The Arena

The Ricci Case: reaction

Plus, today's question: With the field thinning, can you name four plausible GOP presidential candidates?

June 29, 2009

The Ricci Decision: A Roundtable (06/29/2009)

12:09 **Fred Barbash-Moderator**: Good afternoon everyone. Thanks for participating.

Today's topic is the Ricci decision, issued this morning by the Supreme Court, and it's impact on the Sotomayor nomination. We'll have four distinguished guests and let them chat, so we will take reader comments only at the end this time.

12:16 **Fred Barbash-Moderator**: Our guests today are Arena contributors:

Walter Dellinger, former U.S. Solicitor General, a professor of law and an eminent practitioner

Sherrilyn Ifill, professor of law at the University of Maryland and former assistant counsel at the NAACP Legal Defense and Education Fund

Roger Pilon, Vice President for Legal Affairs at the Cato Institute and founder and president of Cato's Center for Constitutional Studies

Mark Tushnet, William Nelson Cromwell Professor of Law at Harvard Law School and author of the most widely used casebook on Constitutional Law.

12:20 **Fred Barbash-Moderator**: For POLITICO's story on the decision, click here:

12:32 **Fred Barbash-Moderator**: Welcome readers and welcome to our distinguished guests. Let's get right down to business starting with Sherrilyn Ifill. Sherrilyn, can

you give us your quick take on the Ricci decision and it's legal significance?

12:39 **sherrilyn ifill**: It's one of the most fascinating decisions I've read from the Court this Term, in that it fairly transparently reveals the deep divisions on the Court, but also the willingness of the conservative majority to be aggressive and active in fashioning the result it wants (and by the way I'm not against so-called "activist judging" -- just hypocrisy in making the charge!). Here's the majority creates a new standard for judging the ability of employers to use the Title VII disparate impact standard as a rationale for taking facially neutral, race conscious action to ameliorate discrimination in public sector employment. Finding deeply problematic the City of New Haven's refusal to certify the racially disparate results of the promotions exam, the Court says "[i]n searching for a standard that strikes a more appropriate balance . . " Wow, this is one hell of an admission. Searching to find a new standard. So, now in addition to disparate impact, employers must show a "strong bias in evidence of disparate impact liability."

12:39 **Fred Barbash-Moderator**: Walter. What do you think?

12:44 **Fred Barbash-Moderator**: Walter tells me his computer is frozen so we'll come back to him when he finds a new one. Roger...you're on

12:48 **Mark Tushnet**: A couple of things are worth noting. First, the decision turns entirely on developing a standard to reconcile competing concerns internal to Title VII, the federal civil rights statute. The majority does not address any constitutional issues, nor does the dissent. (Justice Scalia's separate opinion raises a constitutional question -- whether the interpretation of Title VII that allows an employer to respond to a justified claim that one of the employer's practices causes racially disparate outcomes is unconstitutional -- an issue that's been mooted in law reviews but that no court, as far as I know, has ever adopted.)

12:51 **Fred Barbash-Moderator**: Roger? Walter?

12:51 [Comment From walter dellinger]
One question of interest of Politico.com followers : what will the decision mean for the confirmation of Judge Sotomayor who was a member of the court of appeals panel whose decision was reversed today. Answer: nothing. Some have asked whether the Supreme Court's resolution will show her to be outside the mainstream. Answer: No The opinions make clear that the Court's five-Justice majority is adopting a new standard. Justice Kennedy's opinion for the Court says, "For the foregoing reasons, we adopt the strong-basis-in-evidence- standard … to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII. " Both the majority and dissenting opinions seem to agree that this is the adoption of a new standard, and Ginsburg from the bench called it novel Four Justices (Ginsburg, Stevens, Breyer and Souter) voted to affirm the decision she joined. Being with the four and not the five is surely within the mainstream

12:51 **Roger Pilon**: Now that my computer is unfrozen, let me respond quickly to Sherrilyn. I'm not sure what she means when she says the city took a "facially neutral, race conscious action to ameliorate discrimination." I assume she's

referring to the city's decision to throw out ALL the test scores. But that amounts to discriminating for racial reasons -- as the majority made clear.

12:53 **Mark Tushnet**: Oops. Second, given the appearance of Republican talking points already, it's worth noting that the Second Circuit panel handled the case summarily for two reasons. (1) The district judge had applied existing Second Circuit precedent in a straight-forward way, and there was nothing novel -- within the Second Circuit -- about what she did. Justice Kennedy rejects the Second Circuit's standard and develops his own. Then, to show why there's no need to hold a trial, he goes through the record in some detail -- something the district judge had done as well, but using what the majority regards as the wrong standard. Justice Ginsburg's dissent goes through the record to show, first, that applying the Second Circuit's standard, which she pretty much thinks was the correct one, leads to affirming the court of appeals. The fact that the Supreme Court decisions consume 93 pages -- actually the decisions take up 89 pages (the extra four are the syllabus), but who's counting? -- really doesn't reflect anything about the way the Second Circuit panel handled the case.

