Notes

Heightened Equal-Protection Scrutiny Applies to the Disparate-Impact Doctrine

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I. INTRODUCTION

More than one-hundred firefighters took tests in 2003 to qualify for promotions in the City of New Haven, Connecticut.[1] Although the city tried to ensure that the tests would not disadvantage any racial or ethnic groups,[2] most of the firefighters who scored highly enough for promotions were Caucasian.[3] Few Hispanic or African-American firefighters passed the tests.[4] The city discarded the test results out of fear that it could face disparate-impact liability[5] because "too many whites and not enough minorities would be promoted" if the city used the test results.[6] Several of the firefighters who passed the tests sued the city

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[1] Ricci v. DeStefano, 557 U.S. 557, 561 (2009).
[2] *Id.* at 563–66 (2009).
[3] *Id.* at 566. *See infra* Part III.B.2.d.
[4] *Ricci*, 557 U.S. at 566.
[5] The disparate-impact doctrine will be further explained in Part I of this Note.
[6] *Ricci*, 557 U.S. at 579 (quotation marks omitted) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009)).

under Title VII of the Civil Rights Act,[7] on the ground that it engaged in race-based disparate treatment[8] against them.[9] In this case, *Ricci v. DeStefano*, the U.S. Supreme Court held that the city was liable for disparate treatment because it failed to prove that it had a strong basis in evidence to believe it would have been liable for disparate impact if it made promotions based on the test results.[10]

The plaintiffs in *Ricci* also argued the city engaged in racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment[11] when it discarded the test results.[12] The Court declined to resolve this issue because it held that the city was liable for committing disparate treatment prohibited under Title VII, thus rendering unnecessary the resolution of whether the city was liable for violating the Constitution.[13] Justice Antonin Scalia wrote a concurring opinion to note that the Court's resolution of the case "merely postpones the evil day on which the Court will have to confront" whether an action taken to avoid potential disparate-impact liability violates equal protection.[14] He noted that disparate-impact avoidance seems to conflict with equal protection.[15] In a dissenting opinion, Justice Ruth Bader Ginsburg argued the city did not commit disparate treatment or violate equal protection,[16] so she effectively denied that an action taken to avoid a racially-disparate impact could violate equal protection.[17]

Much academic scholarship in response to *Ricci* has focused on whether Title VII's disparate-impact provision would survive strict

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[7] 42 U.S.C. § 2000e *et seq.* This Note will refer to this law as "Title VII."

[8] The disparate-treatment doctrine will be further explained in Part I of this Note.

[9] *Ricci*, 557 U.S. at 562–63.

[10] *Id.* at 563. A state actor may justify its race-based different treatment under the equal protection clause if the actor has a strong basis in evidence that the differentiation was necessary to remedy the actor's past intentional racial discrimination. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 277–78 (1986) (plurality opinion); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500, 509, 511 (1989) (plurality opinion); Miller v. Johnson, 515 U.S. 900, 922 (1995); *see* Wash. v. Davis, 426 U.S. 229, 245–48 (1976) (stating that showing a strong basis in evidence of intentional discrimination is more difficult than showing a strong basis in evidence of potential disparate-impact liability); *infra* note 253.

[11] U.S. CONST. amend. XIV, § 1. This Note's references to equal protection or the equal protection clause refer to the Fourteenth Amendment's Equal Protection Clause, the equal-protection component of the Fifth Amendment's Due Process Clause, or both, depending on the context. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 213–18 (1995) (explaining that these two constitutional guarantees of equal protection operate identically except that one applies to state and local governments and the other applies to the federal government).

[12] *Ricci*, 557 U.S. at 562–63.

[13] *Id.* at 563, 584, 593.

[14] *Id.* at 594 (Scalia, J., concurring).

[15] *Id.* at 594–95 (Scalia, J. concurring).

[16] *Id.* at 619–20 (Ginsburg, J., dissenting). *See infra* note 185 and accompanying text (noting Justice Ginsburg's argument that the city's actions were race neutral because the test results were discarded and no firefighters were promoted). *See also infra* text accompanying note 197 (arguing that no employees had a "vested right to promotion").

[17] *See infra* note 179 (arguing that while disparate treatment analysis is not identical under Title VII and the Equal Protection Clause, much of the *Ricci* court's analysis would transfer to the equal protection context).

scrutiny[18] under the Equal Protection Clause.[19] But much of this scholarship assumed that an employer triggers strict scrutiny by discarding test results to avoid a racially-disparate impact.[20] The assumption is understandable because the Equal Protection Clause and Title VII's disparate-treatment provision prohibit largely the same conduct,[21] and the majority opinion in *Ricci* held that New Haven's disparate-impact avoidance was illegal disparate treatment.[22] But the majority opinion never bothered to explain that holding,[23] and four justices disagreed with it.[24] No justice joined Justice Scalia's concurrence.[25]

This Note attempts to fill the majority opinion's void[26] by arguing

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[18] For an overview of the tiers of judicial scrutiny, *see* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985); *see infra* note 159. *See also* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1502–03 (2002) (explaining that three to six tiers exist).

[19] *See, e.g.*, Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1 (2010)) ("[*Ricci*] is likely to lead to an increase in disparate impact claims, and soon the disparate impact provision may have to reckon with the Equal Protection Clause . . . . This Article examines the constitutional question left open by the Court in *Ricci*."); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535 (2011) ("This Article concludes that the disparate impact provision is unlikely to pass the narrowly tailored requirement and risks being invalidated on 'the evil day' when the provision is challenged under the Equal Protection Clause."); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1375–82 (2010) (discussing several potentially compelling interests that could justify Title VII's disparate-impact provision under strict scrutiny); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2179–99 (2013) ("Title VII's disparate-impact provision can withstand constitutional attack only if it satisfies strict scrutiny—that is, if it is narrowly tailored to achieve a compelling governmental interest.").

[20] *See* Allen R. Kamp, Ricci v. DeStefano *and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 35 (2011) ("Although the commentary has focused on how *Ricci* almost terminated disparate impact as a viable theory of liability, it must be remembered it did that only after finding disparate treatment."); Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1, 17 (2010) ("[T]his Article will proceed on the presumption that the disparate impact provision is a racial classification that triggers strict scrutiny."); Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2168 n.47 (2013) (citing several articles that briefly argued that an action taken to avoid a disparate impact does not conflict with equal protection). *But see* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 506–15 (2003) (discussing whether a disparate-impact provision classifies by race).

[21] *See infra* note 179 and accompanying text (comparing disparate-treatment analysis under Title VII and the Equal Protection Clause). *Cf. infra* note 27 (discussing the state-action doctrine).

[22] *Ricci*, 557 U.S. at 585 (2009).

[23] *See infra* note 178 and accompanying text (discussing why the court had to express its assumption that avoiding disparate impact can constitute different treatment based on race "in its own voice and without citation").

[24] *Ricci*, 557 U.S. at 608 (Ginsburg, J., dissenting, joined by Stevens, Souter, Breyer, JJ.). *See infra* note 185 and accompanying text (discussing Justice Ginsburg's dissent in greater detail); text accompanying *infra* note 197 (theorizing how Justice Ginsburg would respond to the holding of *New York City Transit Authority v. Beazer*).

[25] *Ricci*, 557 U.S. at 594 (2009) (Scalia, J., concurring).

