The Evolving Strong-Basis-In-Evidence Standard

Herman N. (Rusty) Johnson, Jr.†

One of the many questions arising from the Supreme Court's decision in Ricci v. DeStefano *is the nature of the strong-basis-in-evidence standard used by the Court to rectify the perceived tension between Title VII's disparate treatment and disparate impact provisions. In this article, I demonstrate that the strong-basis-in-evidence standard comprises two related, but separate, legal paradigms. First, since its inception in the Equal Protection, affirmative action context, courts have treated the strong-basis-in-evidence standard as a burden of proof. However, the Supreme Court and the circuit courts have differed as to whether this burden of proof is a burden of production or a burden of persuasion. Based upon my legal analysis and economic models, I submit that the strong-basis-in-evidence standard lodges a burden of persuasion upon defendants.*

Second, I demonstrate that the Court's transfer of the strong-basis-in-evidence standard to the Title VII context in Ricci *spurred the evolution of the standard from a burden of persuasion to a standard of proof. Principally, the transfer imported the strong-basis-in-evidence standard from the realm of legislative facts in the Fourteenth Amendment, Equal Protection context to the realm of adjudicative facts in the Title VII context. Relying upon the application of probability analysis to adjudicative facts, I show that in the Title VII context the strong-basis-in-evidence standard is a standard of proof falling below the preponderance-of-the-evidence standard. I then demonstrate how this understanding of the strong-basis-*

† Assistant Professor of Law, Cumberland School of Law, Samford University. Juris Doctor/Master of International Affairs, Columbia University School of Law and School of International & Public Affairs, 1999; Bachelor of Arts, Economics, Duke University, 1991. I wish to thank Howard Walthall, Corky Strickland, LaJuana Davis, Wendy Green, and Charles Abernathy for their invaluable comments on my article. This work would not have been possible without the generous research stipend provided by my employer, Cumberland, and so I thank the school for its support of my endeavor. I appreciate the hard work of the Berkeley Journal of Employment and Labor Law editors and staff for their efforts to advance this article to publication. Last, but not least, I thank my spouse and best friend, Tamarra, for her patience, indulgence, edits, and insights as I drafted this article.

in-evidence standard would apply to the propriety of discarding the results of a test showing a disparate impact.

INTRODUCTION 349
I. *RICCI* AND THE STRONG-BASIS-IN-EVIDENCE STANDARD 351
A. Title VII's Disparate Treatment and Disparate Impact Prohibitions 351
B. The Analysis of *Ricci* 352
II. BURDENS AND STANDARDS OF PROOF: CO-EXISTENCE IN THE FIRST STRONG-BASIS-IN-EVIDENCE CASE 355
A. Burdens and Standards of Proof 355
B. *Wygant* and the Inception of the Strong-Basis-In-Evidence Standard 357
III. THE STRONG-BASIS-IN-EVIDENCE STANDARD INDUCES A BURDEN OF PERSUASION 360
A. Court Decisions Ruling that the Strong-Basis-In-Evidence Standard Occasions a Burden of Production 360
B. Court Decisions Ruling that the Strong-Basis-In-Evidence Standard Induces a Burden of Persuasion 363
C. The Strong-Basis-In-Evidence Standard Induces a Burden of Persuasion for Defendants 365
IV. STRONG-BASIS-IN-EVIDENCE IS A STANDARD OF PROOF THAT FALLS BELOW THE PREPONDERANCE OF THE EVIDENCE STANDARD 369
A. *Ricci* Transformed the Strong-Basis-In-Evidence Standard from an Inquiry Applied to Legislative Facts into an Inquiry Applied to Adjudicative Facts 370
B. The Strong-Basis-In-Evidence Standard is a Standard of Proof Falling Below the Preponderance-of-the-Evidence Standard 375
V. IMPLICATIONS OF THE STRONG BASIS-IN-EVIDENCE STANDARD FOR EXPERT EVIDENCE 379
VI. COURTS SHOULD LIMIT APPLICATION OF THE STRONG-BASIS-IN-EVIDENCE STANDARD 381
CONCLUSION 383

INTRODUCTION

In the concluding section of its opinion in *Ricci v. DeStefano,* the Supreme Court rendered this cryptic statement:

> [i]f, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-impact liability.[1]

One of the most pressing questions remaining in the wake of the Supreme Court's decision in *Ricci*[2] is how to define the "strong-basis-in-evidence" standard that the Court used to resolve the apparent collision between the disparate treatment and disparate impact provisions of Title VII of the Civil Rights Act of 1964.[3] The Court extracted the strong-basis-in-evidence standard from its Fourteenth Amendment, Equal Protection Clause jurisprudence—where it governed the use of race-conscious remedies—and imported it into the Title VII context. By doing so, the Court raised questions regarding the meaning of the standard both within the constitutional context and in the new, statutory context.

In this article, I argue that *Ricci* altered the meaning of the strong-basis-in-evidence standard both in the constitutional and statutory context. I will examine the character of the strong-basis-in-evidence standard as it existed before its extrapolation in *Ricci*, and its altered traits due to its invocation in the Title VII context. The dispute over the strong-basis-in-evidence standard primarily encompasses two characteristics. First, since its inception, courts have differed as to whether the strong-basis-in-evidence standard creates a burden of persuasion or a burden of production for public entities.[4] Most courts currently categorize the strong-basis-in-evidence standard as creating a burden of persuasion, and this conclusion is supported by economic models of burdens of proof.

As for the second characteristic, *Ricci* established that the strong-basis-in-evidence standard requires proof by less than a preponderance of the evidence. As acknowledged by some commentators, the strong-basis-in-evidence standard represents a new burden of persuasion in civil cases

---

1. Ricci v. DeStefano, 129 S. Ct. 2658, 2681 (2009).

2. *Id.* at 2665.

3. 42 U.S.C. § 2000e (2006).

4. *Compare* Contractors Ass'n of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 597 (3d Cir. 1996) (holding that the strong-basis-in-evidence standard entails a burden of production), *and* Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d 1513, 1522 (10th Cir. 1994) (same), *with* W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 990, 991 (9th Cir. 2005) (holding that the strong-basis-in-evidence standard is a burden of persuasion), *and* Johnson v. Bd. of Regents, 263 F.3d 1234, 1244 (11th Cir. 2001) (same).

involving *Ricci*-type, disparate impact issues.[5] I will demonstrate that the strong-basis-in-evidence standard should be interpreted as incurring a lesser burden than the preponderance-of-the-evidence standard. *Ricci* altered the character of a strong-basis-in-evidence dispute from a conflict over legislative facts to a conflict over adjudicative facts, and the application of probability theory to this genus of adjudicative facts places the strong-basis-in-evidence standard below the preponderance-of-the-evidence standard. I will also explore some of the implications this lesser burden would have on expert evidence in cases similar to *Ricci*, including the showing necessary to demonstrate a disparate impact upon a group and whether validity studies are required to satisfy the burden.

In Part I, I will examine the ruling in *Ricci* and some of the unresolved questions and lingering problems that remain since the Court's decision. In Part II, I will review the various concepts underlying the phrase "burden of proof," including the principal concepts of burden of persuasion and burden of production. Part III will set forth the interpretation of the strong-basis-in-evidence burden in Supreme Court and appellate cases involving challenges to race-conscious remedies. Review of these cases will demonstrate that the balance of precedent and authority situates the strong-basis-in-evidence standard as a burden of persuasion on public authorities. In Part IV, I will assess some of the implications of this standard for cases involving the purported conflict between disparate impact and disparate treatment. Initially, I will review the oft-discussed distinction between legislative facts and adjudicative facts and demonstrate that the Court's use of the strong-basis-in-evidence standard in the Title VII context involved adjudicative facts. As a result, I will show that the strong-basis-in-evidence standard, as a standard of proof, falls below the preponderance-of-the-evidence standard. In Part V, I will demonstrate how the standard should apply in practice to certain expert evidence issues. Finally, in Part VI, I will address whether the strong-basis-in-evidence standard may be used as a standard of proof in traditional disparate impact litigation and will refute the argument that *Ricci* established a new defense to Title VII disparate impact liability.[6]

---

5. *See, e.g.*, Christine Caulfield, *Firefighter Ruling Gives Foggy Answers at Best*, Law360 (June 30, 2009), http://www.law360.com/employment/articles/108825 ("In the law we have only two standards: clear and convincing, or by the preponderance of the evidence. This is a new standard, and trying to figure out what it means is problematic.").

6. *See, e.g.*, David. A Drachsler, *Assessing the Practical Repercussions of* Ricci (Jul. 27, 2009), AM. CONST. SOC'Y BLOG, http://www.acslaw.org/acsblog (noting that the "path to proof of job relatedness by definition provides a 'strong basis in evidence' that failure to use the results of such a test will expose [an employer] to disparate treatment liability"); Joseph W. Hammell, Ricci v. DeStefano*: Supreme Court Holds Employer Liable For Trying To Avoid Claims of Adverse-Impact Discrimination* (Jul. 10, 2009), DORSEY & WHITNEY L.L.P. http://www.dorsey.com/ricci_analysis/ ("[O]ther employers could likewise 'avoid disparate-impact liability' in any instance where, based on [*Ricci*'s strong-basis-in-evidence standard], they decline to alter their course of action notwithstanding a significant statistical

I.
RICCI AND THE STRONG-BASIS-IN-EVIDENCE STANDARD

The *Ricci* case bears critically upon the evolution of the strong-basis-in-evidence standard. To properly frame the prevailing issues, I will first review the disparate treatment and disparate impact provisions of Title VII, and the facts, ruling, and holdings of *Ricci*.

A. Title VII's Disparate Treatment and Disparate Impact Prohibitions

Title VII's disparate treatment prohibition precludes an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[7] To establish liability, the disparate treatment provision requires a plaintiff to prove that an employer intentionally discriminated when it undertook an action adverse to the plaintiff.[8]

Title VII's disparate impact prohibition—which addresses employment practices that render a disproportionately adverse effect on members of a protected group—evolved from the Supreme Court's interpretation of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*[9] Congress codified the disparate impact provisions in the Civil Rights Act of 1991, which defines a prima facie, adverse impact violation as a showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin."[10] If a plaintiff establishes a prima facie violation, an employer may sustain an affirmative defense by demonstrating that the challenged practice is "job related for the position in question and consistent with business necessity."[11] If the employer discharges its burden, a plaintiff may still prevail by demonstrating that the employer failed to adopt a less discriminatory alternative practice that met the employer's needs.[12]

The problem posed by *Ricci* resulted from a purported collision between Title VII's disparate treatment and disparate impact provisions in that an employer seeking to remedy a practice bearing a disparate impact

---

adverse-impact. This may provide employers with a powerful additional defense against disparate-impact claims. Ricci might make summary judgment on such claims more likely, or provide the basis for a helpful jury instruction if the case must go to trial.").