12:55 **Fred Barbash-Moderator**: Thanks. So Walter, as I read you, and to some extent Mark, you're saying that to some extent the SCOTUS inoculated Sotomayor up to a point and when asked about it she'll be able to say that the standard enunciated by SCOTUS is new and, of course, she'd have to reconsider what she originally did in light of that?

12:56 **sherrilyn ifill**: yes, developing a standard because the Court's sense of the decision below is "this just can't be right." The facts drive the Court's sense of this case. This seems apparent because the Court takes the extraordinary step of announcing a new legal standard, and then rather than remanding the case to the district court to view the facts in light of that standard, applies the standard to the facts itself. Not the stuff of appellate courts. This is not a case in which the facts are not hotly contested (see the concurring opinion of Justice Alito and the dissent of Justice Ginsburg). But the Court supplants its own view of the facts over what might be the district court's view -- if the trial court were allowed to apply the new standard the Court announces today ("strong basis in evidence of disparate-impact liability"). Why isn't the majority opinion over after the Court announces the new standard? What this tells is that Judge Sotomayor and her colleagues on the 2nd Circuit were more aware of their role as appellate judges than this Court seems to be. The 2nd Circuit thought the district court had applied the correct legal standard, and thus didn't second-guess the district court's application of the facts to the law. The Supreme Court's saying there's a new legal standard. Why no remand?

12:57 **Mark Tushnet**: in connection with Walter's comment, I think it worth noting as well that Justice Kennedy -- joined by the Court's "conservatives" -- is unabashed about the fact that the Court is "developing" -- read "making up" -- the standard it employs. Nothing wrong with that, of course, except that it pretty clearly shows that the Supreme Court "makes policy" when it interprets statutes that have, as the Court sees it, provisions that are in tension with each other.

12:58 **Roger Pilon**: I don't know what we're avoiding the basic issue. The city threw out the exam results -- ON THE BASIS OF RACE. And it did so for fear of a suit. The

Court said today that there was no evidence to support such a suit. Thus, we're left with disparate treatment -- nothing more complicated than that.

1:00 **Fred Barbash-Moderator**: Roger: In other words, Sotomayor and her colleagues in the majority were wrong, right. But will she be able to better defend herself on account of the new standard Walter and Mark mentioned?

1:00 **Mark Tushnet**: Roger, I don't think the Court said that there was "no evidence" to support the suit. It all depends on the standard for determining when an employer has a good defense for race-based decision-making available to it. The Second Circuit standard, adopted by Justice Ginsburg, was whether the employer has good cause to fear such a suit. There clearly was evidence to support that conclusion, given that standard. The majority adopts a different standard, requiring "strong evidence" to support a disparate treatment suit, and says that the city didn't provide "strong evidence." That's not the same as saying that the city provided "no evidence" to support its claim that it feared a (potentially successful) suit against it.

1:02 **sherrilyn ifill**: Ditto. See my comments at 12:56.

1:02 **walter dellinger**: No. It is not the case that the Supreme Court's decision means that the three judges on the court of appeals were "wrong" They applied existing law, as court of appeals judges are required to do. The Supreme Court has adopted a new standard.

1:03 **Roger Pilon**: Fred, I believe not, because this case is not really complicated -- even the senators will understand it. Put Sotomayor's summary affirmance of the decision below together with her off-the-bench statements in several contexts, and you've got the makings of a stormy hearing on a hot-button issue.

1:06 **Fred Barbash-Moderator**: Roger: So, seen in a broader political context, the Ricci case still has strong legs for her critics, as I read you. But isn't it also true that to argue that she's somehow "out of the mainstream" becomes difficult when, in addition to the lower court judges who agreed with her, we've now got four Supreme Court justices more or less on her side, so to speak? This becomes then, a case of "reasonable people" may differ...

1:06 **Roger Pilon**: Mark, change it to no credible evidence. Why do you think this case has caused such a firestorm? It smelled from the start, and no "different standards" talk will make it smell any better.

1:07 **walter dellinger**: Question for Roger: Suppose East Haven is in a new firefighters promotion process. They had considered using a test from the same company that did the New Haven test, and, like New Haven counting it 60%. But having seen the racial results from the New Haven test, they decide to use another test that has been shown not to have such a racial result, and/or to count it only 30%. Is that now a violation? Can New Haven jettison this test for its new cycle, stating that the process they used this time produced an all white leadership group?