[26] *See* Ngov, *supra* note 20, at 17 n.86 ("A normative discussion of whether neutral practices that are race conscious should be subject to strict scrutiny is a subject for an article in itself."). This Note attempts to provide the discussion predicted by Professor Ngov, although this Note views disparate-impact avoidance as non-neutral and race-based, rather than neutral and race-conscious.

that an employer[27] triggers equal-protection strict scrutiny by discarding test results to avoid a racially-disparate impact. Part I of this Note serves as an introduction, while Part II provides a brief overview of Title VII's disparate-impact doctrine. Part III provides an in-depth view of equal protection. Specifically, Part III.A discusses an important and often-overlooked issue that this Note calls "step one" of equal protection. This issue focuses on when an official act implicates[28] equal protection—in other words, when an official act triggers any kind of equal-protection scrutiny at all.[29] This Note argues that an official act triggers equal-protection scrutiny to the extent it treats people differently than each other.[30] Part III.B discusses the more familiar "step two" of equal

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[27] Title VII's disparate-treatment provision prohibits certain conduct by private or public employers. Bazemore v. Friday, 478 U.S. 385, 394 n.5 (1986) (Brennan, J., joined by all other Members of the Court, concurring in part). By contrast, the Equal Protection Clause prohibits only state action, not private action. *E.g.*, United States v. Morrison, 529 U.S. 598, 621 (2000). Thus, the Equal Protection Clause prohibits racial discrimination by a public, but not a private, employer. *See id.* (quoting Shelley v. Kraemer, 334 U.S. 1, 13, and n. 12 (1948)) ("[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."). But equal protection is violated if a private employer engages in racial discrimination when required to do so by the state, such as Title VII's disparate-impact provision. *See Ricci*, 557 U.S. at 594 (2009) (Scalia, J., concurring) (citing Buchanan v. Warley, 245 U.S. 60, 78–82 (1917)) ("[I]f the Federal Government is prohibited from discriminating on the basis of race . . . then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race."); *see also* Adickes v. S. H. Kress & Co., 398 U.S. 144, 170–71 (1970) (explaining that racial discrimination by a private entity amounts to state action if compelled by the state). Justice Scalia in *Ricci* seemed to think that Title VII's disparate-impact provision was state action, whereas the Court in *Adickes* seemed to hold the private entity's act of state-compelled discrimination was state action. This Note proceeds on the assumption that either or both explanations correctly explain why state-compelled private racial discrimination is unconstitutional. Thus, a private actor triggers strict scrutiny under the Equal Protection Clause when it differentiates on the basis of race under compulsion by Title VII or other law. This Note uses the terms "official act" and "state action" to refer to action by the state, including laws, and action compelled by the state.

[28] If an official act implicates a constitutional right, then the act is subject to a judicial test (*e.g.*, strict scrutiny) that determines whether the act violated that right. But if an act does not implicate such a right, then the act is not subject to any such test because an act cannot have violated a right it did not implicate. The right to equal protection is implicated when the government treats, or requires a private actor to treat, one group differently than another group. *See infra* Part III.A. (discussing the threshold requirements for making an equal protection claim); *see also supra* note 27 (explaining that the Equal Protection Clause applies to state actors, as well as private actors, operating at the behest of the state). When an act implicates equal protection, the act is subject to one of several tiers of scrutiny to determine if the act violated equal protection. *See supra* note 18 (providing an overview of the tiers of judicial scrutiny) & *infra* note 159 (discussing when various levels of judicial scrutiny apply). *See generally infra* Part III.B.2 (discussing the special type of review triggered when the motivating-factor test is used to determine an act's official purpose).

[29] Scholars sometimes use the term "step zero" to refer to the threshold step of determining whether a particular legal test is applicable. *See, e.g.*, Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006). I will refer to this first step as "step one" in order to avoid confusion that could arise from referring to the first step as "step zero," the second step as "step one," and so on.

[30] *See infra* Part III.A. *But see infra* note 54 (discussing one exception to this rule). Although scholars and judges often state that such an official act "classifies" people, this note tends to avoid that term. An act need not classify people in order to trigger equal-protection scrutiny. *See infra* note 54. Moreover, not every official act that technically classifies people triggers equal-protection scrutiny because those acts do not treat anyone differently than anyone else. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 505–06 (2003)

protection, which determines which level of scrutiny applies to an official act that triggers equal-protection scrutiny. In particular, Part III.B.1 explains how to prove the basis upon which an official act differentiates among people, and Part III.B.2 briefly discusses which levels of scrutiny correspond to an act's basis. Part IV applies those equal-protection principles in an employment context akin to *Ricci*. In particular, Part IV.A addresses when an employer triggers equal-protection scrutiny of any kind by taking an action to avoid a disparate impact, and Part IV.B discusses how to determine which level of scrutiny applies to that action. Although this Note does not address "step three"[31]—whether disparate-impact avoidance satisfies the applicable level of scrutiny—the conclusion briefly explains why disparate-impact doctrine is undesirable.

II. BACKGROUND ON TITLE VII'S DISPARATE-IMPACT DOCTRINE

Title VII of the Civil Rights Act of 1964, as amended, prohibits employers from discriminating on the basis of any of several protected traits: race, color, religion, sex, or national origin.[32] It prohibits two distinct types of discrimination.[33] The first and "most easily understood" type is disparate-treatment discrimination,[34] which is an intentional act of unfavorable treatment against a person because of that person's protected trait.[35] The second type is disparate-impact discrimination, which is an act that creates a disproportionate effect on the basis of any protected trait.[36] Disparate-impact liability can attach even without proof of an

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(discussing the Census and other examples of classifications that do not trigger equal-protection scrutiny). Of course, segregation is a classification that treats people differently than one another in two respects: people of group A are not allowed to use facilities reserved for group B, and people of group B are not allowed to use facilities for people of group A. Thus, segregation triggers equal-protection scrutiny due to either of those differences in treatment. The notion that both groups are treated the same because each group is allowed to use its facilities, but not the other group's facilities, overlooks those two ways in which the groups are treated differently.

[31] *See infra* notes 52 ("Applying the correct level of scrutiny is the third step.") & 53 (explaining why "step three" is omitted from this Note's analysis).

[32] Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009). Other federal laws prohibit certain disparate treatment and disparate impact. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275 (2001) (Title VI of the Civil Rights Act of 1964); Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) (Age Discrimination in Employment Act). This Note focuses on Title VII, race, and the employment context because *Ricci* and the scholarship it inspired have that focus.

[33] *See Ricci*, 557 U.S. at 577–78.

[34] *Id.* at 557 (quotation marks omitted) (quoting Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)); *see also* 42 U.S.C. § 2000e–2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[35] *Ricci*, 557 U.S. at 577 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–986 (1988)).

[36] *See id.* at 578 (describing disparate impact discrimination as "a particular employment practice

employer's intent to cause the impact or otherwise discriminate on the basis of a protected trait.[37]

Title VII's disparate-impact doctrine uses a burden-shifting approach for proving and defending against liability. The plaintiff must first prove an employment policy, such as a test, had a disparate impact along the lines of a protected trait.[38] The Equal Employment Opportunity Commission generally regards an employment test as evincing a disparate impact if any group with a protected trait passes the test at a rate of less than 80 percent of the group with the highest rate of passage.[39] After the plaintiff makes such a *prima facie* showing of a disparate impact, the burden shifts to the employer to prove the employment policy in question is consistent with business necessity.[40] If the employer overcomes that burden, the burden then shifts back to the plaintiff to prove the employer refused to adopt an alternative policy that would have served the employer's legitimate needs and resulted in less disparate impact along the lines of a protected trait.[41]

III. HEIGHTENED EQUAL-PROTECTION SCRUTINY APPLIES TO AN OFFICIAL ACT THAT DIFFERENTIATES ON A SUSPECT BASIS

The Equal Protection Clause cannot mean that the government must always treat every person exactly like it treats everyone else.[42] Perhaps

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that causes a disparate impact on the basis of race, color, religion, sex, or national origin").

