

Promoting Opportunity and Racial Equality in America:

A Guide for Federal, State and Local Governments



■ “Yes, government must be a force for opportunity.

Yes, government must be a force for equality.”

— President Barack Obama, Speech to the NAACP Centennial Convention (July 16, 2009).

■ The government has a “legitimate interest ... in ensuring all people have equal opportunity regardless of their race.”

— Justice Anthony Kennedy, *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2791 (2007) (Kennedy, J., concurring).

Despite enormous strides in advancing the cherished American ideals of equality and opportunity, there is still much work to do. Today, the economic recession has widened previously existing inequalities by disproportionately impacting communities of color, among others.¹ For too many Americans, the promise of equal opportunity remains elusive.

Government officials are in a unique position to help make equality and opportunity a reality for all Americans. This document explains that under constitutional law, federal, state, and local government officials may take actions to advance racial equality and promote opportunity for individuals from all racial backgrounds while respecting equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

Unfortunately, the Supreme Court’s June 2009 decision in *Ricci v. DeStefano*,² which ruled on a challenge by firefighters to a city’s decision to reject a promotional exam, has been misunderstood by some to have limited government officials’ ability to take such actions. **This belief is incorrect.**

Government officials are allowed to and should continue to follow constitutional law permitting them to design policies and programs that advance racial equality and equal opportunity. Moreover, federal law and regulations continue to **prohibit** federally-funded programs from engaging in racial discrimination.

In the coming months, as state and local governments distribute federal stimulus funds to revitalize our economy, it is vitally important that they take race into consideration to ensure that all communities benefit from economic recovery efforts **and** that these programs do not discriminate on the basis of race. This document explains that government can promote equal opportunity and racial equality while remaining in compliance with constitutional law.³

■ What is *Ricci v. DeStefano*?

Ricci v. DeStefano is a case brought by seventeen white firefighters and one Hispanic firefighter to challenge the decision by the City of New Haven and its officials to reject a test that resulted in a significant disparity in the rates at which white applicants and African-American and Hispanic applicants were eligible for promotion. The firefighters claimed that the city’s decision violated Title VII of the Civil Rights Act of 1964, a statute that prohibits workplace discrimination, and

the Constitution’s guarantee of equal protection of the laws. The federal trial court found that the city’s decision was permissible.⁴ The decision was appealed and eventually reversed by the U.S. Supreme Court.

The Supreme Court’s decision in *Ricci* reconciled the competing demands of two separate provisions of Title VII—one prohibiting *intentional* discrimination and another prohibiting *unintentional* discrimination. The Supreme Court ruled that the city’s decision to abandon a selection procedure

that produced racially skewed results violated the statute’s prohibition of intentional discrimination in the workplace.⁵ It established that before an employer may reject such a test, it needs a “strong basis in evidence” to believe that acceptance of the test results will violate a **different** provision of Title VII, one that prohibits employment policies or practices that have a **disproportionately adverse effect** on racial and other minorities even if they are **not intentionally discriminatory**.⁶

■ **The Supreme Court's decision in *Ricci v. DeStefano* did NOT change constitutional law or limit many of the measures employers may take to prevent racial discrimination in the workplace.**

The *Ricci* decision did **not** limit the steps that private or public employers may take to design a selection procedure that is fair to all racial groups **before adopting and administering the procedure**.⁷ Title VII **still** requires employers to avoid policies that are discriminatory in practice.⁸ There is **still** a range of steps that employers can take voluntarily to ensure that they are providing equal opportunity in the workplace.⁹

The decision also did **not** consider whether New Haven's actions violated the equal protection provisions of the Constitution.¹⁰

■ **Why does it matter that the Supreme Court's decision in *Ricci v. DeStefano* did not interpret the equal protection provisions of the Constitution?**

In deciding *Ricci v. DeStefano*, the Supreme Court interpreted Title VII of the Civil Rights Act of 1964, a statute that governs what employers—both public and private—can and must do to prevent racial and other types of workplace discrimination.¹¹

In contrast, the equal protection provisions of the Constitution govern the actions that governmental entities (not private actors) can take to address racial and other types of discrimination in a **variety of contexts**—not just when the government is acting as an employer.¹² The Fifth and Fourteenth Amendments apply to government policy in contracting,¹³ education,¹⁴ employment,¹⁵ and other areas.