7. 42 U.S.C. § 2000e-2(a)(1).
8. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).
9. 401 U.S. 424 (1971).
10. 42 U.S.C. § 2000e-2(k)(1)(A)(i).
11. *Id.*
12. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); § 2000e-2(k)(1)(C).

would need to make a race conscious decision, which could be construed as disparate treatment. Specifically, the Supreme Court considered whether an employer's decision to jettison promotion test results because of the exams' disparate impact against African-American and Latino employees constituted disparate treatment against the white employees who performed well on the exam.[13]

B. *The Analysis of* Ricci

Pursuant to city charter, federal and state laws, and a contract with a firefighters' union, the City of New Haven, Connecticut, utilized written and oral examinations to promote firefighters into lieutenant and captain positions; the written exam accounted for sixty percent of an applicant's score and the oral exam accounted for forty percent.[14] When the City endeavored to fill vacancies in its lieutenant and captain ranks, it hired a consultant, Industrial Organizational Solutions, Inc. (IOC), to create the written and oral exams and administer them to the candidates.[15] To design the exam, IOC performed a job analysis of the knowledge, skills, and abilities of the pertinent positions, which included interviewing firefighters occupying those positions; riding with and observing firefighters; administering questionnaires to firefighters; compiling sources of firefighting materials and manuals; and convening out-of-state assessors to administer the exams.[16]

Of the seventy-seven candidates who took the lieutenant examination, thirty-four passed, including twenty-five of forty-three white candidates, nine of nineteen black candidates, and three of fifteen Hispanic candidates.[17] The City selected the top ten scorers to fill vacancies in the lieutenant position, all of whom were white applicants.[18] Of the forty-one candidates who took the captain examination, twenty-two passed, including sixteen of twenty-five white candidates, three of eight black candidates, and three of eight Hispanic candidates.[19] The City selected nine candidates for promotion to captain, seven white candidates and two Hispanic candidates.[20]

Due to a concern over disparate impact liability for disproportionately excluding minority candidates from promotion to the officer positions, the City's Civil Service Board declined to certify the results, and thus the City

13. Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009).
14. *Id.* at 2665.
15. *Id.*
16. *Id.* at 2665-66.
17. *Id.* at 2666.
18. *Id.*
19. *Id.*
20. *Id.*

did not promote any candidates to the vacant lieutenant and captain positions.[21] Citing the refusal to certify the exam results, seventeen white firefighters and one Hispanic firefighter sued the City and several individual defendants for intentional race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VII.[22] The district court granted summary judgment for the defendants, finding that their "motivation to avoid making promotions based on a test with a racially disparate impact . . . does not, as a matter of law, constitute discriminatory intent' under Title VII," and their actions did not result from racial animus in contravention of the Fourteenth Amendment's Equal Protection Clause.[23] The Second Circuit affirmed the district court's ruling.[24]

On appeal, a five to four majority of the Supreme Court reversed the lower courts' ruling. Eschewing the constitutional issues, Justice Kennedy, writing for the Court, based the reversal on Title VII. The Court ruled that absent a justification, the City would be liable for intentional discrimination because it rejected the test results due to the race of the higher scoring candidates.[25] In fashioning a standard under which the city's justification for rejecting the test results would be evaluated, the Court rejected the plaintiffs' argument that employers have to prove an actual violation of Title VII's disparate impact provisions to justify race-conscious action, and it likewise rejected the City's entreaty to employ a good-faith standard as justification for the race-conscious action of avoiding disparate impact liability.[26]

Rather, the Court relied upon the constitutional framework for equal protection challenges to affirmative action programs in fashioning a justification.[27] In this framework, courts subject affirmative action programs to a strict scrutiny analysis, whereby government initiatives that dispense benefits on the basis of race or ethnicity must be "narrowly tailored measures that further compelling government interests."[28] Demonstrating a 'compelling government interest' requires a showing of a "strong basis in evidence" that an affirmative action program is needed to remedy prior governmental discrimination against the minority beneficiaries of the program.[29] Echoing prior determinations that the strong-basis-in-evidence standard addresses the tension between eliminating discrimination and a

21. *Id.* at 2666-71.
22. *Id.* at 2671.
23. *Id.* at 2671-72.
24. *Id.* at 2672.
25. *Id.* at 2673.
26. *Id.* at 2674-75.
27. *Id.* at 2675.
28. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
29. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 277 (1986).

governmental race-conscious remedy designed to effect the elimination, the Court found that the standard serves the same interests in resolving a conflict between Title VII's disparate treatment and disparate impact provisions by "allowing violations of one in the name of compliance with the other only in certain, narrow circumstances."[30] Therefore, to avoid disparate treatment liability the Court held that the City must demonstrate by a strong basis in evidence that it would have been subject to disparate impact liability if it had certified the test results.[31]

Applying the strong-basis-in-evidence standard to the facts of *Ricci*, the Court ruled that the City possessed strong evidence regarding a violation of the first prong of the disparate impact standard: the challenged tests disproportionately affected black candidates pursuant to the Equal Employment Opportunity Commission's eighty percent standard.[32] However, the Court held that the City did not have strong evidence that the tests were not job-related and consistent with business necessity, or that there existed alternative selection practices with less adverse impact.[33]

The implications of the Supreme Court's *Ricci* rulings range far and wide for Title VII litigation. The focus of this article, however, is *Ricci's* impact on the heretofore unexplored definition of the strong-basis-in-evidence standard.[34] My endeavor seeks to ascertain which party bears the

30. *Ricci*, 129 S. Ct. at 2675-76.

31. *Id.* at 2676-77.

32. *Id.* at 2678-79. Courts may rely upon the "four-fifths" or "eighty percent" rule of the E.E.O.C.—which "require[s] a showing that [a] protected group is selected at less than four-fifths or 80 percent of the rate achieved by the highest scoring group"—to ascertain the impact of an employment selection practice. *See, e.g.*, Bouman v. Block, 940 F.2d 1211, 1225 (9th Cir. 1991) (citing 28 C.F.R. § 50.14 at § 4 (d) (1977)).

33. *Ricci*, 129 S. Ct. at 2678-81.

34. Scholarly exploration of the strong-basis-in-evidence standard in the constitutional context is sparse. One comment explored the showing necessary to satisfy the standard; it concluded that the standard requires a demonstration that past discrimination links sufficiently to present effects in a particular context, such that the imposition of race-conscious relief is warranted. *See* Patricia L. Donze, Comment, *The Supreme Court's Denial of Certiorari in Dallas Fire Fighters Leaves Unsettled the Standard for Compelling Remedial Interests*, 50 CASE W. RES. L. REV. 759, 785 (2000). Another comment sought to establish the appropriate standard of appellate review for strong-basis-in-evidence determinations. *See* Nicki Herbert, Comment, *Appellate Review of a "Strong Basis in Evidence" in Public Contracting Cases*, 77 U. COLO. L. REV. 193 (2006).

Other authors have generally addressed the standard in the Title VII context, without engaging in a systematic review of its traits. *See, e.g.*, Barry Goldstein & Patrick O. Patterson, Ricci v. DeStefano: *Does It Herald an "Evil Day," or Does It Lack "Staying Power"?*, 40 U. MEM. L. REV. 705, 767-68 (2010) (remarking that the *Ricci* Court did not explicitly set forth the amount of evidence required to satisfy the strong-basis-in-evidence standard, and that one may review Fourteenth Amendment affirmative action decisions for a reasonable interpretation); Lynda L. Arakawa & Michele Park Sonen, Note, *Caught In the Backdraft: The Implications of* Ricci v. DeStefano *on Voluntary Compliance and Title VII*, 32 U. HAW. L. REV. 463, 479-80 (2010) (concluding that employers must engage in "the full disparate impact analysis" to meet the strong-basis-in-evidence justification); Roberto L. Corrado, Ricci*'s Dicta: Signaling a New Standard for Affirmative Action Under Title VII?*, 46 WAKE FOREST L. REV. 241, 255 (2011) (finding that a "'strong basis in evidence' means an

burden of persuasion on the strong-basis-in-evidence evidentiary showing and to what degree of evidentiary proof the showing must be made. As I will explain, the character of the strong-basis-in-evidence standard may be elucidated by two aspects: whether the standard induces a burden of production or a burden of persuasion for entities subject to the standard, and second, whether it is a standard of proof, and if so, where does it fall on the standard of proof continuum? Sorting out the burden occasioned by the strong-basis-in-evidence standard will provide valuable guidance as to the level of evidence requisite for such claims post-*Ricci*.

II.
BURDENS AND STANDARDS OF PROOF: CO-EXISTENCE IN THE FIRST STRONG-BASIS-IN-EVIDENCE CASE

A. Burdens and Standards of Proof

The first conflict regarding the strong-basis-in-evidence standard surfaces in the distinction between a burden of persuasion and a burden of production. As Professor Thayer stated 120 years ago, the phrase 'burden of proof' delineates two conceptions: an identification of the duty to establish "a proposition as against all counter-argument or evidence," and an indication of "the duty of bringing forward argument or evidence in support of a proposition."[35] The former duty represents a party's burden of persuasion, whereas the latter represents a burden of production. The party holding the burden of persuasion on an issue in a civil case typically must carry his or her case "beyond the point of an equilibrium of proof,"[36] whereas the party holding the burden of production stakes a duty of going forward beyond an opposing party's demonstration of a prima facie case or of a presumption.[37] Alternatively, the burden of persuasion may be described as "the degree to which the jury (or other fact finder) must be persuaded of a factual proposition if it is to find for a given party on the issue of whether that proposition is true," and the burden of production may be defined as the obligation to "introduce enough evidence [so] that a reasonable jury could find that the burden of persuasion has been met."[38]

---

employer finding of potential disparate impact *liability*, as opposed to a mere *prima facie case*") (emphasis in original); Nancy L. Zisk, *Failing the Test: How* Ricci v. DeStefano *Failed to Clarify Disparate Impact and Disparate Treatment Law*, 34 HAMLINE L. REV. 27, 50 (2011) (remarking that the "standard remains[] without further definition from the Court or refinement by Congress") (citation omitted).

35. James B. Thayer, *The Burden of Proof*, 4 HARV. L. REV. 45, 48 (1890).

36. *Id.* at 58.

37. *Id.* at 59-60.

38. RICHARD D. FRIEDMAN, THE ELEMENTS OF EVIDENCE 22 (1991).

The party with the burden of persuasion in a case possesses the ultimate burden to convince the fact finder about its propositions, that is, the putative causes of action or affirmative defenses lodged by the party.[39] The party with the burden of persuasion on an issue usually bears the burden of production on that matter.[40] Parties design their litigation strategies based upon who has the initial burden of proof on a particular issue.[41] If the plaintiff has the burden of proof, the plaintiff will present evidence if and only if an event occurred.[42] The defendant does not have to present any evidence if the plaintiff fails to satisfy its burden.[43] An analogous strategy ensues if the defendant has the burden.[44] The party with the burden will present evidence if and only if evidence supports its position, while the other party refrains from presenting evidence.[45] Nevertheless, the party with the burden of persuasion on a particular issue possesses a distinct disadvantage: that party must ultimately prove that the issue at stake should be decided in its favor.[46]

Most importantly, satisfying a burden of production is less onerous than satisfying a burden of persuasion.[47] The burden of production questions whether the burdened party has sufficient evidence to proceed to trial on a claim or defense, and a party who has carried such a burden is commonly said to have established a prima facie case.[48] Judges determine whether a party has carried a burden of production as a matter of law.[49] Contrarily, a party satisfies a burden of persuasion by convincing the trier of fact (whether judge or jury) that the weight of the evidence warrants a verdict in the party's favor.[50] Thus, the burden of persuasion represents a question of fact for the trier to adjudicate. Conceptually, the burden of production only queries whether a reasonable juror could find—not will find—that the burdened party satisfies a burden of persuasion.[51] That is, the evidentiary showing that warrants success at trial on the weight of the

39. *See* Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1502 (1999).

40. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE: DOCTRINE AND PRACTICE § 3.1 (Aspen Law & Business 1995).

41. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 417 (1997).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Thayer, *supra* note 35, at 58.

47. *See* FRIEDMAN, *supra* note 38, at 22-23; MUELLER & KIRKPATRICK, *supra* note 49, § 3.1.

48. *Id.* at § 3.2.

49. *Id.* § 3.3.

50. *See id.*; *see also* FRIEDMAN, *supra* note 38, at 30.

51. *See* FRIEDMAN, *supra* note 47, at 22-23.

evidence surpasses the evidentiary showing that constitutes sufficient evidence to proceed to trial.[52]

However, burdens of production and persuasion—both of which are types of burdens of proof—differ from standards of proof. The risk of uncertainty regarding fact questions in litigation compels the establishment of "standards of proof for factual findings [that] determine[ ] the consequences of a party's failure to satisfy the controlling proof standard."[53] Fact finders assess the probative value of a particular body of evidence vis-à-vis the proof standard controlling their inquiry. As presumed by most commentators, "the factfinder . . . dutifully tries, within human limits, to compare the probability of the burdened party's version of fact to the given standard of proof."[54] As a concept encompassed within the Due Process Clause of the Fourteenth Amendment, the standard of proof exists to inform the fact finder as to "the degree of confidence our society thinks [it] should have in the correctness of factual conclusions for a particular type of adjudication."[55] The Supreme Court has delineated three standards, or levels, of proof: the minimum level, preponderance of the evidence, for typical civil cases; the intermediate level, clear and convincing evidence, for certain civil cases such as those involving fraud or civil commitment for mental illness; and the high level for criminal cases, proof beyond a reasonable doubt.[56]

The burdens of proof differ conceptually from the standards of proof.[57] The standard of proof equates to a "level of confidence" rule, i.e., "how certain [a] court must be of a fact to accept it."[58] The burden of proof determines who must produce evidence sufficient to convince a court of its position.[59] The strong-basis-in-evidence standard contains both concepts within its purview, one that has been debated since the inception of the standard, and one that was dormant until *Ricci* catalyzed its evolution.