[37] Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.") (citations omitted); *See* Ricci v. DeStefano, 557 U.S. 557, 595 (2009) (Scalia, J., concurring). *See generally* Stacy E. Seicshnaydre, *Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141 (2007) (arguing that mental state is irrelevant in a disparate-impact claim).

At least one federal judge has held that Title VII's disparate-impact provision prohibits only intentional discrimination partly because it prohibits discrimination, which necessarily is intentional. *See id.* at 1173 n.181 (quoting United States v. N.C., 914 F. Supp. 1257, 1265 (E.D.N.C. 1996)). Somewhat similarly, scholars have debated whether the disparate-impact doctrine should be viewed as merely a method of proving intentional discrimination in order to ensure disparate-impact remedies are constitutional. *See id.* at 1178 n.203, 1182–85 (discussing this view). Scholars also have debated whether subconscious discrimination is intentional or otherwise actionable. *See id.* at 1178 n.203; *see also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 532–35 (2003) (discussing this view); Patrick S. Shin, *Liability for Unconscious Discrimination? A Thought Experiment in the Theory of Employment Discrimination Law*, 62 HASTINGS L.J. 67 (2010) (discussing whether unconscious discrimination is actionable). These issues are beyond the scope of this Note.

[38] *See* Ricci v. DeStefano, 557 U.S. 557, 578 (2009) (citing 42 U.S.C. § 2000e–2(k)(1)(A)(i)).

[39] *See id.* 586–87 (2009) (citing 29 C.F.R. § 1607.4(D) (2008)); *Watson*, 487 U.S. at 995–96 n.3 (plurality opinion). For example, in *Ricci*, a prima facie case of disparate-impact liability arose because 58.1% of Caucasians passed one test and 31.6% of African-Americans passed it, and 31.6 is less than 80% of 58.1 (i.e. less than 46.48). *Ricci*, 557 U.S. at 586–87.

[40] *Ricci*, 557 U.S. at 578 (citing 42 U.S.C. § 2000e–2(k)(1)(A)(i)).

[41] *Id.* (citing 42 U.S.C. §§ 2000e–2(k)(1)(A)(ii) and (C)).

[42] *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 544 n.22, 546 n.29

the most obvious reason why is that every action or rule treats some people differently than others, in some respects.[43] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[44] Known as the principle of equality,[45] the view that likes should be treated alike dates back to ancient times.[46] The Supreme Court interpreted the Equal Protection Clause according to that principle shortly after the Fourteenth Amendment was ratified, more than a century ago.[47] The necessary inverse[48] of the principle of equality is that "the equal protection clause does not forbid discrimination with respect to things that are different."[49] Accordingly, the principle of equality is concerned with whether two people who are treated differently than each other are alike in ways relevant to their different treatment—in other words, whether two people's differences justify their different treatment.[50]

Determining whether the Equal Protection Clause allows or prohibits certain state action requires answering two initial questions.[51]

(1982) (asserting that "people who are alike" are not alike in every respect); *see infra* note 49.

[43] Romer v. Evans, 517 U.S. 620, 631 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.") (citations omitted). *See* Westen, *supra* note 42, at 575 ("every rule treats people alike in some respects and unalike in others") (internal citations omitted); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997) ("Most laws, of course—perhaps all—classify individuals one way or another.").

[44] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

[45] *See, e.g.*, Westen, *supra* note 42, at 537 (stating that the principle of equality is that likes should be treated alike)..

[46] *See* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286-87 (1991) (citing ARISTOTLE, ETHICA NICHOMACHEA bk. V.3, 1131a, 1131b (W. Ross trans. 1925)); Westen, *supra* note 42, at 542–43 (citations omitted).

[47] *See* Missouri v. Lewis, 101 U.S. 22, 31 (1879) (The Equal Protection Clause "means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."); *see also* Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286 n.28 (1991) (citing slightly later Supreme Court cases that viewed equal protection according to the principle of equality).

[48] *See* Westen, *supra* note 42, at 539–40 & n.8 (arguing that the principle of equality necessarily means that people who are unlike need not be treated alike).

[49] Puget Sound Power & Light Co. v. City of Seattle, Wash., 291 U.S. 619, 624 (1934). *See* Vacco v. Quill, 521 U.S. 793, 799 (1997) (The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.") (citing Plyler v. Doe, 457 U.S. 202, 216 (1982) ("'[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'") (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940))). *See also* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (the right to equal protection "is not a demand that a statute necessarily apply equally to all persons") (citing *Tigner*, 310 U.S. at 147).

[50] *See* Westen, *supra* note 42, at 543–47, 576–77 n.136; Maureen B. Cavanaugh, *Towards A New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 421 (1994).

[51] Scholars and courts sometimes have clearly analyzed an equal-protection claim under a two-step process like the one in this Note. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 296–313 (2001). *See also* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 588–89 (1979) (finding the plaintiffs' showing of

First, when does state action implicate the Equal Protection Clause—when does state action treat one person differently than another? Second, what is the basis of the state action for treating those persons differently? The first question is a threshold issue for stating an equal-protection claim, and courts and commentators tend to overlook or wrongly analyze it.[52] This Note will answer both questions in turn.[53]

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different treatment sufficient to state an equal-protection claim); *see id.* at 592–93 & n.40 (finding that the different treatment was not based on a suspect purpose and thus was subject to rational-basis scrutiny). *See also* Monterey Mech. Co. v. Wilson, 125 F.3d 702, 708–12 (9th Cir. 1997) (determining the law at issue implicated equal protection because it imposed different treatment); *id.* at 712–15 (determining that the different treatment was based on race and gender, so heightened scrutiny must apply to the law). "'The first step in equal protection analysis is to identify the [defendants'] classification of groups.' . . . To accomplish this, a plaintiff can show that the law is applied in a discriminatory manner or imposes different burdens on different classes of people. . . . 'The next step . . . [is] to determine the level of scrutiny.' . . . Classifications based on race or national origin, such as those alleged here, are subject to strict scrutiny." Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995) (citations omitted).

[52] Sometimes courts do not explain whether they are deciding cases by answering the first or second question. For example, the Supreme Court once stated that the law at issue "does not embody a racial classification. It neither says nor implies that persons are to be treated differently on account of their race." Crawford v. Bd. of Educ. of City of L.A., 458 U.S. 527, 537 (1982) (footnote omitted). But the Court did not clearly explain whether it meant that the law did not differentiate among groups or, instead, that the law differentiated on some ground besides race. *See id.* at 537–45.

Similarly, some courts have conflated the two questions (*e.g.*, the first two steps) into one. "Analysis of an equal protection claim alleging an improper statutory classification involves two steps. Appellants must *first* show that the statute, either on its face or in the manner of its enforcement, results in members of a certain group being *treated differently* from other persons *based on membership in that group*." United States v. Lopez-Flores, 63 F.3d 1468, 1472 (9th Cir. 1995) (emphasis added) (citing Jones v. Helms, 452 U.S. 412, 423–24 (1981); Hernandez v. Texas, 347 U.S. 475, 479 (1954)). "Second, if it is demonstrated that a cognizable class is treated differently, the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified." *Id.* (citing Plyler v. Doe, 457 U.S. 202, 217–18 (1982)). Contrary to what the Ninth Circuit stated in *Lopez-Flores*, the first step consists of determining only the existence of different treatment. *See infra* Part III.A. If the first step is satisfied, the second step consists of determining the basis for the different treatment. *See infra* Part III.B. Applying the correct level of scrutiny is the third step. The Ninth Circuit has recognized these three distinct steps in some cases. *See supra* note 51.