The *Ricci* decision did **not** impact the precedent of the Supreme Court and other courts that interpret the equal protection provisions of the Constitution to permit government to advance racial equality and address discrimination when certain conditions are met. These decisions are still good law.

■ **The Constitution does NOT require government officials to ignore race or the impact of policies and programs on different racial groups.**

There is no constitutional provision or Supreme Court decision interpreting the Constitution that prohibits government officials from considering the impact of policies and programs on different racial groups or taking measures to address racial discrimination or inequality. **The Constitution permits government officials to consider race in policymaking in certain circumstances and in a number of ways.**

■ **The Constitution allows government officials to use racial classifications in certain circumstances to advance special racial equality goals.**

The government uses a **racial classification** when it assigns an individual, a business, or another entity a “race” for purposes of assigning benefits or burdens.¹⁶ As described in another ACLU Legal Memorandum,¹⁷ the Supreme Court has held that the use of any racial classification by any level of government is subject to “strict scrutiny” review by courts to ensure that the use is permissible and does not overly burden equal protection rights guaranteed by the Constitution.¹⁸ Racial classifications “are constitutional only if they are narrowly tailored to further compelling governmental interests.”¹⁹

The Supreme Court has recognized several “compelling governmental interests” that may justify the government’s use of racial classifications, including remedying the effects of past or present racial discrimination,²⁰ promoting student body diversity in higher education,²¹ and advancing student body diversity in other contexts.²²

If the government’s use of a racial classification is found to have been adopted to further a compelling governmental interest, the action is permitted if it satisfies the requirements of “narrow tailoring.”²³

■ **Government officials may also make race-conscious decisions that promote equal opportunity and address racial inequality and discrimination.**

A **race-conscious action** seeks to prevent or address racial inequality and discrimination by considering the impact of policies or programs on racial minorities without classifying individuals, businesses, or other entities by race.²⁴ The equal protection provisions of the Constitution permit government officials to take race-conscious actions in a wider range of circumstances than those in which they may use racial classifications, which must satisfy the requirements of strict scrutiny.²⁵

For example, in the context of public schools, Justice Kennedy of the Supreme Court recognized that the “[e]xecutive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”²⁶

The Supreme Court's decision in *Ricci* does **not** alter the law governing what constitutes the government's use of a race-conscious action as opposed to a racial classification. Nor does it suggest that race-conscious actions must meet the rigorous strict-scrutiny standard to be permitted by the Constitution.

■ What is a race-conscious action as opposed to a racial classification?

Under the equal protection provisions of the Constitution, the government uses a racial classification when it assigns an individual, business, or other entity a "race" for purposes of assigning benefits or burdens.²⁷ For example, a school assignment plan that classifies students as "white" or "non-white" when allocating slots in oversubscribed high schools constitutes a government use of racial classifications that is subject to strict scrutiny.²⁸

In contrast, the government uses a race-conscious measure when it addresses a governmental interest related to race by adopting a general policy that does not classify individuals, businesses, or other entities by race. These actions "do not lead to different treatment based on a classification that tells each [individual] he or she is to be defined by race."²⁹

Race-conscious action is permissible under the Equal Protection Clause in a wider range of circumstances than the use of racial classifications because strict scrutiny does not apply.³⁰

■ Did the Supreme Court's decision in *Ricci* change what is considered a governmental racial classification or a race-conscious action under the equal protection provisions of the Constitution?