B. Wygant *and the Inception of the Strong-Basis-In-Evidence Standard*

The strong-basis-in-evidence standard originated in a case involving a challenge to a race-conscious remedy. The Constitution's mandate that

---

52. *Id.*

53. Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 79 (2008).

54. Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 470 (2009).

55. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970)).

56. *Id.* at 423-24.

57. *See* Dominique Demougin & Claude Fluet, *Rules of Proof, Courts, and Incentives*, 39 RAND J. OF ECON., 20, 20 (2008) ("In civil litigation, courts must decide on the basis of a preponderance of evidence, a *standard of proof* requirement . . . . There are also situations where the law imposes on courts the *burden of proof* assignment.").

58. Hay & Spier, *supra* note 41, at 414.

59. *Id.* at 415.

government actors provide individuals equal protection under the law precludes such entities from taking unjustified action because of an individual's race.[60] When a public entity—such as a state legislature, a federal department, or a school board—employs an affirmative action program to benefit a particular racial group, for example, African-Americans, it essentially classifies the beneficiaries of the program by race. In 1995, the Supreme Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[61] The strict scrutiny standard requires that such classifications be "narrowly tailored measures that further compelling governmental interests."[62] As the Court acknowledged in the *Ricci* opinion, the strong-basis-in-evidence standard originated in the context of race-conscious remedy (i.e., affirmative action) cases.[63]

In *Wygant v. Jackson Board of Education*, the Court considered a challenge by non-minority schoolteachers against a provision in a collective bargaining agreement that gave preferential treatment to minority teachers during staff reductions.[64] In finding that the preferential treatment for minority teachers violated the Equal Protection Clause, a plurality of the Court ruled that a public entity that uses racial classifications for benign purposes could not satisfy the compelling interest prong of the strict scrutiny inquiry by relying upon a showing of general, societal discrimination.[65] Rather, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that [race conscious] remedial action was necessary," typically via a showing of prior discrimination, or passive participation in such discrimination, by the governmental actor.[66] The Court proceeded to declare that the plaintiffs retain the "ultimate burden" on the constitutional issue; however, the Court also found that an appellate court cannot ascertain the propriety of a race-conscious remedy unless the trial court assesses the strong-basis-in-evidence question.[67]

---

60. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Although the Fourteenth Amendment does not apply to the federal government, the Supreme Court has interpreted the Fifth Amendment's due process clause—which does apply to the federal government—as incorporating the same equal protection principles embodied in the Fourteenth Amendment. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).

61. *Id.* at 227.

62. *Id.*

63. 129 S. Ct. 2658, 2675 (2009).

64. 476 U.S. 267, 269-72 (1986).

65. *Id.*

66. *Id.* at 274, 277.

67. *Id.* at 277-78. In a notable concurrence, Justice O'Connor rejected a rule requiring government employers to prove that they illegally discriminated before adopting affirmative action programs. *Id.* at 290 (O'Connor, J., concurring). To the contrary, Justice O'Connor stated that a "public

The *Wygant* decision implicitly conceptualized the strong-basis-in-evidence standard as a burden of production. Justice Powell's plurality opinion stated that public entities "must ensure" that they have "convincing evidence that remedial action is warranted" before undertaking race-conscious initiatives,[68] and the plurality reiterated that they "must have sufficient evidence to justify the conclusion that there has been prior discrimination."[69] The plurality also held that the "ultimate burden remains with the employees [challenging race-conscious initiatives] to demonstrate the unconstitutionality of an affirmative-action program."[70] Justice O'Connor re-emphasized this viewpoint in her concurrence.[71] This holding indicated that the Court initially intended the strong-basis-in-evidence standard to induce a burden of production, not a burden of persuasion, for those entities who sought to maintain race-conscious remedies.

Regarding the standard of proof, Justice Powell's plurality opinion held that a showing of societal discrimination "is insufficient and over expansive" as "the basis for imposing discriminatory legal remedies" against "innocent people."[72] That is, the plurality declared that a showing of general, societal discrimination did not satisfy the level of proof required to prove the compelling necessity for a race-conscious remedy. Furthermore, in responding to the dissenting opinion in *Wygant*, Justice Powell declared that the split within the Court concerned not whether sufficient facts were on record before the Court, but whether the employer had demonstrated the "necessary factual predicate" of prior discrimination that would justify a race-conscious remedy.[73] Further, Justice Powell stated that public entities could not "unilaterally insulate themselves" from the question "by conceding that they have discriminated in the past."[74] However, the Court did not promulgate a standard to evaluate how much evidence suffices to satisfy this "necessary factual predicate;" it simply declared the need for 'strong evidence.'[75]

---

employer must have a firm basis for determining that affirmative action is warranted," which it may depict by demonstrable statistical evidence of disparities in selection rates. *Id.* at 292. She declared that in challenges to such affirmative action programs, the plaintiffs bear the ultimate burden of proving a violation of their constitutional rights. *Id.* at 292-93. The allocation of proof in such challenges reveals that putative plaintiffs may easily demonstrate intentional adoption of race-based classifications; yet after the public entity introduces evidence sufficient to demonstrate a firm basis for the race-conscious remedy, the plaintiffs must "prove their case" and "continue to bear the ultimate burden" of persuasion on the constitutional issues. *Id.* at 293.

68. *Id.*

69. *Id.*

70. *Id.* at 277-78 (plurality opinion).

71. *Id.* at 290, 292-93 (O'Connor, J., concurring).

72. *Id.* at 276 (plurality opinion).

73. *Id.* at 278 n.5.

74. *Id.*

75. *Id.*

Thus, the inception of the strong-basis-in-evidence standard in *Wygant* exhibited two conflicts: (1) whether the strong-basis-in-evidence standard induces a burden of persuasion or a burden of production; and (2) the amount of evidence that suffices to meet the strong-basis-in-evidence standard.

III.
THE STRONG-BASIS-IN-EVIDENCE STANDARD INDUCES A BURDEN OF PERSUASION

The strong-basis-in-evidence standard both induces a burden of proof, and constitutes a standard of proof. This section of the article will examine the divergent case law characterizing the strong-basis-in-evidence standard alternately as a burden of production and a burden of persuasion, and will demonstrate that the standard is a burden of persuasion.

A. Court Decisions Ruling that the Strong-Basis-In Evidence Standard Occasions a Burden of Production

The Supreme Court and courts of appeal cases reviewing the strong-basis-in-evidence standard in affirmative action and other race-conscious remedy cases reveal that there is no consensus on whether the strong-basis in evidence standard induces a burden of production or persuasion.

Three years after *Wygant*, a Supreme Court majority employed the strong-basis-in-evidence standard to strike down an affirmative action program for minority contractors in Richmond, Virginia.[76] Justice O'Connor, writing for the Court, definitively ruled that courts must subject benign, race-based classifications to strict scrutiny under the Equal Protection Clause, and thus there must exist a "'strong basis in evidence that remedial action was necessary'" to combat the effects of past discrimination.[77] The Court implied that such an evidentiary showing must "approach[] a prima facie case of a constitutional or statutory violation," and noted that statistical evidence which would "'constitute prima facie proof of a pattern or practice of discrimination' under Title VII" or raises "an inference of discriminatory exclusion" would suffice.[78] Although Justice O'Connor's majority opinion indicated the quantum of evidence required to satisfy the strong-basis-in-evidence standard, the opinion did not delineate the nature of this burden (i.e., a burden of persuasion or burden of production) or which party bears the ultimate burden on the issue.

---

76. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

77. *Id.* at 500 (quoting Wygant, 476 U.S. at 277).

78. *Id.* (citations omitted) (noting that statistical evidence must show enough disparity to warrant an inference of discrimination). After finding that the City of Richmond did not provide a strong basis in evidence that remedial action was necessary, the Court immediately remarked that "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation[.]" *Id.*

Subsequent to the Court's rulings in *Croson*, several circuit courts either directly or indirectly declared that the strong-basis-in-evidence standard induces a burden of production. These courts principally concluded that the defendants bore a burden of production on the strong-basis-in-evidence standard and the other components of the strict scrutiny inquiry, whereas the plaintiffs challenging an affirmative action program or race conscious remedy bore the ultimate burden of persuasion on the Equal Protection issue. As a result, those public entity-defendants enjoyed a burden of proof that commanded a lesser evidentiary showing than that under a burden of persuasion.

Thus, in *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*,[79] the Third Circuit declared that the plaintiffs challenging a race-conscious remedy must show "that there is no 'strong basis in evidence' for the conclusions that race-based discrimination existed and that the remedy chosen was necessary."[80] The court asserted that the public entity in such affirmative action challenges bears a "burden of coming forward with evidence providing a firm basis for inferring" the existence of past discrimination—a burden which the court described as a "burden of production"—and that the plaintiffs challenging the race-conscious remedy retain the burden of persuasion on the constitutional issue. [81] However, the Third Circuit qualified the burden of persuasion levied upon affirmative action challengers. The court held that where a plaintiff challenges an affirmative action program intended to remedy past discrimination, the municipality must produce "facts alleged to justify its conclusions," and "the plaintiff has the burden of persuading the court that those facts are not accurate;" however, the court also noted that "the burden of persuasion in the traditional sense plays no role in the court's resolution of [the] ultimate [legal] issue" whether a strong basis in evidence exists.[82] By situating the strong-basis-in-evidence standard as an issue of law, the Third Circuit appears to qualify the plaintiffs' burden of persuasion. Nonetheless, the public entity still only bears a burden of 'coming forward with evidence,' which, of course, is a burden of production.[83]

79. 91 F.3d 586 (3d Cir. 1996).

80. *Id.* at 597.

81. *Id.*

82. *Id.* at 597-98.

83. In an earlier case involving the same dispute, the Third Circuit stated that the strong-basis-in-evidence standard is not an affirmative defense burden for public entities; yet when applying intermediate scrutiny to affirmative action provisions in favor of women, the court clearly stated that public entities bear the burden of presenting evidence supporting its gender preference. Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1010 (3d Cir. 1993). In addition, the court stated that the quantum of proof necessary to satisfy the strong-basis-in-evidence standard represents that evidence which raises an "inference of discrimination." *Id.* at 1006, 1008.

The Tenth Circuit similarly established that the strong-basis-in-evidence standard requires only a burden of production. In *Concrete Works of Colorado, Inc. v. City and County of Denver*,[84] the Tenth Circuit declared that the government must demonstrate a strong basis in evidence that race-conscious, remedial action is necessary, and this inquiry constitutes a question of law.[85] However, once the government meets its burden, the plaintiff bears the burden of rebutting the government's showing.[86] Thus, the ultimate burden remains with a plaintiff at all times to demonstrate that the race-conscious provision is unconstitutional.[87]

Likewise, the Sixth Circuit held in *Aiken v. City of Memphis*[88] that the government bears a burden of production on the strong-basis-in-evidence issue, whereas the plaintiff challenging the race-conscious relief bears the ultimate burden of persuasion on the constitutional question.[89] The public entity does not need to demonstrate a "*formal* finding of discrimination" to satisfy its burden; "strong" or "convincing" evidence suffices.[90] A prima facie case presenting appropriate statistics indicating discrimination suffices to provide a strong basis in evidence that race-conscious, remedial relief is warranted.[91] As the next section will demonstrate, however, a subsequent panel of the Sixth Circuit declared that the strong-basis-in-evidence standard requires a burden of persuasion.

The remaining circuits held that the strong-basis-in-evidence standard induces a burden-of-production without much discussion. The First Circuit held that the defendant's 'compelling interest' in utilizing an affirmative action program must have a strong basis in evidence to support the justification, and that the "Supreme Court has made clear that [this standard yokes] the government [with] a burden of production to justify a racial preference."[92] The Eighth Circuit also ruled, after the government had carried its strong-basis-in-evidence burden, that plaintiffs challenging an affirmative action program failed to satisfy their burden of persuading the court that the program violated the Equal Protection Clause.[93] This holding reflects that the strong-basis-in-evidence standard was a burden of

84. 321 F.3d 950 (10th Cir. 2003).