[53] *Infra* Part III.A. answers the first question, and *infra* Part III.B. answers the second question. *Infra* Part IV applies the answers to these questions in the context of an employer's discarding of test results to avoid a racially-disparate impact. In particular, *infra* Part IV.A. explains when avoiding a disparate impact treats one person differently than another. *Infra* Part IV.B. explains when race is the basis for avoiding a disparate impact.

The final step in an equal-protection claim is determining whether different treatment is justified by applying a tier of equal-protection scrutiny. *See supra* note 52. This Note does not analyze whether an action taken to avoid a racially-disparate impact would satisfy the appropriate level of scrutiny. Several articles have analyzed that issue. *See* sources cited in *supra* note 19. Rather, this Note focuses solely on the first two steps: whether such an action implicates equal protection and, if so, which level of judicial scrutiny it triggers.

A. Step One: Different Treatment Is the Only Threshold Showing Required for Stating An Equal Protection Claim

Supreme Court practice reveals that the only required threshold for stating an equal-protection claim is that an official act treats one person differently than another.[54] Several cases suggest that this showing is easy to make. Essentially any case against the government could support an equal protection claim if framed in the correct way. A showing of different treatment[55] need not rise to the level of a deprivation of liberty or property protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[56] Although a law is immune from equal-protection review to the extent it does not differentiate,[57] it is subject to

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[54] An act that classifies people into "identifiable group[s]" treats people differently and therefore implicates equal protection. *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008). An official act that does not classify people but nevertheless treats some people differently than others implicates equal protection under a "class-of-one" theory of equal protection. *See id.* That theory "presupposes that like individuals should be treated alike, and that to treat them differently is to classify them in a way that must survive at least rationality review." *Id.* at 605. The class-of-one theory does not apply in the context of public employment. *Id.* An employment action taken to avoid a racially-disparate impact, such as discarding test results that were racially skewed, fits into the classification theory rather than the class-of-one theory. *See id.* (viewing the classification theory broadly enough to include a policy that prohibits employees from using narcotics and a policy that requires teachers to receive continuing education). *See also infra* notes 68 & 210 (discussing these two theories); *infra* Part IV.A. (arguing that an action taken to avoid a racially-disparate impact implicates equal protection).

[55] Technically, the showing is of different (i.e. uneven) treatment, not "unequal" treatment. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (explaining when "differential treatment" violates equal protection). The principle of equality determines whether different treatment is unequal treatment. *See supra* notes 44–49 and accompanying text (explaining the principle of equality). In practice, courts make that determination by applying one of the tiers of scrutiny. *See supra* note 18 and *infra* note 159 (discussing the tiers of scrutiny). Note that the equal protection clause "protect[s] *persons,* not *groups*." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Thus, where this Note refers to different treatment of groups, a group may consist of one or more persons. *But see infra* note 210 (discussing a limit on "class-of-one" equal-protection claims).

[56] *See infra* note 72 and accompanying text.

[57] For example, in one case the Supreme Court upheld a city's decision to close all public swimming pools to avoid a court order to racially desegregate them. Palmer v. Thompson, 403 U.S. 217, 218–19 (1971). Scholars expressed concern with this case because they viewed it as holding that lawmakers' motives are irrelevant in equal-protection cases. *See, e.g.*, Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108–10 (1989) (discussing scholarship that had this concern). But the Court did not hold that. Rather, the Court held that an official act does not implicate equal protection to the extent it does not differentiate, so there is no need to determine whether the motives behind the act would subject it to strict scrutiny if it implicated equal protection. *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 298 (2001). In other words, the plaintiffs failed to get past "step one," so proceeding to "step two" would be improper. *See Palmer*, 403 U.S. at 225 (the evidence shows "no state action affecting blacks differently from whites"); *id.* at 226 ("the issue here is whether black citizens in Jackson are being denied their constitutional rights when the city has closed the public pools to black and white alike"); *id.* ("Nothing in the history or the language of the Fourteenth Amendment nor in any of our prior cases persuades us that the closing of the Jackson swimming pools to all its citizens constitutes a denial of 'the equal protection of the laws.'"); *id.* at 220 ("[T]his is not a case where whites are permitted to use public facilities while blacks are denied access. It is not a case where a city is maintaining different sets of facilities for blacks and whites

such review to the extent it does differentiate. Indeed, several U.S. Supreme Court cases show that a law that treats everyone alike in certain ways nevertheless implicates equal protection if it differentiates in at least one respect.[58]

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and forcing the races to remain separate in recreational or educational activities."); *see also* Washington v. Davis, 426 U.S. 229, 243 (1976) ("The holding [in *Palmer*] was that the city was not overtly or covertly operating segregated pools and was extending *identical treatment* to both whites and Negroes." (emphasis added)).

Plaintiffs in *Palmer* could have gotten past "step one" if they argued the pool closures differentiated among city employees by depriving pool employees, but not other city employees, of jobs. But there was no plausible way to argue that such differentiation was race-based, so that argument would have likely failed under rational-basis scrutiny. Instead, the plaintiffs tried to trigger strict scrutiny by plausibly arguing the pool closures were race-based because they sought to prevent pool-goers from swimming with people of other races. But this argument failed to get past "step one" because the city did not treat any pool-goers differently than any other pool-goers.

See also United States v. Armstrong, 517 U.S. 456, 470-71 (1996) (selective-prosecution claim failed to implicate equal protection because it failed to identify any persons who could have been, but were not, prosecuted for the same offense); Coal. for Econ. Equity v. Wilson, 122 F.3d 692, 702 (9th Cir. 1997) ("Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender. A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense.").

[58] Professor Rebecca L. Brown has noted that the Supreme Court struck down a poll tax on equal protection grounds for discriminating against African Americans, although the law facially applied to everyone. *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1542–43 (2002). She then argued that there should be a principled way to distinguish that law from a law imposing a generally applicable speed limit, which should not implicate equal protection. *See id.* If a speed limit implicated equal protection, "[i]t would strain the nobility of the equality principle, not to mention the resources of the federal judiciary, if every such inequality of impact were cognizable based on the different ways that a general law might fall on different people." *Id.* at 1542 (citing Emp't Div. v. Smith, 494 U.S. 872, 878 (1990); Washington v. Davis, 426 U.S. 229, 246-47 (1976)).

However, the principled way to distinguish those two laws is not to decide that only one implicates equal protection; rather, it is to decide that only one triggers heightened scrutiny. Strict scrutiny should apply to a poll tax because it burdens the fundamental right to vote, *see infra* note 74, and because it discriminates against African Americans. By contrast, the speed limit would easily satisfy rational-basis scrutiny. *See infra* Part III.B.2; *see infra* note 208 and accompanying text. Simply put, different treatment implicates, but does not necessarily violate, the right to equal protection. And essentially every official act treats people differently in one way or another.

According to Professor Brown, the *Davis* Court was wary of thinking that every law *implicated* equal protection because such a practice would call into question the validity of many laws. *See id.* at 1542 n.258 (citing *Davis*, 426 U.S. at 248). To the contrary, the *Davis* Court was concerned with finding every law to be *race-based* solely because it had an uneven racial impact, because such a finding would *trigger strict scrutiny* and thereby call into question most laws. *Davis*, 426 U.S. at 248 ("A rule that a statute designed to serve neutral ends is nevertheless invalid, absent *compelling* justification, if in practice it benefits or burdens one *race* more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of . . . statutes[.]") (emphasis added); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979).