No. The majority opinion in *Ricci* clarified that rejecting a promotional exam based on its racially disparate results constitutes "race-based" action under Title VII.³¹ It did **not** change constitutional law clarifying the difference between the government's use of racial classifications and race-conscious measures. It also did **not** alter Supreme Court precedent establishing the scope of permissible uses of racial classifications under the Fifth and Fourteenth Amendments or precedent indicating that race-conscious actions are constitutional even if they meet a more lenient standard than the strict-scrutiny standard applicable to the use of racial classifications.

■ How can government take race-conscious actions to promote equal opportunity and racial equality, particularly with respect to the economic recovery?

The 2009 economic stimulus programs present an important chance to reverse recent setbacks and to remove persistent barriers to equality and opportunity.³² Executive and legislative branch officials may take actions to advance racial equality and promote opportunity for individuals of all racial backgrounds in administering these **and other** government programs. A few examples:

1) Government officials designing and implementing stimulus-funded programs are required to ensure that programs do not intentionally discriminate on the basis of race and may be required to prevent unintentional racial discrimination.

Title VI of the Civil Rights Act of 1964 prohibits intentional discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.³³ Most funding agencies have regulations implementing this law that also prohibit recipient practices that **have the effect** of discrimination on the basis of race, color, or national origin.³⁴ Recipients of federal stimulus dollars therefore **must** take actions to prevent intentional racial discrimination and **may be required** to prevent unintentional racial discrimination as well.

2) When designing a policy or program, officials can consider existing racial inequalities, the racial composition of those who have access to or would be excluded from the policy/program, and the impact of the policy/program on different racial groups, and may adopt the plan that best promotes equal opportunity and racial equality.³⁵

For example, in the context of education, school boards may promote equal educational opportunity by looking at the racial composition of students in schools, drawing school attendance zones in a certain manner, strategically selecting sites for new schools, allocating resources for special programs, and targeting the recruitment of students and faculty to promote diversity.³⁶

3) Government officials can track race and other statistics about those benefitted or burdened by a stimulus-funded program.³⁷ Tracking statistics can help ensure that stimulus funds are used to help those most impacted by the economic recession, including people of color, and leave no one racial or ethnic group behind.

1 Why Fairrecovery.org? An Uneven Economic Crisis, <http://www.fairrecovery.org/whyfairrecovery/communities.html> (last visited July 17, 2009).

2 *Ricci v. DeStefano*, No. 07-1428, slip op. (U.S. June 29, 2009).

3 This document is intended as general guidance only. It is not intended to and does not constitute specific legal advice to lawyers in their capacity representing clients, prospective clients or other individuals, nor is it intended to be and does not constitute specific legal advice to any other individuals. This document does not and is not intended to establish an attorney-client relationship. Prior to using this information to provide legal advice to any client, you should verify the information set forth herein, including the application of the information set forth herein to your client's particular circumstances and the applicability of the information set forth herein in the applicable jurisdiction. Individuals and groups seeking legal advice for themselves with respect to the matters referenced in this document should consult with counsel and should not rely on this document. This document is provided "as is" without warranty of any kind, and the American Civil Liberties Union assumes no liability for the use or interpretation of information set forth herein.

4 *Ricci v. DeStefano*, 554 F. Supp. 2d 142 (D. Conn. 2006), *aff'd*, 530 F.3d 87 (2d Cir. 2008), *rev'd* 129 S.Ct. 2658 (U.S. June 29, 2009).

5 Title VII's "disparate treatment" provision prohibits intentional acts of employment discrimination based on race, color, religion, sex, and national origin. 42 U.S.C. § 2000e-2(a)(1).

6 *Ricci*, slip op. at 26; see 42 U.S.C. § 2000e-2(k)(1)(A)(i) (prohibiting employment practices that have "a disparate impact on the basis of race, color, religion, sex, or national origin").

7 *Ricci*, slip op. at 25.