85. *Id.* at 958.

86. *Id.* at 959.

87. *Id.*

88. 37 F.3d 1155 (6th Cir. 1994).

89. *Id.* at 1162.

90. *Id.* at 1162-63 (citations omitted) (emphasis in original).

91. *Id.* at 1163.

92. Cotter v. City of Boston, 323 F.3d 160, 168 n.6 (1st Cir. 2003) (citing Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

93. Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 970 (8th Cir. 2003). The court stated that "[i]n addition to identifying a compelling governmental interest, the government must demonstrate a 'strong basis in the evidence' supporting its conclusion that race-based remedial action was necessary to further that interest." *Id.* at 969.

production. Finally, the Federal Circuit held in an affirmative action challenge that "[a]lthough the party challenging a statute bears the ultimate burden of persuading the court that it is unconstitutional, the government first bears a burden to produce strong evidence supporting the legislature's decision to employ race-conscious action."[94]

B. Court Decisions Ruling that the Strong-Basis-In- Evidence Standard Induces a Burden of Persuasion

Other circuits firmly characterized the strong-basis-in-evidence standard as a burden falling upon public entities in cases challenging racial classifications, and those characterizations resemble a burden of persuasion. Most notably, in *Johnson v. California*, a case challenging the State of California's policy of segregating prison inmates by race during initial evaluation, the Supreme Court stated that governments bear the "burden of proving" the components of the strict scrutiny analysis, i.e., that racial classifications represent narrowly tailored measures to further compelling interests.[95] In response to a dissenting opinion's suggestion that deference should be accorded to the government in cases regarding incarceration, the majority reiterated that the Court's equal protection jurisprudence places the "burden on state actors to demonstrate that their race-based policies are justified."[96] Although the Court does not specifically mention the strong-basis-in-evidence standard, the fact that a strong-basis-in-evidence is a necessary part of the state's case implies that it is included in the Court's holding. Likewise, in the context of equal protection challenges to race-conscious districting, the Supreme Court has declared that plaintiffs in such actions need only prove a race-based motive for drawing district lines, yet the public entity "must" have a strong basis in evidence underlying its compelling interest to draw the lines pursuant to racial classifications.[97] In the educational context public schools "must demonstrate that the use of individual racial classifications" serve a compelling interest, without any mention of a concomitant burden upon the challengers to such race conscious diversity programs.[98] While the language in the foregoing cases

94. Rothe Dev. Corp. v. Dep't of Def. (*Rothe VII*), 545 F.3d 1023, 1036 (Fed. Cir. 2008). The court's ruling echoes its declaration in an earlier disposition of the dispute, where it ruled that the government's strong-basis-in-evidence burden constitutes a "burden to produce evidence," yet a court assesses a plaintiff's ultimate burden of persuasion on the factors of the strict scrutiny inquiry. Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1317 (Fed. Cir. 2001).

95. 543 U.S. 499, 505 (2005). Although in this case the Court exhibits Thayer's critique, *supra* note 35, at 48-49, that courts do not clearly delineate the type of burden occasioned by use of the phrase "burden of proof," it should be clear from the context of *Johnson* that the Court ascribes a burden of persuasion for the public entity.

96. *Johnson*, 543 U.S. at 506 n.1.

97. Shaw v. Hunt, 517 U.S. 899, 905, 908 n.4, 909 (1996).

98. Parents Involved In Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

may be unclear, they at least imply that the strong-basis-in-evidence standard has evolved into a burden of persuasion.[99]

Several circuits have also placed the burden of persuasion on public entities to justify the use of race-conscious remedies. The Second Circuit remarked that a public entity's use of express racial classifications shifts the burden of proof to the government to prove the components of the strict scrutiny analysis.[100] The Fourth Circuit declared that the proponent of a race-conscious remedy "must demonstrate" a strong basis in evidence for the necessity of the remedy,[101] and because courts "bear an especial obligation to scrutinize the asserted bases for race-conscious relief" public entities "must specify the racial discrimination" that is targeted by an affirmative plan.[102]

In the Fifth Circuit, the court has ruled that public entities "must justify" the use of race-conscious remedies by showing a strong basis in evidence of past discrimination and the necessity for remedial action.[103] Recognizing the sparse guidance offered by the Supreme Court as to the quantum of evidence necessary to satisfy the standard, the Fifth Circuit juxtaposed the strong evidence requirement against a need for governments to prove the existence of past discrimination to justify the use of race-conscious remedies.[104] The Fifth Circuit had previously invoked *Wygant* for the proposition that the ultimate burden in challenges to race-conscious remedies remain with plaintiffs,[105] yet the court acknowledged that its previous declarations may have needed clarification.[106]

The Sixth Circuit altered its interpretation of the standard by holding that "the state bears the burden of demonstrating a 'strong basis in evidence for its conclusion'" that past discrimination necessitated a race-conscious remedy.[107] As a result of this burden, the court held that "governments must 'identify discrimination with some specificity before they may use race-conscious relief'" and that "explicit 'findings of a constitutional or statutory violation must be made.'"[108] The Seventh Circuit mirrors the Sixth Circuit's requirement for a "finding[] of a constitutional or statutory

99. *See, e.g.*, *Rothe VII*, 545 F.3d at 1036.

100. Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 204-05 (2d Cir. 2006).

101. Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994).

102. Md. Troopers Ass'n, Inc. v. Evans, 993 F.2d 1072, 1076 (4th Cir. 1993) (citations omitted).

103. Dean v. City of Shreveport, 438 F.3d 448, 454, 455 (5th Cir. 2006).

104. *Id.* at 455.

105. Edwards v. City of Houston, 37 F.3d 1097, 1113 (5th Cir. 1994) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986)).

106. *Dean*, 438 F.3d at 455.

107. Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 735 (6th Cir. 2000) (citations omitted).

108. *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497, 504 (1989)).

violation" by declaring that preferential treatment does not violate the Equal Protection Clause if it remedies "intentional discrimination" by a public entity.[109]

The Ninth Circuit unequivocally maintains that the "'burden of justifying different treatment by ethnicity or sex is always on the government,'" and that the government discharges this burden by demonstrating a strong-basis-in-evidence.[110] This "burden of justification is demanding and it rests entirely on the state."[111] Likewise, the Eleventh Circuit found that the proponent of a racial classification "bears the burden of proving" by a strong basis in evidence that its consideration of race serves a compelling interest, and this burden is "substantial."[112] The strong basis in evidence standard requires evidence approaching a prima facie case of a constitutional or statutory violation, which includes a prima facie proof of a pattern and practice discrimination case under Title VII.[113] Finally, the District of Columbia Circuit similarly describes the strong basis in evidence requirement as "evidence at least approaching a prima facie case of racial discrimination."[114]

C. *The Strong-Basis-In-Evidence Standard Induces a Burden of Persuasion for Defendants*

The Supreme Court precedent and balance of authority demonstrate that the strong-basis-in-evidence standard is a burden of persuasion, rather than a burden of production. Most critically, the Supreme Court's decision in *Johnson v. California* clearly placed the burden of proving the strict scrutiny components on the government actor, and the Court did not refer to an 'ultimate burden' or any corresponding burden for the plaintiff in the decision.[115] That is, the Court sanctioned the strict scrutiny analysis in *Johnson* and did not declare that the plaintiff bore a burden of persuasion on his Equal Protection challenge.[116] To the contrary, the Court heaped the burden on the public entity.[117] Although some Supreme Court decisions prior to *Johnson* placed the 'ultimate burden of persuasion' on the plaintiffs challenging a public entity's race-conscious remedial relief,[118] and indeed

109. Builders Ass'n of Greater Chi. v. Cnty. of Cook, 256 F.3d 642, 643-44 (7th Cir. 2001).

110. W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 990, 991 (9th Cir. 2005) (quoting Monterrey Mech. Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997)).

111. Monterrey Mech. Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997) (citation omitted).

112. Johnson v. Bd. of Regents, 263 F.3d 1234, 1244, 1250 (11th Cir. 2001).

113. Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1553 (11th Cir. 1994).

114. O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992).

115. 543 U.S. at 505, 506 n.1.

116. *Id.*

117. *Id.*

118. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986).

some post-*Johnson* appellate opinions characterize the strong-basis-in-evidence standard as inducing a burden of production,[119] present-day Supreme Court jurisprudence situates the strict scrutiny inquiry as warranting a burden of persuasion for public entities, and this burden of persuasion may be met by a strong-basis-in-evidence for the compelling interest prong.

Further support for this conclusion rests upon the Supreme Court's decision in *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Greenwich Collieries*.[120] In *Greenwich Collieries*, the Court had to construe the meaning of the terms "burden of proof" under the Administrative Procedure Act.[121] The Court discussed the ambiguity in the phrase 'burden of proof'—that is, whether it refers to the burden of persuasion or burden of production[122]—and the Court concluded that the "ambiguity had largely been eliminated by the early 20th century."[123] "[C]ourts and commentators almost unanimously agreed that the definition was settled[,]" and the Court concluded that "as of 1946 the ordinary meaning of burden of proof was burden of persuasion."[124] Based upon the Court's conclusion in *Greenwich Collieries*, the Court's conclusion in *Johnson v. California* that public entities bear the 'burden of proving' the strict scrutiny components is tantamount to declaring that such entities bear a burden of persuasion, notwithstanding the contrary declarations in *Wygant*.[125]

This conclusion flows logically from the strict scrutiny framework. The heightened, strict scrutiny standard of review for suspect classifications requires a public entity to justify the use of race-conscious relief with the showing of a compelling interest.[126] Assigning a mere burden of production on a crucial component of the compelling interest requirement—the strong-basis-in-evidence standard—lessens the affect the heightened, strict scrutiny standard of review entails. Fashioning the strong-basis-in-evidence standard as inducing a burden of production is wholly inapposite with strict scrutiny.

Furthermore, several scholars have provided methods for allocating the proof burdens based upon economic analysis.[127] To some extent, these

119. *See* Rothe Dev. Corp. v. Dep't of Def. (*Rothe VII*), 545 F.3d 1023, 1036 (Fed. Cir. 2008).

120. 512 U.S. 267 (1994).

121. *Id.* at 269, 272.

122. *Id.* at 272-76.

123. *Id.* at 276.

124. *Id.*

125. 476 U.S. 267, 277-78, 292-93 (1986).

126. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

127. *See, e.g.*, Chris William Sanchirico, *A Primary-Activity Approach to Proof Burdens*, 37 J. LEGAL STUD. 273 (2008); Hay & Spier, *supra* note 41; Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. REV. 1 (1997).

analyses attempt to develop a more systematic approach to assigning burdens of persuasion and production. Applying the rationales from these economic models supports the conclusion that the strong-basis-in-evidence standard places a burden of persuasion upon defendants.

One scholar has noted that a common approach for allocating both proof burdens heaps the onus on the party with "better access to relevant information."[128] Another model distributes the burden of proof based on costs of access to relevant information.[129] Two factors determine the optimal assignment. One factor is the parties' relative costs of gathering and presenting evidence. If one party has easier access to evidence, which entails lower costs of presentation, then that party should have the burden of persuasion.[130] The second factor represents the probability that an event occurred as a result of the signal presented to the court, that is, the probability that unlawful conduct occurred based upon the information initially presented to the court (via a complaint, pleading, etc).[131] Three conditions justify the general rule that the plaintiff has the burden of persuasion regarding the events underlying the causes of action: (1) the plaintiff's costs of gathering and presenting evidence are "not substantially greater than the defendant's"; (2) "actors generally comply with the law," so the probability of an unlawful event occurring (the "signal") is low; and (3) concomitantly, the probability of the non-occurrence of an unlawful event is high.[132] Exceptions to the general rule exist "where [a] plaintiff's costs are a lot greater than defendant's," where the probability of a

128. Sanchirico, *supra* note 127, at 275 (citing JOHN MACARTHUR MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW (1947); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE (3d ed. 2003); JAMES FLEMING, JR. ET AL., CIVIL PROCEDURE § 7.16 (5th ed. 2001); Hyun Song Shin, *Adversarial and Inquisitorial Procedures in Arbitration*, 29 RAND J. ECON. 378, 378 (1998)).