Moreover, both upholding a speed limit and striking down a poll tax are consistent with the equality principle. *See supra* notes 44–49 and accompanying text (discussing the equality principle). As for poll taxes, the races are similarly situated and people of varying degrees of affluence are similarly situated with respect to ability to vote competently, so the equality principle demands like treatment among the races and among all levels of affluence with respect to voting. By contrast, motorists that drive at an unsafely high speed are not like motorists that drive at a safe, slower speed, and thus

The first illustrative case is *Vacco v. Quill*[59], in which the Supreme Court upheld New York's ban on physician-assisted suicide.[60] New York law allowed physicians to remove life support from terminally-ill patients.[61] The Court noted that New York's ban on assisting suicide and its laws permitting patients to refuse medical treatment do not facially "treat anyone differently from anyone else or draw any distinctions between persons. *Everyone*, regardless of physical condition, is entitled, if competent, to refuse unwanted lifesaving medical treatment; *no one* is permitted to assist a suicide."[62] Despite this apparent similar treatment, the Court explored the equal-protection argument due to clever framing. A lower court ruled that the statutes treated people differently because "some terminally ill people—those who are on life-support systems—are treated differently from those who are not, in that the former may 'hasten death' by ending treatment, but the latter may not 'hasten death' through physician-assisted suicide."[63] This framing sufficed to state an equal-protection claim.[64]

Another example is *New York City Transit Authority v. Beazer*. In that case, the Supreme Court upheld a Transit Authority policy that excluded users of narcotics, including people receiving methadone treatment, from being considered for employment.[65] The Court stated that "[g]eneral rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with" the Equal Protection Clause.[66] "Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether [the Equal Protection Clause] is violated arise."[67] Thus, different treatment is sufficient to implicate equal protection.[68] The Transit Authority policy at issue "places a meaningful restriction on all of its employees and job applicants; in that sense the rule is one of general applicability and satisfies the equal protection

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treating them differently is permissible under the equality principle.

[59] Vacco v. Quill, 521 U.S. 793 (1997).

[60] Vacco v. Quill, 521 U.S. 793, 808–09 (1997).

[61] *Id.* at 796–97.

[62] *Id.* at 800.

[63] *Id.*

[64] *See id.* at 800–09.

[65] N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 570–71 (1979). *See id.* at 573–74 (stating methadone has lawful uses, including as a painkiller and a means of curing a heroin addiction).

[66] *Id.* at 587.

[67] *Id.* at 587–88.

[68] *See* Engquist v. Oregon Dep't of Agr., 553 U.S. 591, 605 (2008) ("[T]he Equal Protection Clause is implicated when the government makes class-based decisions in the employment context, treating distinct groups of individuals categorically differently") (citing New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979); Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199–201 (1979); Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 314-17 (1976)). Thus, the policy at issue in *Beazer* fit into the classification theory, rather than class-of-one theory, of equal protection. *See supra* note 54 & *infra* note 210 (discussing these two theories).

principle without further inquiry."[69] But the Court engaged in further inquiry because a court below ruled that the policy treated methadone users differently than people who do not use narcotics, including methadone.[70] This case shows how framing can turn almost any grievance against the government into an equal-protection claim,[71] even if the claim falls short of implicating the right to due process.[72]

In *Zablocki v. Redhail*, the law at issue forbade anyone from marrying who owed child support to children outside of his or her custody.[73] The Court applied strict scrutiny to the law because it infringed on the fundamental right to marry[74] and thereby struck down the law under the Equal Protection Clause.[75] Justice Potter Stewart criticized the Court's decision to rely on equal protection instead of substantive due process.[76] "Like almost any law, the [marriage-requirement] statute now before us affects some people and does not affect others. But to say that it thereby creates 'classifications' in the equal protection sense strikes me as little short of fantasy."[77] Rather, Justice Stewart believed that the Equal Protection Clause guards against only "invidiously discriminatory classifications," of which the

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[69] *Beazer*, 440 U.S. at 588.

[70] *Id.*

[71] This means that the equal protection clause is implicated and that an appropriate level of scrutiny should apply; this does not mean that the clause is necessarily violated. *See supra* note 18 (referring to an overview of the tiers of judicial scrutiny provided by City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–42 (1985).

[72] The job applicants that filed the lawsuit in *Beazer* certainly did not have a due process right to be considered for employment. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 592 n.38 (1979) (the applicants abandoned their due process argument before the Supreme Court, which found "no merit" in the argument); *see also* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 575, 578 (1972) (terminating an at-will public employee without a hearing or an explanation does not implicate the right to due process).

[73] Zablocki v. Redhail, 434 U.S. 374, 375 (1978).

[74] *Zablocki*, 434 U.S. at 383. Under the Supreme Court's equal protection jurisprudence, strict scrutiny applies to an official act that targets a suspect class or burdens a fundamental right. *See* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 253–54, 263 (1974) (stating that saving taxpayer money is not a sufficient state interest to sustain durational residence requirements that inhibit individuals' right to freely migrate); *See also* Romer v. Evans, 517 U.S. 620, 631 (1996) ("if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). This fundamental-rights aspect of equal protection can be called "substantive equal protection." *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1500–12 (2002) (discussing this doctrine). Although the Court could have relied on substantive due process in its "substantive equal protection" cases, it relied on equal protection instead because its substantive due process jurisprudence is criticized more often than its equal protection jurisprudence. *See generally id.*; Carlos A. Ball, *Why Liberty Judicial Review Is As Legitimate As Equality Review: The Case of Gay Rights Jurisprudence*, 14 U. PA. J. CONST. L. 1 (2011). Substantive equal protection is beyond the scope of this Note.

[75] Zablocki v. Redhail, 434 U.S. 374, 382 (1978).

[76] *Zablocki*, 434 U.S. at 91 (Stewart, J., concurring in the judgment). Substantive due process is beyond the scope of this Note.

[77] *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment). For a discussion of dissenting Justices in other cases who shared Justice Stewart's narrower view of equal protection, *see* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1511 (2002).

"paradigm" example is a racial classification.[78] The flaw with Justice Stewart's narrow view of when an act implicates equal protection is that his logic does not support his conclusion. Using Justice Stewart's logic, if the marriage law at issue passed muster under equal protection, it would be because the law did not invidiously discriminate and thus satisfied rational-basis scrutiny.[79] It would not be because the law failed to classify and thus failed to implicate equal protection.[80] In other words, Justice Stewart seemed to conflate the first and second steps of an equal-protection claim.[81] Indeed, the other eight Justices thought the law implicated equal protection,[82] and Justice Stewart, somewhat inconsistently, had written an earlier majority opinion relying on equal protection in a similar case.[83]

A litigant need not show that he or she is similarly situated with other persons in order to state an equal-protection claim.[84] Instead,

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[78] *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment).

[79] *See infra* notes 208–11 (explaining the constructs surrounding the various levels of judicial scrutiny).

[80] If a law denies to people of one race, but not other races, the right to marry, then it certainly treats two groups differently (i.e., it "classifies"). The law at issue in *Zablocki* denied to one group, but not others, the right to marry. Thus, that law implicated equal protection just like the hypothetical racial law does. The important difference between these two laws is that the racial law triggers strict scrutiny because it is race-based, whereas the law in *Zablocki* would not necessarily trigger strict scrutiny. *See Zablocki*, 434 U.S. at 383–84 (majority opinion) (explaining that although the law does not classify by race, it is subject to strict scrutiny because it burdens the fundamental right to marry); *see also supra* note 58 (arguing that the tiers of scrutiny are the most principled way to distinguish laws that violate equal protection from those that do not).