1:08 **Roger Pilon**: I see we've got three lawyers, plus Fred, coming my way, which means we can only talk at cross purposes -- at best. Fred, you want to moderate this?

1:09 **Mark Tushnet**: Well, Roger, it "smelled" to some people (roughly, the Republican Senators and their supporters), but not to other people (roughly, President Obama

and his supporters). In my view, "cases" don't cause firestorms, politicians do. And we'll see in a couple of weeks whether water or gasoline will put out or fuel the firestorm.

1:10 **Fred Barbash-Moderator**: Ok. Roger, how bout responding to Walter first.

1:11 **Roger Pilon**: Which of his comments?

1:11 **Fred Barbash-Moderator**: Above at 1:07 were he says "question for Roger"

1:12 **walter dellinger**: I'll put it more simply: Big question: does this opinion only apply when a test has already been given? or does it limit the reason for which a jurisdiction may choose one test over another?

1:16 **Roger Pilon**: My guess, Walter, if I understand your question at all, is that the law remains as it has been, that if a test has been validated as race neutral, and no other test is available that is job related, yet produces less disparate impact, then a city is home free, and it can easily defend against a disparate impact suit.

1:18 **Roger Pilon**: To your earlier question, Fred, let's not forget that there were six Second Circuit judges who wanted to rehear this case.

1:18 **Fred Barbash-Moderator**: Thanks Roger.

Final question as our time is running out: Sherrilyn had to leave...so Roger, Walter, Mark...How might it have looked "worse" for Sotomayor politically? That is, what might the court have done that would have made it more difficult for her than it will be?

1:21 **Roger Pilon**: Nothing. Still, the numbers are on her side. In fact, the committee is 13-7, which means that Democrats will get nearly twice the TV time as Republicans. If I were betting . . .

1:22 **walter dellinger**: Well, if Justice Souter had voted to reverse that would have been a problem. And the Court's conservatives had said the Court of Appeals had wrongly applied prior law, that would have been a blip. But neither of those things happened. All three of the Second Circuit Justices applied existing precedent. And all three Sixth Circuit Justices -- who upheld disregarding test results on virtually the same facts -- also thought the result clearly controlled by precedent -- they didn't even publish their opinion!

1:22 **Mark Tushnet**: I think Roger's basically right. Of course, we can imagine a Court writing an opinoin that would have slammed her panel for blatantly ignoring clear law already established by the Supreme Court. But that wouldn't be this Court.

1:23 **Fred Barbash-Moderator**: Roger, Mark, Walter, Sherrilyn: Thank you for being with us today...Sorry about my difficulties moderating among four...first time on that...but your comments were immensely helpful.

Now--readers..thanks for being here. If any of you want to comment, this is your chance...

1:26 [Comment From Phillip]
11 of 21 federal justices have now ruled the same way Sotomeyer did. She is hardly outside the mainstream.

1:28 [Comment From Craig]
When did I wake up as a 39 year old african-american man and find out that I have an advantage over whites. The cries of reverse racisim seems like an excuse to hold on to power. There had to be something wrong with a test that only whites and 2 hispanics could pass. I would think the city should have thrown out the test and found another way to promote firefighters regardless of their race that achieved the mix desired.

1:28 [Comment From Jen]
I'd like to ask one of the legal experts here whether, apart from the Sotomayor aspect, this decision has important implications for future Title VII cases?

1:32 [Comment From Jon Mark]
There is a no way any normal neutral test would get such an extreme result and I am white and still dont see that as possible

1:33 **Mark Tushnet**: In response to Jen 1:28, probably so. On first reading, it seems to suggest that an employer who adopts an affirmative action program either because it thinks it's the right thing to do or because it's concerned about lawsuits claiming that it engages in employment practices that have a disparate impact on racial minorities -- which is, I think, the usual case for voluntary affirmative action programs -- will have to have in hand a "strong basis" for thinking that such lawsuits have a good chance of succeeding. On the other hand, precisely because such an interpretation would have a fairly large disruptive impact on existing practices, there's reason to think that that's not the way the law will develop -- either because the courts will limit the holding or because, once that effect becomes clear, Congress will intervene (as it did in "correcting" what it regarded as the Court's mistakes in the 1991 Civil Rights Restoration Act.

1:34 **Fred Barbash-Moderator**: Thanks to everyone-- panelists and readers-- for participating in today's chat. I look forward to seeing all of you here again soon on another topic.

1:35