129. Hay & Spier, *supra* note 41, at 418. Hay and Spier denominate their model as describing burdens of production. *Id.* at 415. However, Sanchirico observes that such cost analyses apply to the allocation of both burdens. Sanchirico, *supra* note 127, at 275. Hay and Spier mention that burdens of persuasion fall within the level of confidence, that is, the standard of proof. Hay & Spier, *supra* note 41, at 414 n.3, 415 n.4. Yet, as noted previously, the majority of scholars declare that the standard of proof should be demarcated as a concept separate from the burdens of proof. *See* Part II.A.

130. *See* Hay & Spier, *supra* note 41, at 419.

131. *Id.* at 419-20.

132. *Id.* at 424; *see also* Lee, *supra* note 127, at 15-16. Lee argues that defendants bear the burden of persuasion on affirmative defenses because they can produce evidence on critical issues at a lower cost than plaintiff, in particular regarding conduct where plaintiffs may not have been involved or where defendants possess superior incentives to keep records. *Id.* Lee proceeds to argue that the business necessity justification in the disparate impact framework should entail solely a burden of production, rather than a burden of persuasion, for defendants. *Id.* at 32. He bases this argument upon the existence of liberal discovery rules and the requirement that employers maintain records on their selection practices. *Id.* Unfortunately, Lee fails to engage in a more systematic appraisal of the costs incurred by parties in the disparate impact litigation context. As elucidated by the Hay/Spier model, the appraisal of relative costs should consider the resources to gather and present information, not just the costs of gaining access. Hay & Spier, *supra* note 41, at 419. Furthermore, unlike Hay and Spier, Lee fails to appraise the "signal" given by parties and the concomitant burden occasioned by such signals.

signal/occurrence is greater than the probability of a signal/non-occurrence, or where the frequency of occurrences is very large.[133]

Based upon this model, defendants should bear the burden of persuasion on the strong-basis-in-evidence standard. In the race-conscious remedy cases, the costs of gathering evidence about the reasons for implementing a remedy—or for not using the results of a practice purportedly evincing an adverse impact—fall substantially on the plaintiffs. Compiling the legislative record underlying the reasons for enacting a race-conscious remedy—including the statistical analyses and other like information—entails less costly measures for the entities that passed the legislation.[134] Likewise, employers should incur fewer costs—vis-à-vis plaintiffs—in presenting evidence of the statistical analyses and validity studies underlying a decision not to employ a test garnering a disparate impact.[135]

Despite the best efforts to follow the law, the nature of the type of litigation at issue demonstrates an increased probability of an unlawful occurrence or signal. As explained in the *Wygant* plurality, the use of race-conscious remedies brings together two potentially inharmonious charges for public entities: the goal of eliminating vestiges of segregation and discrimination, and the requirement to eradicate governmental classifications based on race.[136] Likewise in *Ricci*, the Court identified a similar juxtaposition between the disparate treatment and disparate impact provisions of Title VII.[137] The dichotomy identified in the two cases explicitly maintains that the defendants' race-conscious actions contravene

133. Hay & Spier, *supra* note 41, at 425-26.

134. *See* Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 494 n.17 (2004) ("[A]llocations of burdens of production and persuasion may depend on which party—plaintiff or defendant, petitioner or respondent—has made the 'affirmative allegation' or 'presumably has peculiar means of knowledge.'") (citing 9 JOHN HENRY WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981); Campbell v. United States, 365 U.S. 95-96 (1961)). This is not to suggest that a public entity bears the entire burden of proof in a case involving an Equal Protection challenge. The plaintiff challenging a government program would still bear the burden of persuasion on whether the challenged initiative was motivated by race. *See* Hunt v. Cromartie, 526 U.S. 541, 553 (1999) (holding that the plaintiff bears the burden of persuasion in demonstrating that legislation was racially motivated); Schaeffer *ex. rel.* Schaeffer v. Weast, 546 U.S. 49, 57 (2005) (citing *Hunt*, 526 U.S. at 553).

135. *See* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.15(A) (2009) (providing that employers using "selection procedures . . . should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity"); *see also* 29 C.F.R. § 1607.15(A)(2)(a) (describing that users of selection procedures "should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact"); 29 C.F.R. § 1607.15(A)(3)(a) (providing that where a selection process has an adverse impact, employers should "maintain and have available" documentation evidence regarding the procedure's criterion-related validity, content validity, construct validity, validity within a particular workplace, or reasons why a validity study need not or cannot be performed).

136. 476 U.S. 267, 277 (1986).

137. 129 S. Ct. 2658, 2675-76 (2009).

the intentional discrimination prohibitions in the Fourteenth Amendment and Title VII. The increased probability of purportedly unlawful acts merits the imposition of the burden of persuasion on defendants.[138]

Furthermore, the burden allocation should be used as a deterrent.[139] This warrants heaping the burden of persuasion upon defendants in the race-conscious remedy cases because of the general deterrence against intentional treatment based upon suspect classifications.[140]

IV.
STRONG-BASIS-IN-EVIDENCE IS A STANDARD OF PROOF THAT FALLS BELOW THE PREPONDERANCE OF THE EVIDENCE STANDARD

While courts have debated whether the strong-basis-in-evidence standard is a burden of production or persuasion since its inception in *Wygant*, there is less precedent defining the standard-of-proof it entails.

---

138. Some commentators describe the burden of persuasion as the prevailing standard of decision-making when evidence is in equipoise; that is, it mandates which party wins when the evidence is equally in favor of both parties. *See* Lee, *supra* note 127, at 11 ("The burden of proof . . . functions as a tiebreaker, dispositive only . . . when liability is said to be 'indeterminate' . . . or if the party with the burden of proof offers no proof at all."); Chris William Sanchirico, *The Burden of Proof in Civil Litigation: A Simple Model of Mechanism Design*, 17 INT'L. REV. L. & ECON. 431, 433 (1997) (stating that the most common interpretation of the burden of proof is as a tie-breaker rule). As formulated, the party with the burden of persuasion loses when evidentiary equipoise is present.

This rationale fails to explain why one party sustains the burden over the opposing party in such circumstances. *Id.* at 433. Furthermore, although this rationale for positing the burden of persuasion may explain the outcomes of civil cases when evidence is in equipoise and the standard of proof is a preponderance of the evidence, this feature of the rule does not readily apply to circumstances of a heightened standard of proof—i.e., the clear and convincing standard for certain categories of civil cases, and the proof beyond a reasonable doubt standard for criminal cases. Evidentiary equipoise does not explain the allocation of the burdens of persuasions in those categories of cases. The heightened standards of proof in those types of cases should render evidentiary equipoise irrelevant. The focus of such cases should be whether the burdened party has met its heightened standard of proof, which necessarily exceeds that standard of proof defined in evidentiary equipoise.

If commentators merely infer that the burden of persuasion matters when the weight of the evidence sits at that point on the continuum where the standard of proof resides, then I do not have any quarrel with that argument. However, that observation does not assist in the determination who should bear the burden.

139. Sanchirico, *supra* note 127, at 276.

140. Sanchirico actually posits a more-nuanced appraisal for allocating the burden of persuasion; he argues that the deterrence impact of litigation is increased by burdening the plaintiff on a defendant's non-compliance. *Id.* at 276-279. That is, placing proof burdens on plaintiffs in negligence actions will increase the deterrent incentive on putative defendants in such actions. Assessing the merits of Sanchirico's argument is beyond the scope of this article, yet one notes that Hay and Spier maintain that the assignment of the burden of proof will not affect a defendant's primary behavior if the standard of care efficiently deters a defendant (which occurs when the costs of taking care are less than the harm which a plaintiff may suffer from a violation of the standard of care). Hay & Spier, *supra* note 41, at 423. In equilibrium, "the defendant will . . . be held liable if negligent, and not otherwise." *Id.* That is, the threat of litigation, not the burdens allocated in litigation, will incentivize a defendant to take requisite care. *See id.*

Indeed, the demarcation of the strong-basis-in-evidence standard as a standard of proof has only emanated from an assortment of individuals commenting upon the holdings of *Ricci*.[141] The lack of precedent is due to the fact that prior to *Ricci*, the strong-basis-in-evidence standard applied to the consideration of legislative facts. Determining a standard-of-proof was not necessary until the Supreme Court applied the strong-basis-in-evidence standard to the consideration of adjudicative facts in *Ricci*.

A. Ricci *Transformed the Strong-Basis-In-Evidence Standard from an Inquiry Applied to Legislative Facts into an Inquiry Applied to Adjudicative Facts*

The Advisory Committee for the Federal Rules of Evidence distinguished adjudicative facts and legislative facts, noting that adjudicative facts are those arising in a specific form from the evidence gathered that shed light on the dispute between the parties, whereas legislative facts "have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body."[142] That is, legislative facts constitute the circumstances considered by legislatures in passing laws and by judges in crafting rules of decision.

Professor Kenneth Davis first described this distinction between legislative facts and adjudicative facts in his landmark article, *An Approach to Problems of Evidence in the Administrative Process*.[143] In assessing the treatment of facts in hearings before administrative tribunals, Professor Davis remarked that agencies engage in two types of fact finding. Administrative agencies must adjudicate the facts regarding the parties before their tribunals, and they must also choose legal rules based upon facts not cabined by the dispute between the parties.[144] Professor Davis designated these latter types of facts, as previously stated, legislative facts. Some scholars subsequently described legislative facts as constitutional

141. *See* Caulfield, *supra* note 5.

142. FED. R. EVID. 201(a) adv. cmt. note (1975) (citing Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942); Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955); KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE, 338-434 (West Publ'ing Co. 1958) [hereinafter DAVIS, ADMINISTRATIVE LAW]; Kenneth Culp Davis, *A System of Judicial Notice Based on Fairness and Convenience*, *in* PERSPECTIVES OF LAW 69-95 (Roscoe Pound et al. eds., 1964)).

143. 55 HARV. L. REV. 364 (1942).

144. Professor Davis's exposition, although brief, clearly described the distinction between adjudicative and legislative facts acknowledged in the Rule 201(a) advisory committee notes: the former includes "facts concerning immediate parties," while the latter includes "question[s] of law or policy." *Id.* at 402. This distinction matters because "the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts." *Id.* at 402-03.

facts.[145] In any event, commentators have widely accepted Professor Davis's dichotomy between legislative and adjudicative facts.[146]

One notable feature regarding the consideration of legislative facts involves the extent to which such assessments aim at truth-seeking. Although both legislative bodies and members of the judiciary engage in the consideration of legislative facts, courts accord some deference to the legislative facts underlying the making of rules by lawmaking assemblies.[147] Therefore, the assessment of legislative facts does not typically focus upon establishing the veracity of such facts. Rather, courts review legislative facts for their propriety, i.e., to determine whether the facts justify the particular legislative enactment or legal rule in question.[148]

This foregoing feature of legislative facts incites a concomitant distinction: the courts have not developed a coherent framework for assessing the extent to which legislative facts will justify a particular legislative enactment or legal rule. As one scholar declared, "lawyers

145. *See, e.g.*, David L. Faigman, *Normative Constitutional Fact-Finding : Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 553 (1991) (accepting Davis's dichotomy as representative in constitutional litigation, but refining the legislative fact category into the "subcategories, 'constitutional-rule' facts and 'constitutional-review' facts."); Jeffrey M. Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 U. FLA. L. REV. 236, 236 (1983) (positing that in Constitutional Law, "[l]egislative facts are no less essential to the judicial function than they are to the legislative one, and therefore are more appropriately referred to as 'constitutional facts.'").