[81] *See infra* Part III.B (discussing the second step of an equal-protection claim).

[82] *See Zablocki*, 434 U.S. at 382 (majority opinion) (relying on equal protection clause); *id.* at 391 (Burger, C.J., concurring) (stating that he joined the majority opinion); *id.* at 400 (Powell, J., concurring in the judgment) (stating that the law is unconstitutional under either equal protection or substantive due process); *id.* at 406 (Stevens, J., concurring in the judgment) (relying on equal protection); *id.* at 407 (Rehnquist, J., dissenting) (arguing the law should be upheld under rational-basis scrutiny under equal protection and substantive due process).

[83] *See* Carrington v. Rash, 380 U.S. 89 (1965). That case involved a "substantive equal protection" claim, *see supra* note 74, that challenged a Texas law that forbade military members stationed there from voting there. *Id.* at 89–90. According to Justice Stewart's majority opinion, the law treated military members and non-military members differently. *See id.* at 91–93. But in *Zablocki*, he thought the marriage-license requirements did not impose different treatment. *See Zablocki*, 434 U.S. at 391 (Stewart, J., concurring in the judgment).

[84] *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011) (arguing that "similarly situated" analysis is not a preliminary hurdle that litigants must clear to proceed to equal protection review). Of course, the litigant must *allege* that he or she is similarly situated with differently-treated persons in order to state an equal protection claim. *See* Engquist v. Oregon Dep't of Agr., 553 U.S. 591, 601–02 (2008) (in Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000), the Court held the "complaint stated a valid claim under the Equal Protection Clause because it *alleged* that [the plaintiff] had 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment'" (emphasis added)); *id.* at 602 ("When those who *appear* similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference[.]" (emphasis added)). *See also* Samaad v. City of Dallas, 940 F.2d 925, 941–42 (5th Cir. 1991) (stating that litigant failed to state an equal protection claim by failing to allege being similarly situated with differently-treated persons). The Eighth Circuit misinterpreted *Samaad* to require a litigant to show, rather than merely allege, he was similarly situated with others. *See infra* note 88 (exemplifying that some circuit courts have held that a court must decide whether two groups are similarly situated in order to determine whether equal protection is implicated). Requiring such an *allegation* makes sense because "similarly situated" is part of the definition of "equal," *see supra* notes 44–49 and accompanying text, so failing to allege

whether two groups are similarly situated is a conclusion that a court reaches by applying a proper level of equal-protection scrutiny.[85] Specifically, equal-protection scrutiny determines whether the groups are similar in ways relevant to their different treatment—in other words, whether distinctions between two groups justify the groups' different treatment.[86] Hence, justifying race-based different treatment is much more difficult than justifying age-based different treatment because racial groups, but not age groups, are strongly assumed to be similarly situated.[87] Some circuit courts have held that a court must decide

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being similarly situated would fail to allege that the different treatment in question is *unequal* treatment.

[85] *See generally* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581 (2011) (arguing that "similarly situated" analysis is not a preliminary hurdle that litigants must clear to proceed to equal protection review); Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating that the legislature makes the initial determination as to "what is 'different' and what is 'the same'" when it classifies people, and courts review whether that determination is correct by applying a level of equal-protection scrutiny, most often rational-basis scrutiny). True, equality means nothing without a notion of being similarly situated. *See supra* notes 44–49 and accompanying text (describing the principle of equality). But that truism does not explain which party bears the burden of establishing whether two groups are similarly situated and when a party must establish that. Because the issue of being similarly situated is relevant only during application of a tier of judicial scrutiny, the equal-protection claimant essentially needs to prove the groups in question are similarly situated if rational-basis scrutiny applies. *See infra* note 159 (clarifying that when heightened scrutiny applies, the government essentially needs to prove the groups in question are not similarly situated).

Courts have failed to understand this. *See* Silveira v. Lockyer, 312 F.3d 1052, 1088 (9th Cir. 2002), *abrogated on other grounds by* District of Columbia, 554 U.S. 570 (2008), ("[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately") (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)) (other citations omitted). The Ninth Circuit would have been correct if it omitted the words "similarly situated" from that quote. When the state treats similarly-situated persons differently, it does not merely trigger equal-protection review. Instead, the state violates equal protection. *Cleburne*, 473 U.S. at 439 (stating that the equal protection clause is "a direction that all persons similarly situated should be treated alike") (citing *Plyler*, 457 U.S. at 216); *Plyler*, 457 U.S. at 216 ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'") (citation omitted); *see supra* notes 44–50 and accompanying text (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny).

[86] Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 615 (2011) ("'[S]imilarly situated' analysis is relational. Its focus is not merely pointing out any difference between the two classes, but rather evaluating the relationship between the classification and the statutory purpose.") (citations omitted); *id.* at 619 (arguing that instead of "focusing on differences between two groups," the "similarly situated" analysis focuses on "the statutory aims and the 'fit' between the legislative classification and these asserted goals"). *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 546 n.29 ("'Equals . . . ought to be treated alike in the respect in which they are equal; but there may be other respects in which they differ . . . which justify differences in treatment.'") (quoting S. BENN & R. PETERS, THE PRINCIPLES OF POLITICAL THOUGHT 124 (1959)); In re Antazo, 3 Cal. 3d 100, 110, 473 P.2d 999, 1005 (1970) ("the 'concept of the equal protection of the laws compels recognition of the proposition that persons *similarly situated with respect to the legitimate purpose of the law* receive like treatment'") (emphasis added) (citation omitted). *See also supra* text accompanying *supra* note 50.

[87] There is a direct correlation between (1) the strength of the assumption that two groups are similarly situated and (2) how difficult to justify different treatment between those groups is. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985) (explaining that suspect classifications such as race are "seldom relevant" to state interests, quasi-suspect classifications such as gender "frequently bear[] no relation" to state interests, and non-suspect classifications are often relevant to state interests; explaining the tiers of scrutiny that apply to these three classifications). *See also* Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464, 478 (1981) (Stewart, J., concurring) ("[S]o far as the Constitution is concerned, people of different races

whether two groups are similarly situated in order to determine whether to apply any such scrutiny—that is, to determine whether equal protection is implicated.[88] However, some of those same circuit courts have held to the contrary,[89] and courts in other circuits apparently have

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are always similarly situated") (citations omitted); Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns[.]"); Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 614 (2011) ("The phrase 'similarly situated' appears less in race cases because the Court is less willing to entertain the claim that racial line-drawing is legitimate, no matter the asserted justification.") (citations omitted).