8 42 U.S.C. § 2000e-2(k)(1)(A)(i); *Ricci*, slip op. at 21 ("[B]y codifying the disparate-impact provision in 1991, Congress has expressly prohibited both [disparate-treatment and disparate-impact] types of discrimination. We must interpret the statute to give effect to both provisions where possible.").

9 See *Ricci*, slip op. at 23-24 ("The [strong-basis-in-evidence] standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination.").

10 *Ricci*, slip op. at 25.

11 *Ricci*, slip op. at 2; see 42 U.S.C. § 2000e *et seq.*

12 See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña* (*Adarand I*), 515 U.S. 200, 227 (1995)).

13 See, e.g., *Adarand I*, 515 U.S. 200 (applying equal protection analysis to a government contracting program); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (same); *Roth Development Corp. v. U.S. Dept. of Defense*, 262 F.3d 1306 (Fed. Cir. 2001) (same).

14 See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738 (2007) (applying equal protection analysis to a school desegregation plan); *Grutter*, 539 U.S. 306 (same for higher education institution's use of race in admissions).

15 See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (applying equal protection analysis to a school board policy extending preferential protection to minority employees against layoffs).

16 *Parents Involved*, 127 S.Ct. at 2751.

17 Nusrat Choudhury, Expanding Opportunity Through the American Recovery and Reinvestment Act of 2009—The Legal Landscape (May 4, 2009), http://4909e99d35cada63e7f757471b7243be73e53e14.gripelements.com/pdfs/expanding_opportunity_through_the_arra_of_2009_legal_memo_aclu_5.05.09.pdf.

18 *Adarand I*, 515 U.S. at 227.

19 *Grutter*, 539 U.S. at 326.

20 *Shaw v. Hunt*, 517 U.S. 902, 909 (1996) (citing *Croson*, 488 U.S. at 498-506). See also *Croson*, 488 U.S. at 491-92 (plurality opinion) ("[I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").

21 *Grutter*, 539 U.S. at 328.

22 *Parents Involved*, 127 S.Ct. at 2789 (by implication) (Kennedy, J. concurring); *id.* at 2823 (Breyer, J., dissenting).

23 *Adarand I*, 515 U.S. at 237. Narrow tailoring may be achieved if (1) the government entity considered race-neutral alternatives prior to adopting a program that uses racial classifications; (2) the program is more than a mere promotion of racial balancing; (3) the program does not require numerical quotas; (4) the program is not overinclusive because it does not presume discrimination against certain minority groups; and (5) if the program involves a set-aside plan, the plan is based on the number of qualified minorities in the area capable of performing the scope of work identified. *Croson*, 488 U.S. at 507-08.

24 *Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J., concurring).

25 *Id.*; *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion).

26 *Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J., concurring).

27 *Id.* at 2751.

28 *Id.* at 2790-91.

29 *Id.* at 2792.

30 See, e.g., *Bush v. Vera*, 517 U.S. at 958 (plurality opinion) (explaining that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race"). A majority of Justices uphold the view that certain race-conscious education policies are not subject to strict scrutiny. See *Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J., concurring); *id.* at 2819 (Breyer, J., dissenting) ("Apparently Justice Kennedy also agrees that strict scrutiny would not apply in respect to certain 'race-conscious' school board policies.").

31 *Ricci*, slip op. at 19-20.

32 For a detailed description of the various federally-funded components of the 2009 economic stimulus, please visit Economic Recovery Programs: What are they?, <http://www.fairrecovery.org/programs.html> (last visited July 9, 2009).

33 42 U.S.C. § 2000d *et seq.* "No person in the United States shall, on the ground of race, color, or national origin, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

34 U.S. Dep't of Justice Civil Rights Div., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, <http://www.usdoj.gov/crt/cor/coord/titlevi.php> (last visited July 17, 2009).

35 "In the administration of public schools by the state and local authorities, it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." *Parents Involved*, 127 S.Ct. at 2792 (Kennedy, J., concurring).

36 *Id.*

37 See *id.*