146. *See, e.g.*, Faigman, *supra* note 145, at 552; Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230 n.16 (1985); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113-14 (1988); Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Adjudication*, 114 U. PA. L. REV. 637, 640 (1966); Rachael N. Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. PA. L. REV. 655, 663 n.26 (1988) (noting that courts widely recognize Davis's distinction) (citing Concerned Citizens v. Pine Creek Conservancy Dist., 429 U.S. 651, 657 (1977) (Rehnquist, J., dissenting); N.J. Citizen Action v. Edison Township, 797 F.2d 1250, 1259 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1336 (1987); *id.* at 1267 (Weis, J., dissenting); City of N.Y. Mun. Broad. Sys. v. FCC, 744 F.2d 827, 840 n.7 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); Nat'l Org. for Women v. Soc. Sec. Admin., 736 F.2d 727, 737 n.95 (D.C. Cir. 1984)).

147. *See* Monaghan, *supra* note 146, at 231 n.16 (noting "the deferential judicial review ordinarily given to findings of legislative fact") (citing Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337 (1984); Note, *Anti-Pornography and First Amendment Values*, 98 HARV. L. REV. 460, 476-80 (1984)); Shaman, *supra* note 145, at 252 (explaining that courts once viewed "'legislative' (i.e., constitutional) facts [as] beyond the legitimate purview of the judiciary.").

148. *See* Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 84-85 (1960) (stating that courts commonly examine legislative facts, "not to determine their 'truth,' but to determine whether a reasonable legislative judgment could have been made supporting the statute in its enacted form."); Alfange, *supra* note 146, at 640 (explaining that consideration of legislative facts is often essential to judicial tasks such as statutory interpretation, and arriving at a decision that achieves the public purpose of the legislation.); *see also* Henry Wolfe Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 14 (1924) (noting the drawback of deference to legislative facts since that approach "provid[es] no opportunity for testing, by the usual methods available in connection with evidence offered at the trial, the trustworthiness of the information thus submitted ... .").

present and courts receive legislative facts in [] a willy-nilly fashion."[149] Another scholar expounded upon this theme, finding that even judges disagree about what constitutes a legislative fact, and that even the Supreme Court has not developed a proper methodology to deal with legislative facts.[150] Therefore, the review of legislative facts, in particular those facts underlying legislative enactments, largely escaped standard-of-proof conceptualization for much of constitutional history.[151]

Unlike the assessment of legislative facts, there is a defined standard-of-proof framework for evaluating adjudicative facts. The standard-of-proof framework is probabilistic; that is, "establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty."[152] As described previously, the common law traditionally described three standards of proof: (1) the preponderance of the evidence standard, meaning more likely-than-not, which is the standard in civil litigation; (2) the clear and convincing evidence standard, translating into much-more-likely-than-not, used most often in special situations, such as when terminating parental rights; and (3) the proof beyond a reasonable doubt standard, meaning proof to a "virtual certainty," used almost exclusively in criminal law.[153]

As the Supreme Court declared, standards of proof exist to "instruct the fact-finder concerning the degree of confidence our society thinks [it] should have in the correctness of factual conclusions for a particular type of adjudication."[154] Although the Court acknowledged that the effect of standards of proof upon decision-making are largely unknowable, adopting

149. Woolhandler, *supra* note 146, at 113.

150. Shaman, *supra* note 145, at 236-37. Shaman discerned the Supreme Court's recognition "that meaningful evaluation of constitutional fact is a critical element of heightened scrutiny." *Id.* at 245. Under such scrutiny, the Court "stated that it will not uphold governmental regulations on the basis of speculative or hypothetical facts. Important constitutional rights . . . may not be circumscribed by imaginary state interests. Nothing less than a relatively sound factual basis for governmental action would seem to be acceptable under heightened scrutiny." *Id.* at 245-46. However, "the Court ha[d] been willing to ignore [this guidance] when to do so suits its purposes." *Id.* at 246.

151. The trouble with this lack of review, as expressed by Shaman, results from the wholly inadequate facts utilized by legislative bodies to enact laws, resulting in their making errors of constitutional fact. *Id.* at 250-51. He outlines several factors leading to this consequence, including the lack of resources available to state legislatures to inform themselves (as compared to those available for Congress), the potential for lawmakers to be influenced by outside forces, and the prevalence of lawmakers' failures to attend legislative hearings at which more information is aired on any particular bill. *Id.* Shaman argues that "[w]hen the legislature takes action based solely upon factual assumption, or upon outdated, incomplete, or biased information, there is no justification for total deference by the Court." *Id.* at 251

152. Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 251 (2002) (internal quotation marks omitted).

153. *Id.*

154. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970)).

a standard of proof "is more than an empty semantic exercise" as it "reflects the value society places on individual liberty" and individual rights.[155]

The foregoing delineation between legislative facts and adjudicative facts foreshadows their relevance for the strong-basis-in-evidence standard. The strong-basis-in-evidence standard in Fourteenth Amendment cases originated in contexts requiring review of legislative facts.[156] Courts reviewed the legislative facts to ascertain whether the government met its burden of proof, by a strong basis in evidence, to justify the use of a race-conscious remedial program. Under the strict scrutiny analysis applied to this original manifestation of the strong-basis-in-evidence standard, the court does not seek to assess whether the legislative facts are true, so there is no need for a standard of proof.[157] The acts definitely occurred, or rather, the government relied upon certain facts for the passage of particular, race-conscious legislation or regulations. The ultimate question in such Fourteenth Amendment cases is whether the legislative facts relied upon by the representative body justified the use of the race-conscious remedy.[158]

The *Ricci* decision applied the strong-basis-in-evidence standard for the first time to adjudicative facts, those facts arising from the particular dispute and issues between the parties. [159] That is, in *Ricci*, the Court did not apply the standard to ascertain whether certain statistical facts in the abstract—bereft of any reference to specific constituents—merited the creation of a remedial program, an inquiry which reflects the circumstances underlying the application of the strong-basis-in-evidence standard to legislative facts.[160] To the contrary, the Court applied the standard to ascertain whether certain statistical facts—reflecting the circumstances of specific parties before the court—merited the remedial exercise of

155. *Id.* at 424, 425 (citations omitted).

156. *See* Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the [racially] discriminatory classification, . . . and the legislature must have had a strong basis in evidence to support that justification before it implements the classification.").

157. *See* Contractors Ass'n. of E. Pa., Inc. v. City of Phila., 91 F.3d 586, 597 (3d Cir. 1996) (holding that the municipality does not need to "convince the court of the accuracy of its conclusions regarding discrimination"; it just needs "a strong basis in evidence for those conclusions").

158. *See Shaw*, 517 U.S. at 910 ("[T]he institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'") (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality opinion)) (emphasis in original).

159. *See* FED. R. EVID. 201(a) adv. cmt. note ("When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts.") (quoting DAVIS, ADMINISTRATIVE LAW, *supra* note 142, at 353).

160. *See, e.g., Contractors Ass'n.*, 91 F.3d at 596-98; Concrete Works of Colo. v. City of Denver, 321 F.3d 950, 957-59 (10th Cir. 2003); Dean v. City of Shreveport, 438 F.3d 448, 453-55 (5th Cir. 2006).

discarding test results.[161] In such cases, fact finders do not review the facts presented by a public entity to determine if they justify a particular legislative remedial program or Title VII's comprehensive statutory scheme. Rather, fact finders review the particular adjudicative facts generated by the parties in the dispute to determine *the veracity* of a defendant's contention that it would have been subject to disparate impact litigation if it did not jettison a selection mechanism.

Therefore, when adjudicating a *Ricci*-type Title VII challenge, courts cannot instruct juries that defendants must prove their disparate-impact justification by a *preponderance of the evidence.*[162] Rather, based upon *Ricci*, courts will have to instruct juries that defendants need to carry their burden by a *strong basis in evidence*, which represents a new standard of proof distinct from the preponderance-of-the-evidence standard.[163] Fact finders will review the adjudicative facts in a case to ascertain whether the employer—public or private—met its burden of persuasion, by a strong basis in evidence, of the justification for its decision not to implement practices allegedly having a disparate impact.[164]

By employing the strong-basis-in-evidence standard in the Title VII context, the Supreme Court transformed the standard—for Title VII cases—into a standard of proof because adjudicative facts fall within a realm of uncertainty subject to probability assessments.[165] The strong-basis-in-evidence standard originated under a non-probabilistic standard of review regime—strict scrutiny of legislative acts. By denominating the strong-basis-in-evidence standard as a justification for disparate treatment under Title VII, it evolved into a standard of proof subject to demarcation on the ordinal, probability continuum.[166]

---

161. Ricci v. DeStefano, 129 S. Ct. 2658, 2678-81 (2009).

162. Employers must carry their affirmative defense under Title VII's disparate impact doctrine by a preponderance of the evidence. *See* United States v. City of Erie 411 F. Supp. 2d 524, 568 (W.D. Pa. 2005); Kilgo v. Bowman Transp., Inc., 570 F. Supp. 1509, 1526 (N.D. Ga. 1983); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 698 (D. Md. 1979); *see also* FED. R. EVID. 201 adv. cmt. note ("[T]he adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.") (citation omitted).

163. 129 S. Ct. 2658, 2678 (2009).

164. *Id.*

165. Clermont & Sherwin, *supra* note 152, at 251 ("[E]stablishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.").

166. One objection to this conclusion is that the Equal Protection Clause's strict scrutiny framework—and thus the strong-basis-in-evidence standard—also applies to voluntary affirmative action plans that result from litigation, i.e., a settlement, not just legislative acts. *See, e.g.*, In re Birmingham Reverse Discrimination Emp't. Litig., 20 F.3d 1525, 1544 (11th Cir. 1994). This critique, however, merits little favor because courts have always treated the strong-basis-in-evidence standard the same in the context of legislation and litigation; the governing principle in both contexts is the strict scrutiny framework. *See, e.g., id.* at 1534 (noting that strict scrutiny applies because there was "no reason for treating a consent decree entered pursuant to a voluntary settlement differently from a voluntary affirmative action plan") (citation omitted). Therefore, courts have not had the occasion to

B. *The Strong-Basis-In-Evidence Standard is a Standard of Proof Falling Below the Preponderance-of-the-Evidence Standard*

Ricci, having established the strong-basis-in-evidence standard as a standard of proof for assessing adjudicative facts in particular types of Title VII disputes, still leaves another question: where does the strong-basis-in-evidence standard fall on the standard-of-proof continuum? The answer to this question requires analyzing the relative placement of the other standards of proof on the continuum, and the reasons for those placements.

The prevailing standard-of-proof categories for the assessment of adjudicative facts rest upon the application of probability principles to the uncertainty arising in litigation.[167] As discussed previously, standards of proof find their grounding in the field of probability.[168] Generally, positing the probability that an asserted fact is true merely represents an assessment of the likelihood that the fact is actually true.[169] If propositions of fact are mutually exclusive, then one simply posits that two opposing facts cannot both be true. When one assigns probabilities to each of the mutually exclusive facts, the sum of their probabilities must equal the number "1", and therefore declaring that a fact is more probable than not implies that the probability for that fact exceeds 0.5.[170]

This description of the field of probability strays a bit from traditional Bayesian decision theory. The assessment of probabilities traditionally relied upon the "relative frequency concept," i.e., theorists expressed probabilities in terms of "the proportion of times[] that [an observation] would be true over a long series of identical experiments or investigations."[171] Of course, litigation and trials do not provide a series of opportunities to derive a probability regarding the occurrence of factual events. In response to this problem, theorists devised the concept of subjective, or personal, probabilities, whereby a rational decision-maker's probability regarding a fact reflects the decision-maker's "degree of belief"

---

discern that applying the strong-basis-in-evidence standard in a Title VII context transforms the standard from a burden of proof to a standard of proof. As the Supreme Court has noted, "the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans" are not "identical," Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987), and *Ricci* embodies this principle by fundamentally altering the strong-basis-in-evidence standard in its application to the Title VII tension between disparate treatment and disparate impact claims.

167. *See* Woolhandler, *supra* note 146, at 113 ("The retrospective and discrete nature of the inquiry [regarding adjudicative facts] gives a sense that there is one true version of the happening, even if the truth-finding process necessarily consists in an ad hoc assessment of probability.").

168. *See* Clermont & Sherwin, *supra* note 152, at 251.

169. James Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L. J. 79, 81 (1982).

170. *Id.* at 82.