[88] Harvey v. Town of Merrillville, 649 F.3d 526, 531 (7th Cir. 2011) (holding that to state an equal-protection claim, claimants "need[] to come forward with evidence from which a jury could conclude (1) they were members of a protected class; (2) they were similarly situated to members of an unprotected class in all relevant respects; and (3) they were treated differently from members of the unprotected class") (citation omitted); Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994), ("Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim.") (citing Samaad v. City of Dallas, 940 F.2d 925, 941 (5th Cir. 1991)); Griffith v. Johnston, 899 F.2d 1427, 1441 (5th Cir. 1990) ("Adopted children who rely upon their adoptive parents for support and children under state conservatoires, are in no way similarly situated with regard to the medical and psychological services provided by the state. The state has no responsibility to treat these disparately situated children identically. Appellants have failed to state an Equal Protection cause of action."); Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996) (stating that because female-inmate plaintiffs failed to prove they are similarly situated with better-treated male inmates, "[t]he female inmates . . . are, therefore, foreclosed from making an equal protection challenge"); *Women Prisoners*, 93 F.3d at 951 (Rogers, J., concurring in part and dissenting in part) ("Rather than examine whether the District can justify its separate and unequal treatment of the sexes . . . the court concludes that . . . equal protection principles do not even apply: these two identical prisoners are not 'similarly situated.'"); *Harvey*, 649 F.3d at 531–32; Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595, 604 (2007) ("The *Klinger* court held that because the prisoners were not similarly situated, there could be no equal protection violation. The court did not analyze the program using any level of scrutiny—strict, intermediate, or rational basis—to determine whether the program violated the Equal Protection Clause and to ensure that the women were free from illegal gender discrimination.").

[89] The Eighth Circuit held this view two days before it took a different view in *Klinger*. Bills v. Dahm, 32 F.3d 333, 336 (8th Cir. 1994) ("Where men and women are found not to be similarly situated, the court must still determine whether" [their different treatment in a prison setting] "was rationally related to a permissible state objective.") *See also* Timm v. Gunter, 917 F.2d 1093, 1102–03 (8th Cir. 1990) (explaining that rational-basis scrutiny is satisfied because the differently treated groups are not similarly situated); Oliver v. Scott, 276 F.3d 736, 746–47 (5th Cir. 2002) (parroting the holding of *Timm*).

However, the court in *Bills* erred because the state satisfies equal protection if it treats different groups differently. *See* text accompanying *supra* notes 44–50 (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny). Equal-protection scrutiny determines if groups are similar or different. *See id.* The Eighth Circuit failed to recognize this point in both *Klinger* and *Bills*, although the court in those cases took opposing views as to whether rational-basis scrutiny applies after a court decides the groups are different. The Eighth Circuit failed to recognize this point in both *Klinger* and *Bills*, although the court in those cases took opposing views as to whether rational-basis scrutiny applies after a court decides the groups are different. *See* Bills v. Dahm, 32 F.3d 333, 336 (8th Cir. 1994) (applying rational-basis scrutiny even after concluding that the men and women were not similarly situated); Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"*, 51 N.Y.L. SCH. L. REV. 595, 604 (2007) (explaining that the *Klinger* court refused to apply any level of scrutiny once it concluded that the female inmates and male inmates were not similarly situated).

as well.[90] Supreme Court practice shows that the issue of being similarly situated is relevant only during application of a level of scrutiny, not as a threshold requirement to state an equal-protection claim.[91] A contrary view could circumvent the heightened scrutiny that applies to gender[92] and race[93] discrimination, thereby allowing such discrimination to continue.[94] Indeed, such a view makes no sense because once an equal-protection claimant has shown the official act in question treats similarly-situated persons differently, the claimant has shown the act violated equal protection, thereby rendering unnecessary any application of judicial scrutiny.[95]

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[90] *See* United States. v. Lopez-Flores, 63 F.3d 1468, 1472 (9th Cir. 1995) (explaining how to state an equal-protection claim, without any reference to a showing of being similarly situated); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 708–12 (9th Cir. 1997) (analyzing whether the law at issue implicated equal protection, without considering whether the differently -treated groups were similarly situated); Freeman v. City of Santa Ana, 68 F.3d 1180, 1187 (9th Cir. 1995) ("Once the plaintiff establishes governmental classification, it is necessary to identify a 'similarly situated' class against which the plaintiff's class can be compared.") (citation omitted).

[91] *See* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 608–12, 616-19 (2011) (describing several U.S. Supreme Court cases where the "similarly situated" issue was relevant during application of a tier of equal-protection scrutiny, not as a threshold requirement in order to proceed to such scrutiny).

[92] *See* Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated"* 51 N.Y.L. SCH. L. REV. 595, 612 n.115 (2007) (explaining that the court in Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996), recognized that it would have subjected the challenged state action to heightened scrutiny if the differently-treated sexes were similarly situated).

[93] *See supra* note 87 (describing race as a suspect classification and gender as a quasi-suspect classification, both of which mandate heightened scrutiny)..

[94] *See* Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of "Similarly Situated."* 51 N.Y.L. Sch. L. Rev. 595, 617 (2007) ("Like other cases in which the court addresses equal protection claims without a detailed analysis of whether groups are similarly situated, women prisoners should also have their equal protection claims addressed to ensure that they are free from illegal gender discrimination."); *see also* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 592–93 (2011) (discussing this view). *See also supra* note 87 (describing race as a suspect classification and gender as a quasi-suspect classification, both of which mandate heightened scrutiny).

[95] The state violates equal protection when it treats similarly-situated persons differently. *See supra* notes 44–50 and accompanying text (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny). That is all the equal protection clause means, and that meaning has been settled for a very long time. *See id.* Failure to understand that basic meaning of equal protection has led courts to write such senseless statements as: "Even if the challenger can show that the classification differently affects similarly situated groups, '[i]n ordinary equal protection cases not involving suspect classifications or the alleged infringement of a fundamental interest,' the classification is upheld unless it bears no rational relationship to a legitimate state purpose." People v. Ranscht, 173 Cal. App. 4th 1369, 1372, 93 Cal. Rptr. 3d 800, 802 (2009) (citing Weber v. City Council of Thousand Oaks, 9 Cal.3d 950, 958–59 (1973)). Upholding a law that a plaintiff has proved "differently affects similarly situated groups" would be directly contrary to the core meaning of equal protection, which is that the state may not treat similarly-situated groups differently. *See supra* notes 44–50 and accompanying text (providing background and analysis on the treatment of the Equal Protection Clause and the various levels of scrutiny).

B. Step Two: Determining Which Level of Scrutiny Applies

The previous section explained how to state an equal-protection claim and explained that a court's first step in reviewing such a claim is determining whether state action differently treated two groups.[96] The previous section did not discuss how a court would likely rule on the merits of the claim, which is the focus of the second step of an equal-protection claim.[97] The second step is the focus of the present section and has two components: determining if an official act is based on a suspect or quasi-suspect purpose,[98] and determining which level of scrutiny corresponds to that purpose.[99]

1. *Determining an Official Act's Purpose*

To rule on the merits of a claim, a court must determine whether an act has a suspect or quasi-suspect purpose, and an act can have multiple purposes.[100] If an act has multiple purposes and at least one of them is quasi-suspect or suspect, the level of scrutiny that applies to the act will correspond to the most suspect purpose.[101] For example, if an act has a racial purpose, then heightened scrutiny would apply to the act, regardless of the act's non-racial purposes.[102] An act purposely treats two groups differently if the actor decided to perform the act "at least in part 'because of,' not merely 'in spite of,'" its effect on one or both of those groups.[103]

There are at least four ways to determine whether an act purposely treats two groups differently: (1) the act's express purpose, (2) the act's impact alone, (3) a motivating factor behind the act, and (4) and the

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[96] A plaintiff who fails to show different treatment not only fails to state an equal-protection claim, but the plaintiff also fails to establish its standing to bring that claim. *See* Ne. Fla Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993). Standing doctrine and procedural rules regarding motions to dismiss and the like are beyond the scope of this Note.

[97] *See supra* note 51 (stating that scholars and courts sometimes analyze equal-protection claims under a two-step process like the one in this Note).

[98] *See infra* Part III.B.1 (explaining that the second step in analyzing equal-protection claims involves determining if an official act is based on a suspect or quasi-suspect purpose and determining which level of scrutiny corresponds to that purpose).

