

In 2009, the Supreme Court decided [Ricci v. DeStefano](#). The Justices reversed Judge Sonia Sotomayor's indefensible ruling against the Frank Ricci and the other firefighters. But the Court stopped short of deciding whether New Haven's attempt to avoid liability for disparate impact violated the Equal Protection Clause. Justice Scalia concurred to explain the Court was merely postponing the inevitable question:

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.

Nearly two decades later, with a very different Supreme Court, this question is now primed for resolution.

Today the Office of Legal Counsel issued an [opinion](#) finding that the EEOC's Title VII guidelines are unconstitutional.

EEOC's existing interpretations, including the Uniform Guidelines on Employee Selection Procedures ("Guidelines"), embrace an unconstitutional reading of Title VII. Rather than treating disparate impact as an evidentiary mechanism to smoke out intentional discrimination—imposing liability only when disproportionate adverse effects give rise to a strong inference of intentional discrimination—EEOC's historic interpretations contemplate liability based on disproportionately adverse effects alone, without regard to an employer's likely intent. Because EEOC's historic approach divorces liability from circumstances giving rise to a strong inference that intentional discrimination occurred, it functions as a qualified racial-proportionality mandate and spurs employers to engage in race-based decisionmaking to avoid liability. That approach is unlawful and unconstitutional.

The opinion relies on *Allen v. Milligan*, which declared for the first time that our Constitution is "color-blind."

Three corrections to that approach are necessary "to resolve the tension between [disparate-impact] claims under [Title VII] and our color-blind Constitution." *Allen v. Milligan*, No. 25A1314, 2026 WL 1552756, at *1 (U.S. June 2, 2026) (per curiam).

As I [observed](#), this emergency docket opinion may become more significant than *Callais*, a theme that the [Wall Street Journal picked up](#). *Allen* made clear that *Callais* applies to the Equal Protection context. Indeed, the Opinion links *Callais* back to the Justice Alito's TJ dissent.

Even facially race-neutral actions, when motivated by the purpose of altering racial balance, constitute intentional discrimination against the members of the racial group who are balanced down. After all, "if race played a role in a decision made by a government

actor," or at the behest of a government actor, then race discrimination has occurred and "strict scrutiny applie[s]." *Louisiana v. Callais*, 146 S. Ct. 1131, 1146 (2026); see also *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 545 (2024) (Alito, J., dissenting from denial of certiorari).

This opinion is earth-shattering. The Department of Justice ruled that disparate-impact compels employers to engage in unconstitutional race discrimination.

Just as "the Federal Government is prohibited from discriminating on the basis of race," so too is it "prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race," unless those laws survive strict scrutiny. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (first citing *Bolling*, 347 U.S. at 500; and then citing *Buchanan v. Warley*, 245 U.S. 60, 78–82 (1917)). And just as it is unconstitutional for the federal government to "force[] States to engage in the very race-based discrimination that the Constitution forbids," *Callais*, 146 S. Ct. at 1142; see also *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995), so too it is unconstitutional for the federal government to coerce employers to adopt employment policies or make employment decisions motivated by race. Disparate-impact liability does not just raise constitutional doubt in occasional cases; unless narrowly circumscribed, it structurally compels the very racial discrimination that the Constitution forbids.

In the same way that *Callais* "updated" *Gingles*, this opinion calls on the Court to "update" *Griggs*:

Reading *Griggs* in context and together with the Supreme Court's more recent precedent requires "updat[ing] the framework" for disparate-impact liability "to ensure a constitutional reading and application of" Title VII. *Callais*, 146 S. Ct. at 1157, 1161 (updating the framework for claims under section 2 of the Voting Rights Act). As Justice Scalia suggested in *Ricci*, a properly tailored disparate-impact scheme might constitutionally operate as "an evidentiary tool" to "smoke out" practices that present a significant likelihood of intentional discrimination. 557 U.S. at 595 (Scalia, J., concurring); see also *City of Rome v. United States*, 446 U.S. 156, 177–78 (1980).

This is a similar approach to the one that the Supreme Court took in *Callais*, which held that section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, "imposes liability only when the circumstances give rise to a strong inference that intentional discrimination occurred."... Applying *Griggs*, *Wards Cove*, *Inclusive Communities*, and *Callais*, we identify three limiting principles on disparate-impact liability that prevent a constitutional collision under current Supreme Court precedent. We emphasize, as the Supreme Court has, that no single limiting principle is wholly sufficient; rather, each caveat is essential to avoid the conclusion

I suspect the EEOC will bring suit against firms that have made race-conscious decisions to avoid disparate impact suits (or more likely because they agree with separating people based on race). At that point, the constitutionality of disparate-impact is squarely teed up.

Kudos to Assistant Attorney General Elliot Gaiser and Deputy Assistant Attorney General Josh Craddock for putting forth this remarkable opinion. I also have to give credit to my Manhattan Institute colleague, Gail Heriot, who is cited throughout the opinion. Gail has been beating this sometimes-lonely drum for decades. And she has been right for decades.