171. *Id.*

in the truth of that fact.[172] In a pared-down description of the framework, a fact finder must determine whether the probability of a plaintiff's version of facts in dispute in a common civil case is greater than 0.5 to satisfy the preponderance-of-the-evidence standard, whereas the clear-and-convincing-evidence and beyond-a-reasonable-doubt standards of proof require an assessment of greater probabilities on the continuum.[173]

Determining the proper placement of the strong-basis-in-evidence standard on the standard-of-proof continuum requires an examination of why the preponderance-of-the-evidence standard falls at the more-probable-than-not point, or put another way, incrementally more than 0.5. The rationale for the preponderance-of-the-evidence standard is to minimize the total number of erroneous determinations. This calculus works under the assumption that an erroneous verdict in a civil suit is the same whether it applies against the plaintiff or the defendant.[174]

---

172. *Id.* at 83; D.H. Kaye, *Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do*, 3 INT'L. J. EVID. & PROOF 1, 4 (1999) [hereinafter Kaye, *What Bayesian Decision Rules Do*] ("The [Bayesian decision] theory interprets phrases like 'preponderance of the evidence' and 'beyond a reasonable doubt' as specifying decision rules in terms of a juror's subjective probability that the facts are such as to warrant imposing liability."). Nevertheless, this conception of the subjective probability determination represents a proper exercise in modern theory. *See* D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54, 54-55 (1987) [hereinafter Kaye, *Confidence Coefficients*] ("[T]he probabilistic formulation[ ], is a direct application of the branch of statistics, popular in economics and business, known as Bayesian decision theory ('BDT'). As applied to forensic proof, BDT holds that, in principle, a verdict for plaintiff is justified if an idealized judge or jury, given the parties' evidence, finds that the probability that plaintiff's story is true exceeds some threshold figure.").

173. Brook, *supra* note 169, at 85; *see also* Kaye, *What Bayesian Decision Rules Do*, *supra* note 172, at 4 ("[The theory] interprets the preponderance standard to mean, 'Return a verdict for the plaintiff if the probability is greater than 1/2 that the facts that the plaintiff needs to prevail are as the plaintiff alleges.'"). Conceptualized properly, the theory "holds that, in principle, a verdict for plaintiff is justified if an idealized judge or jury, given the parties' evidence, finds that the probability that plaintiff's story is true exceeds some threshold figure." Kaye, *Confidence Coefficients*, *supra* note 172, at 54-55. "Thus, the theory has two components: (1) the probability that quantifies the idealized factfinder's partial belief, and (2) the critical number that specifies the minimum degree of belief required under the applicable burden of persuasion." *Id.* at 55 (footnote omitted).

174. Brook, *supra* note 169 at 86 (footnotes omitted); *see also* Kaye, *Confidence Coefficients*, *supra* note 172, at 55 (noting that the preponderance of the evidence probability "reflect[s] the relative losses associated with the two possible types of error: a finding for the plaintiff when the defendant's story is true (a false alarm) and a failure to find for the plaintiff when the plaintiff's story is true (a miss). According to [Bayesian decision theory], the law has adopted a burden of persuasion that minimizes the expected losses. In civil litigation, where the loss for a false alarm equals the loss for a miss, this criterion leads to the 'more-probable-than-not' standard.") (footnotes omitted); Kaye, *What Bayesian Decision Rules Do*, *supra* note 172, at 4-5 ("The difference in the criminal and civil burdens of persuasion and the transition point of 1/2 in civil cases seem to flow naturally from the command to minimise expected loss. In the simplest derivation, the transition point is just a function of the two error costs—the loss associated with a false verdict for the plaintiff and the loss associated with a false verdict for the defendant. When these two losses are of equal magnitude, the more-probable-than-not standard always minimises the expected loss. When they are different, a different threshold probability minimises expected loss . . .") (footnotes omitted); Clermont & Sherwin, *supra* note 152 at 252-53 ("The [civil preponderance-of-the-evidence] rule emerges as optimal if two assumptions about these types of errors are granted. The first is that one type is neither more nor less costly than the other. A dollar

The Supreme Court expressly recognized this rationale for standards of proof, stating that such standards serve "to allocate the risk of error between the litigants . . . ."[175] In particular, the Court declared that the preponderance-of-the-evidence standard results in litigants "shar[ing] the risk of error in roughly equal fashion" because "society has a minimal concern with the outcome of such private suits," whereas the beyond-a-reasonable doubt standard expresses society's attempt "to exclude as nearly as possible the likelihood of an erroneous judgment" by heaping the "entire risk of error upon itself" due to the nature of the liberty interests at stake.[176]

Employing the same analyses underlying establishment of the preponderance-of-the-evidence standard provides that the strong-basis-in-evidence standard falls below the preponderance-of-the-evidence standard. If one properly equates the preponderance-of-the-evidence standard to 'actual' or 'definitive' proof of discrimination, then the *Ricci* majority supports this conclusion. As the Court noted in selecting the strong-basis-in-evidence standard, employers do not have to actually prove a violation of Title VII's disparate impact provisions to justify intentional discrimination against the plaintiffs challenging the rejection of test results.[177] Requiring employers to actually prove a violation of disparate impact prohibitions "would run counter to . . . Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII'" because it would induce employers to "hesitate before taking voluntary action for fear of later being proven wrong in the course of litigation and then held to account for disparate treatment."[178] The Court's sentiment in *Ricci* is echoed by the race-conscious remedy cases that characterize the strong-basis-in-evidence standard as evidence approaching—not establishing—a prima facie case of a constitutional or statutory violation or an inference of a pattern and practice discrimination case under Title VII.[179]

---

mistakenly paid by defendant (a false positive) is just as onerous as a dollar erroneously paid by a plaintiff (a false negative). The second assumption is that the best decision rule keeps the sum of the expected costs of each type of error to a minimum. In other words, the claim on behalf of the [preponderance] rule is that it does better than [any other standard of proof] in minimizing the total expected number of dollars coming from the wrong pockets.").

David Kaye's, *Naked Statistical Evidence*, 89 YALE L. J. 601, 603-05 (1980) (book review), and Richard O. Lempert's, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1032-34 (1977) provide mathematical explanations for the preponderance-of-the-evidence standard of proof.

175. Addington v. Texas, 441 U.S. 418, 423 (1979).

176. *Id.* at 423-24; *see also* Santosky v. Kramer, 455 U.S. 745 (1982).

177. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009); *see also* Bush v. Vera, 517 U.S. 952, 978 (1996) (plurality opinion) (noting that a strong basis in evidence exists when "threshold conditions" for liability are present).

178. *Ricci*, 129 S. Ct. at 2674 (citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 515 (1986)).

179. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 500, 503 (1989); Cotter v. City of Boston, 323 F.3d 160, 169 (1st Cir. 2003); Concrete Works of Colo. v. City of Denver, 321 F.3d 950, 971 (10th Cir. 2003); Peightal v. Metro. Dade Cnty., 26 F.3d 1545, 1553 (11th Cir. 1994).

The compliance objectives for Title VII, and the command under the Fourteenth Amendment to eradicate all vestiges of public sector discrimination, warrants the conclusion that errors in favor of the plaintiffs in *Ricci*-type cases are more costly than errors in favor of the putative defendants. An error in favor of the defendant in these types of cases—which means that the defendant erroneously prevails on its justification for not certifying a test—results in the discarding of the purported discriminating practice. No one is promoted or hired, and all candidates have an opportunity to participate in another selection practice for the coveted positions. An erroneous determination in favor of a plaintiff, however, results in a gain for the plaintiff and a loss for members of the protected group who otherwise would have a fair opportunity to benefit from a selection practice. Given the differing disutilities arising from erroneous determinations vis-à-vis plaintiffs versus defendants in these types of cases, courts should interpret the strong-basis-in-evidence standard of proof as falling below the preponderance-of-the-evidence standard on the probability continuum.

Proper placement of the strong-basis-in-evidence standard may be achieved by examining the probability continuum espoused by Kevin Clermont.[180] As described by Clermont, there exist seven categories applied to the assessment of legal matters in the realm of uncertainty: "(1) slightest possibility, (2) reasonable possibility, (3) substantial possibility, (4) equipoise, (5) probability, (6) high probability and (7) almost certainty."[181] In this model, the preponderance-of-the-evidence standard would be positioned at the mid-, or 'equipoise' point.[182] If the preponderance-of-the-evidence standard represents the level necessary to prevail on a typical civil claim, then demonstrating less than actual liability, i.e., a prima facie case, an inference, or a 'strong basis in evidence' of liability—would fall below the preponderance-of-the-evidence standard, or equipoise, on the probability continuum. Based upon Clermont's formulation, the strong-basis-in-evidence standard would fall below equipoise, and thus occupy either the "reasonable possibility" or "substantial possibility" realms. This

---

Justice Ginsburg's *Ricci* dissent construes the majority's application of the strong basis in evidence standard as more burdensome than its use in race-conscious remedy cases. *Ricci*, 129 S. Ct. at 2701-02, 2702 n.7 (Ginsburg, J., dissenting). Justice Ginsburg's concerns may result from Justice Kennedy's application of the standard to all elements of the disparate impact claim, whereas in the race-conscious remedy cases the strong-basis-in-evidence standard was typically invoked for the analysis of statistical evidence only. *See, e.g.*, *Cotter*, 323 F.3d at 170-71; W. States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 991-91 (9th Cir. 2005). Although one may bemoan the extension of the standard to inquiries beyond the statistical realm, the level of proof occasioned by the burden may still fall below that required to prove a disparate impact claim by a preponderance of the evidence.

180. Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115 (1987).

181. *Id.* at 1143.

182. *See* Brook, *supra* note 183, at 82.

burden would result in a defendant having to prove a 'reasonable possibility' or 'substantial possibility' that it would face disparate impact liability; that is, the showing must be made on all three prongs of the disparate impact analysis, not just the prima facie prong.

V.
IMPLICATIONS OF THE STRONG-BASIS-IN-EVIDENCE STANDARD FOR EXPERT EVIDENCE

The practical implications of the *Ricci* strong-basis-in-evidence standard have yet to play out; however, some preliminary observations should ensue regarding the effect of this standard on the process and substance of expert evidence in *Ricci*-type Title VII cases. Disparate impact litigation represents one of the areas of employment law where expert evidence plays a continued, central role. Both parties in a disparate impact dispute typically utilize some combination of statisticians, labor economists, and/or industrial and organizational psychologists to conduct statistical and validity studies in support of their respective positions.[183] Employment testing constitutes one of the more litigated subjects in disparate impact cases, and the United States Equal Employment Opportunity Commission has indicated that such litigation will not abate any time soon.[184] Given this terrain, *Ricci* presents some critical implications for cases involving disparate impact issues.

Initially, it should be clear that in disparate treatment challenges similar to *Ricci* the strong-basis-in-evidence burden compels a showing sufficient to overcome the type of evidence proffered by the plaintiffs in *Ricci*. The consulting business employed by the City in *Ricci* performed a job analysis incorporating the following steps: it interviewed firefighters occupying the pertinent positions; rode with and observed firefighters; administered questionnaires to firefighters; and compiled sources of firefighting materials and manuals.[185] Because the case was decided at the summary-judgment stage of proceedings, the plaintiffs essentially proffered the job analysis to demonstrate that the City did not have "strong" evidence that the promotion exam failed the job related/business necessity prong of the disparate impact test.[186] The Court accepted this argument and ruled

183. *See* 29 C.F.R. § 1607.15.

184. *See* Press Release, EEOC, EEOC Spotlights Employment Testing and Screening in the 21st Century Workplace (May 16, 2007), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-16-07.cfm.

185. 129 S. Ct. 2658, 2665-66 (2009).

186. *Id.*

that the City failed to submit credible evidence to raise a genuine dispute on its strong-basis-in-evidence burden.[187]

Due to this result, it may behoove those individuals who would be disproportionately affected by a practice to intervene and/or petition the court to be deemed necessary parties in actions such as *Ricci*.[188] This would allow them to present evidence that a test has a disparate impact sufficient to satisfy the strong-basis-in-evidence justification, instead of relying upon the employer to do so.

