

SCALIA, J., concurring

SUPREME COURT OF THE UNITED STATES

Nos. 07–1428 and 08–328

FRANK RICCI, ET AL., PETITIONERS
07–1428 *v.*
JOHN DESTEFANO ET AL.
FRANK RICCI, ET AL., PETITIONERS
08–328 *v.*
JOHN DESTEFANO ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[June 29, 2009]

JUSTICE SCALIA, concurring.

I join the Court’s opinion in full, but write separately to observe that its resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? The question is not an easy one. See generally Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493 (2003).

The difficulty is this: Whether or not Title VII’s disparate-treatment provisions forbid “remedial” race-based actions when a disparate-impact violation would *not* otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result. See *ante*, at 20–21. But if the Federal Government is prohibited from discriminating on the basis of race, *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954), then surely it is also prohibited from enacting laws

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mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race. See *Buchanan v. Warley*, 245 U. S. 60, 78–82 (1917). As the facts of these cases illustrate, Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory. See *ante*, at 19; *Personnel Administrator of Mass. v. Feeney*, 442 U. S. 256, 279 (1979).

To be sure, the disparate-impact laws do not mandate imposition of quotas, but it is not clear why that should provide a safe harbor. Would a private employer not be guilty of unlawful discrimination if he refrained from establishing a racial hiring quota but intentionally designed his hiring practices to achieve the same end? Surely he would. Intentional discrimination is still occurring, just one step up the chain. Government compulsion of such design would therefore seemingly violate equal protection principles. Nor would it matter that Title VII requires consideration of race on a wholesale, rather than retail, level. “[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Miller v. Johnson*, 515 U. S. 900, 911 (1995) (internal quotation marks omitted). And of course the purportedly benign motive for the disparate-impact provisions cannot save the statute. See *Adarand Constructors, Inc. v. Peña*, 515 U. S. 200, 227 (1995).

It might be possible to defend the law by framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to “smoke out,” as it were, disparate treatment. See Primus, *supra*, at 498–499, 520–521. Disparate impact is sometimes (though not always, see *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 992 (1988) (plurality opinion)) a signal of something illicit, so a

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regulator might allow statistical disparities to play some role in the evidentiary process. Cf. *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802–803 (1973). But arguably the disparate-impact provisions sweep too broadly to be fairly characterized in such a fashion—since they fail to provide an affirmative defense for good-faith (*i.e.*, nonracially motivated) conduct, or perhaps even for good faith plus hiring standards that are entirely reasonable. See *post*, at 15–16, and n. 1 (GINSBURG, J., dissenting) (describing the demanding nature of the “business necessity” defense). This is a question that this Court will have to consider in due course. It is one thing to free plaintiffs from proving an employer’s illicit intent, but quite another to preclude the employer from proving that its motives were pure and its actions reasonable.

The Court’s resolution of these cases makes it unnecessary to resolve these matters today. But the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.