of *St. Mary's Honor Center v. Hicks*, see Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1 (1996).

134. *See Hicks*, 509 U.S. at 505–12.

135. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000) (noting the conflict among circuits in applying the *McDonnell Douglas* test after *Hicks*).

136. 530 U.S. 133 (2000).

137. *See id.* at 142–43.

work.[138] The Court may similarly need to clarify its rulings in the wake of its decisions last term.

At any rate, the room the Supreme Court has given courts of appeals to rethink fundamental issues will likely not be lost on the Fourth Circuit. The Fourth Circuit has never been shy about taking the road less traveled when it comes to employment discrimination doctrine.[139] The Fourth Circuit's employment discrimination doctrine may soon resemble the Wild West. However, just how wild may depend on who fills the vacancies on the Fourth Circuit bench.

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138. For a discussion of the interaction between *Hicks* and *Reeves*, see Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 119–121 (2005).

139. *See, e.g.*, Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc., 199 F.3d 477, 484 (D.C. Cir. 1999) ("All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmore*, other than the Fourth, are in accord with this view.").

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