Because the strong-basis-in-evidence standard incurs a lesser burden than the preponderance-of-the-evidence standard, one should not need a validity study to combat the evidence proffered by the plaintiffs in *Ricci*. For example, a good content validity study requires demonstration of the following five factors: "(1) a suitable job analysis; (2) competence in test construction; (3) test content related to job content; (4) test content representative of job content; and (5) a scoring system that selects those who can better perform the job."[189]

Rather than engaging in a wholesale content validity study demonstrating the afore-mentioned factors, the strong-basis-in-evidence standard may only require a litigant to discredit certain discrete factors, such as by demonstrating a flawed job analysis. The discrediting of a job analysis may take the following measures, some of which will require expert knowledge, but not as much as that required to complete a validity study. A plaintiff may ascertain the qualifications of the individuals conducting the job analyses and creating the challenged exam or practice; assess the information-gathering process in the job analysis, i.e., were enough subject-matter experts consulted, were proper survey techniques employed, did the job analysis rely upon a large enough sample, etc.; and determine whether a validity test could be constructed from the results of the job analysis, that is, whether sufficient knowledge, skills, and values, were identified via the job analysis.

As one industrial and organizational psychologist stated, the tests employed in *Ricci* had a series of fatal flaws including design omissions (e.g. omitting skills like "command presence"), design flaws (e.g. inclusion of irrelevant material) and inappropriate usage of results (e.g. arbitrary cut-off points).[190] Any of these flaws probably would have satisfied the strong-

187. Notably, Justice Kennedy stated that the City did not request a validity report from the company that created the exams, as contemplated in its contract with the company. *Id.* at 2679.

188. *See* FED. R. CIV. P. 19, 24.

189. Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 95-106 (2d Cir. 1980), *cited in* 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 201-02 (4th ed. 2007).

190. Dan A. Biddle, *Ricci v. DeStefano: An Opinion*, THE SIOP EXCHANGE (June 24, 2009), http://siopexchange.typepad.com/the_siop_exchange/2009/06/ricci-v-destefano-an-opinion-.html.

basis-in-evidence standard with a proper explication of the lesser burden occasioned by the standard.

Another area of concern is the type of statistical proof needed to satisfy the strong-basis-in-evidence burden. In *Ricci*, the Court held that evidence demonstrating a failure of the E.E.O.C.'s eighty percent rule satisfies the strong-basis-in-evidence burden.[191] However, one should query whether a disparity rate that exceeds the eighty percent rule constitutes a strong basis in evidence that a practice did not have a disproportionate impact upon a group. Although one may use statistical evidence of impact to essentially "overrule" the results of the eighty percent rule, the Court has signaled that it may accept the eighty percent rule as probative on the strong-basis-in-evidence inquiry.

VI.
COURTS SHOULD LIMIT APPLICATION OF THE STRONG-BASIS-IN-EVIDENCE STANDARD

Finally, I note a debate over a remark by the Court in the concluding section of the *Ricci* majority opinion:

> "[i]f, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability."[192]

Several commentators on both sides of employment disputes remark that the aforementioned conclusion establishes a new defense to Title VII disparate impact actions.[193] One scholar noted the problems occasioned by such a new defense, stating that if an employer had reason to believe a test

191. 129 S. Ct. 2658, 2677-78 (2009).

192. 129 S. Ct. at 2681.

193. *See, e.g.*, David. A Drachsler, *Assessing the Practical Repercussions of* Ricci (Jul. 27, 2009), AM. CONST. SOC'Y BLOG, http://www.acslaw.org/acsblog (arguing that the "path to proof of job relatedness by definition provides a 'strong basis in evidence' that failure to use the results of such a test will expose [an employer] to disparate treatment liability."); Joseph W. Hammell, Ricci v. DeStefano: *Supreme Court Holds Employer Liable For Trying To Avoid Claims of Adverse-Impact Discrimination* (Jul. 10, 2009), DORSEY & WHITNEY L.L.P. http://www.dorsey.com/ricci_analysis/ ("[O]ther employers could likewise 'avoid disparate-impact liability' in any instance where, based on [*Ricci*'s strong-basis-in-evidence standard], they decline to alter their course of action notwithstanding a significant statistical adverse impact. This may provide employers with a powerful additional defense against disparate-impact claims. Ricci might make summary judgment on such claims more likely, or provide the basis for a helpful jury instruction if the case must go to trial."); Darrell VanDeusen, *VanDeusen on* Ricci v. DeStefano, 2009 EMERGING ISSUES 4031 ("Anticipating the fears of some employers of disparate impact liability, the Court provided a defense for the inevitable disparate impact claims that will result from the use of such tests . . . . This defense essentially provides that the lack of a strong basis in evidence that the test would result in disparate impact liability, provides a strong basis in evidence that the test would result in disparate-treatment liability.").

was not job-related, but the reason did not rise to the level of the "strong basis" standard, the test and its results would be upheld, effectively eliminating the burden on the employer to meet the burden of showing job-relatedness.[194] For example, a purported job analysis—such as the one described in *Ricci*—may satisfy the strong-basis-in-evidence defense described in the previous quotation, without the need to conduct a validity study.

If these concerns materialize in cases, it would appear that invocation of such a new defense violates the Civil Rights Act of 1991. The amended provisions of Title VII define an employer's duty to "demonstrate" that a challenged practice is job related and consistent with business necessity, meaning that an employer must "meet the burdens of persuasion and production."[195] Regardless of any other purported affirmative defense set forth by the Court in *Ricci*, Congress has mandated that employers must satisfy the business necessity defense in disparate impact litigation.[196] Of course, the preponderance of the evidence standard represents the burden of persuasion occasioned by the disparate impact provisions.[197]

As a conceptual matter, the rationale for the preponderance-of-the-evidence standard merits its application in traditional disparate impact litigation. The use of the preponderance-of-the-evidence standard in traditional disparate impact litigation reflects society's conclusion that an error for a plaintiff incurs the same value as an error for a defendant, but application of the strong-basis-in-evidence standard in such litigation results in the favoring of the employer over plaintiffs. This result would be anathema to the goals of Title VII. In *Ricci*, the Court cited approvingly to

194. 2 LEX K. LARSON ON EMPLOYMENT DISCRIMINATION § 23.07 (2011). Other scholars have interpreted the Court's remark differently. *See* Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2205-07 (2010) (positing that the Court's statement may be interpreted as creating a new affirmative defense "allow[ing] an employer to defend against a claim of disparate impact by showing that at the time it took the challenged employment action, it did not believe that the test had an unlawful disparate impact."); Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 U.C.L.A. L. REV. 73, 102 (2010) ("Narrowly interpreted, [the Court's statement] is a party-specific direction to the lower court as to how to proceed on remand in the Ricci litigation. The use of the term 'the City' is clearly a reference to the city of New Haven, not a general reference to 'an employer' used earlier in the opinion to set forth the Court's holding.").

195. 42 U.S.C. § 2000e(m).

196. *Id.*

197. *See* United States v. City of Erie, 411 F. Supp. 2d 524, 568 (W.D. Pa. 2005) ("[T]he City failed to prove by a preponderance of the evidence the job-relatedness (or validity) of the . . . test."); Kilgo v. Bowman Transp., Inc., 570 F. Supp. 1509, 1526 (N.D. Ga. 1983) (holding that the "defendant must prove by a preponderance of the evidence that the requirement in question is job related and is required by business necessity.") (citing Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 753 (5th Cir. 1981)); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 698 (D. Md. 1979) ("Once a plaintiff has made out a prima facie case, the burden shifts to the employer to show, by a preponderance of the evidence that the job requirement has a 'manifest relationship' to the job.") (citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

the "voluntary compliance" rationale underlying Title VII objectives.[198] In a regime designed to encourage employers to comply with Title VII's objectives of eradicating discrimination, it would be illogical to hold that an erroneous determination in favor of a defendant in traditional disparate impact litigation is worse than an erroneous determination in favor of the plaintiff. At the least, the values of erroneous determinations are equal between plaintiffs and defendants in disparate impact litigation. Therefore, the expressed goals of Title VII and the disparate impact theory of recovery merit application of the preponderance of the evidence standard for defendants in such litigation.

CONCLUSION

While the *Ricci* court borrowed a familiar phrase by importing the strong-basis-in-evidence standard from the Equal Protection context to the Title VII context, the application of this standard to the Title VII context altered its meaning. In the constitutional context, the strong-basis-in-evidence standard involved only the consideration of legislative facts to determine whether a public entity met its burden of proof (first that of production, and arguably now, only persuasion) to justify the use of a race-conscious remedy. In the Title VII context, the strong-basis-in-evidence standard involves the consideration of adjudicative facts. Courts review adjudicative facts to ascertain whether an employer carries its burden of persuasion, by a strong basis in evidence, of the justification for its decision not to implement practices allegedly having a disparate impact. By employing the strong-basis-in-evidence standard in the Title VII context, however, the concept transforms into a standard of proof because adjudicative facts fall within a realm of uncertainty subject to probability mechanisms. In *Ricci*-type cases, courts must develop and apply this new standard of proof—the strong-basis-in-evidence standard—when instructing juries about the amount of evidence necessary for an employer to sustain its justification that it would have faced disparate-impact liability if it had not taken a race-conscious action. This new standard of proof demands a lower evidentiary burden than the preponderance-of-the-evidence standard.

Indeed, the Second Circuit reached this same conclusion in a recent decision, *United States v. Brennan*.[199] In *Brennan*, the United States sued the New York City Board of Education on behalf of black, Hispanic, and female employees due to the disparate impact of tests and recruitment practices for Custodial and Custodial Engineer positions.[200] During the long procedural history of the case, white employees intervened into the case to

198. 129 S. Ct. 2658, 2674 (2009).

199. 650 F.3d 65 (2d Cir. 2011).

200. *Id.* at 70.

launch Title VII and Equal Protection challenges to the race-conscious, seniority relief agreed to by the Board to remedy the alleged disparate impact.[201] The district court rejected the intervenors' Title VII challenge by ruling that the race-conscious remedy was justified as a valid affirmative action program,[202] yet Judge Calabresi, writing for the Second Circuit, reversed the district court by finding that the remedy did not fit within the definition of affirmative action programs.[203]

However, Judge Calabresi relied upon *Ricci* to hold that the Board may justify adoption of the race-conscious remedy by presenting a strong basis in evidence that it would be subject to disparate-impact liability if it did not adopt the remedy.[204] The Second Circuit mirrored *Ricci* in holding that the justification requires the Board to demonstrate the three factors of the disparate impact framework—a prima facie case, job-relatedness and business necessity, and any less discriminatory alternative practices—by a strong basis in evidence, yet the court further held that the necessity for any individualized relief also had to be established by a strong basis in evidence.[205]

Most critically for this article, however, Judge Calabresi held that because *Ricci* does not compel employers to actually "*prove*" a disparate-impact violation to sustain the justification, the "strong-basis-in-evidence test does not, therefore, require that there be a *preponderance of the evidence of an actual disparate impact violation.*"[206] Rather, the strong-basis-in-evidence standard falls below the preponderance standard and equates to an "objectively reasonable fear of disparate-impact liability."[207]

Unfortunately, this issue regarding the meaning of the strong-basis-in-evidence standard was not put to bed by Judge Calabresi's decision. A concurring opinion in *Brennan* described the majority's guidance on the standard as "dicta," and expressly declared that the majority's formulation of the strong-basis-in-evidence standard was "dubious."[208] As illustrated in *Brennan*, *Ricci* inserted this standard into a new context that will generate a copious amount of litigation in the foreseeable future.

Finally, I would be remiss if I did not give a nod to a lingering question: should the probabilistic conception of the strong-basis-in-evidence standard reverberate and apply to race-conscious remedy cases? That is, should the conceptualization of the strong-basis-in-evidence

201. *Id.* at 70-71.
202. *Id.* at 71-72.
203. *Id.* at 99-109.
204. *Id.* at 110.
205. *Id.* at 110-114.
206. *Id.* at 112 (emphasis in original and added).
207. *Id.* at 110, 113.
208. *Id.* at 144.

standard for adjudicative facts provide some long-awaited parameters in its application to Fourteenth Amendment claims? In *Brennan*, Judge Calabresi expressly noted, for several reasons, that a "'strong basis in evidence' for purposes of *Ricci* and Title VII is not necessarily the same as it is for Equal Protection Clause purposes."[209] I, on the other hand, will reserve that inquiry for another day.

209. *Id.* at 113.