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**OP-ED CONTRIBUTOR**

**The Court Changes the Game**  
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THE law of employment discrimination today is not what it was before 10 a.m. Monday, when the Supreme Court ruled against the City of New Haven for scrapping a fire department promotional exam that appeared to favor white test-takers.

Whatever else the court's 5-to-4 majority achieved, the result removed the breathlessly awaited case of *Ricci v. DeStefano* as a substantial issue in the imminent Supreme Court confirmation hearing for Judge Sonia Sotomayor.

Judge Sotomayor, famously, was one of three judges on an appellate panel who applied their federal circuit's settled precedent to rule in New Haven's favor. Like that decision or hate it, cheer Monday's ruling or deplore it, one thing that is clear from reading the Supreme Court's 89 pages of opinions in the case is that Judge Sotomayor and her colleagues played by the old rules, and the court changed them. Although "Sotomayor Reversed" was a frequent headline on the posts that spread quickly across the Web, it was actually the Supreme Court itself that shifted course.

To understand the nature of the shift requires a bit of history. Congress enacted Title VII of the Civil Rights Act of 1964, the statute at issue in the *Ricci* case, with a simple command to employers: thou shalt not discriminate on the basis of race or other protected characteristics, including sex and religion. But the simple proved to be complicated. An employer of blue-collar workers in North Carolina, Duke Power, required a high school diploma of all job applicants, a requirement that screened out 88 percent of black men in that region at that time.

In a 1971 decision, the Supreme Court ruled unanimously that a test that was “fair in form, but discriminatory in operation” could violate Title VII even without proof that the discrimination was intentional. Congress eventually amended Title VII to codify that decision, Griggs v. Duke Power. The rule was clear: if a job requirement produced a “disparate impact,” the employer had the burden of showing that the requirement was actually necessary.

Federal agencies, in turn, stepped forward to define the statistical disparity that prompted the further inquiry. Under the Equal Employment Opportunity Commission’s “four-fifths rule,” a test that one racial group passed at less than 80 percent the rate of another group would place an employer in presumptive violation of Title VII.

The early Supreme Court decision and later Congressional ratification represented a highly visible social settlement in the employment discrimination area. But beginning in the 1990s, changes in the Supreme Court’s membership and outlook began to unravel not only the legal structure, but also the philosophic one that had kept the settlement intact.

Powerful voices on the court, including Justice Anthony M. Kennedy, who wrote the majority opinion on Monday, began to call for something close to a zero-tolerance policy when it came to government counting its citizens by race for any purpose. And the court became skeptical of Congress’s making its own legislative judgments in ways that threatened to expand the boundaries of the court’s own narrowing constitutional vision.

These were tensions that underlay the challenge to the Voting Rights Act that the justices deflected with a narrow statutory ruling last week. The same tensions made the disparate-impact prong of Title VII something of an accident waiting to happen, because curing or avoiding a disparate impact obviously requires an employer to take race into account. A municipal employer like New Haven is bound not only by Title VII but also by the 14th Amendment’s equal protection clause, which the Supreme Court has interpreted to prohibit only intentional, and not simply statistical, discrimination.

The New Haven case, like the Voting Rights Act case, thus reached the court at a moment when the tectonic plates were in motion. White firefighters in New Haven had passed the promotional exams in 2003 at roughly double the rate of black and Hispanic test-takers, and no black firefighters had scored high enough to be eligible for promotion in a department with a long history of minority under-representation in a city that is now 60 percent black and Hispanic. Advised by its counsel that it faced Title VII disparate-impact liability, New Haven decided not to use the exam's results. It thought it had found an escape from liability, and two lower federal courts agreed.

But where the lower courts saw a safe harbor, the Supreme Court majority saw "express, race-based decision-making" that violated Title VII's other prong, the prohibition against disparate treatment. A "statistical disparity based on race," the standard that Judge Sotomayor and her colleagues used, is no longer a sufficient excuse, Justice Kennedy said. The court announced what it called a "strong-basis-in-evidence standard." Without a "strong basis" for concluding that a disparate impact made it vulnerable, and not just a lawyer's plausible caution, an employer is stuck.

As it did last week, the court stopped short of addressing the deeper constitutional question. But Justice Kennedy warned that the Ricci opinion did not mean "that meeting the strong-basis-in-evidence standard would satisfy the equal protection clause in a future case."

In dissent, Justice Ruth Bader Ginsburg had her own warning: "The court's order and opinion, I anticipate, will not have staying power."

Both predictions are provocative, and each depends on the same thing: not future cases so much as future justices. Even before the court ruled, there was little doubt that Judge Sotomayor would be confirmed. With the justices having changed the rules in employment discrimination cases, now it's not even clear what there will be to talk about.

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