[99] *See infra* Part III.B.2. (explaining how courts determine which level of scrutiny applies to an equal-protection claim).

[100] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977). *See generally* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (determining whether a law that purposely provides a hiring preference for veterans also purposely imposes a burden on females).

[101] *See Arlington Heights*, 429 U.S. at 265–66 (pointing out that "judicial deference is no longer justified" when there is proof of racial discrimination).

[102] *See id. See infra* Part III.B.2. for a discussion of tiers of scrutiny.

[103] *Feeney*, 442 U.S. at 279.

predominant factor behind the act.

a. Express Purpose Shown by a Writing or an Admission

One way to determine one of an official act's purposes is to determine if the act expressly imposes different treatment. If so, no further inquiry into that purpose of the act is necessary.[104] The most obvious example is a written policy, such as a statute or an administrative guideline that facially imposes different treatment on the basis of race.[105] Additionally, an action can expressly treat two groups differently even if the purpose is not expressed in writing. For example, an unwritten policy to segregate prison inmates by race is expressly based on race, at least if the prison officials admit to the existence of the policy.[106] For an act that does not expressly impose different treatment, there are other ways to determine the act's purpose [107] In such a case, a deeper inquiry into the purposes behind the act is necessary.

b. Showing an Act's Purpose by Showing Its Impact

Impact alone is a second way to determine one of an official act's purposes.[108] In "rare" cases, an official act's uneven impact will be "stark" enough to prove the act's purpose.[109] In such a case, the evidentiary inquiry is relatively easy, and inquiry into factors besides impact will be unnecessary.[110] An act's starkly-uneven impact proves the

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[104] Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (citing Shaw v. Reno, 509 U.S. 630, 642 (1993)); Wayte v. United States, 470 U.S. 598, 608 n.10 (1985) (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

[105] *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (discussing a federal statute that required federal contractors to presume racial minorities are socially and economically disadvantaged individuals and that provided a benefit to contractors for sub-contracting with such individuals); Gratz v. Bollinger, 539 U.S. 244 (2003) (holding that a public university's written admission guidelines favorably viewed an applicant's status of belonging to a particular race).

[106] *See* Johnson v. California, 543 U.S. 499, 502–03, 508–09 (2005) (holding that strict scrutiny should have been applied to the California Department of Corrections's unwritten policy of segregating prisoners by race.).

[107] Such an act is often said to be a "facially neutral" act. *See, e.g.*, Feeney, 442 U.S.at 283 (Marshall, J., dissenting).

[108] In such a situation, the equal protection violation is the act's presumed purpose, not the stark imbalance, although the imbalance is the sole reason for the presumption. Miller v. Johnson, 515 U.S. 900, 913 (1995) ("Even in [*Yick Wo* and *Gomillion*], however, it was the presumed racial purpose of state action, not its stark manifestation, that was the constitutional violation.").

[109] Vill. of Arlington Heights, v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266. (1977). This Note will refer to this method of proving an act's purpose as the impact-alone test.

[110] *Id.*

act had a particular purpose only if the impact is unexplainable on any ground besides that purpose.[111] Therefore, the impact-alone test has two prongs that must be satisfied to prove a particular purpose (*e.g.*, racial discrimination): starkly-uneven impact along a particular line (*e.g.*, race) and a negation of any other purpose (*e.g.*, a non-racial purpose).[112]

Seminal examples of cases where impact alone proved intent include *Guinn v. United States*, *Lane v. Wilson*, *Yick Wo v. Hopkins*, and *Gomillion v. Lightfoot*.[113] In *Guinn*, the Supreme Court invalidated an Oklahoma law that imposed a literacy requirement on voters because it exempted voters whose ancestors were able to vote before the ratification of the Fifteenth Amendment, which forbids race-based denial of the right to vote.[114] In *Lane*, the Court struck down a law that Oklahoma enacted to circumvent *Guinn* by forever disenfranchising anyone who was unable to vote pre-*Guinn* and who failed to register to vote within a twelve-day window post-*Guinn*.[115] In *Yick Wo*, San Francisco granted laundry-business permits to all but one of the Caucasian applicants and to no Chinese applicants; this was race-based discrimination because both racial groups complied with the permit requirements and officials gave

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[111] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979).

[112] *See Arlington Heights*, 429 U.S. at 266 (noting that some cases exist in which the motivating factor behind an official action cannot be explained by any grounds other than race); *Feeney*, 442 U.S. at 274–75. The Court in *Feeney* was unclear as to what burden of proof the equal-protection claimant bears under the impact-alone test's first prong. The *Feeney* Court was also unclear as to whether the second prong requires an equal-protection claimant to negate possible innocent explanations for a disparity or whether the opposing party must provide an innocent explanation. Cases challenging the jury-venire selection process might resolve these issues. In a challenge to a jury-venire selection process, the first prong requires the equal-protection claimant to make a *prima facie* case of intentional discrimination. Washington v. Davis, 426 U.S. 229, 241 (1976). A higher burden of proof might apply in other contexts because a disparity can satisfy the first prong in the jury-venire context although the disparity would be insufficiently stark to satisfy this prong in other contexts. *See infra* note 132. However, that fact probably simply means that the first prong uses a *prima facie* standard in every context, and that standard is satisfied more easily in a jury-venire context than in other contexts. After the claimant satisfies the first prong, the second prong shifts the burden of production to the opposing party to produce an innocent explanation for the disparity. *Davis*, 426 U.S. at 241. The jury-venire cases are part of the impact-alone doctrine, so the burdens of proof used therein would likely apply to any impact-alone case. *See* McCleskey v. Kemp, 481 U.S. 279, 293–94 & n.12 (1987) (noting that cases challenging jury-venire selection are part of the impact-alone doctrine); *Arlington Heights*, 429 U.S. at 266 n.13 (same). Indeed, these burdens of proof are the standard for proving intentional discrimination because they also apply to Title VII disparate-treatment cases and equal-protection cases challenging petit-jury selection. *See* Johnson v. California, 545 U.S. 162, 168, 170–71, n.7, 173 (2005). Although the second prong places the burden of production on the party defending against the equal-protection claim, the claimant always bears the burden of persuasion—at least in cases challenging petit-jury selection. *Id.* at 170–71. *See infra* Part IV.B.2.d. for an application of these two prongs in the context of an employer's discarding of test results to avoid a racially-disparate impact.

[113] *See Arlington Heights*, 429 U.S. at 266 (citing these cases for the proposition that "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect if the state action, even when the governing legislation appears neutral on its face"); *Feeney*, 442 U.S. at 272 (citing these cases for the proposition that some ostensibly neutral classifications are obvious pretexts for racial discrimination).

[114] Guinn v. United States, 238 U.S. 347, 357, 363 (1915).

[115] Lane v. Wilson, 307 U.S. 268, 275–76 (1939).

no reason for the different treatment.[116] In *Gomillion*, a city engaged in race-based action when it changed its political boundary from a square to a "strangely irregular twenty-eight-sided figure" that removed 395 of 400 African-American voters and no Caucasian voters from the city.[117] In all four of these cases, the Supreme Court held the state action at issue was race-based because the "stark" racial disparity was unexplainable on any ground besides race,[118] or, in other words, was "an obvious pretext for racial discrimination."[119]

Those rare cases might add some confusion to the distinction between impact and purpose.[120] The Supreme Court has seemed inconsistent by asserting that uneven impact alone cannot violate the Equal Protection Clause[121] while also asserting that impact can reveal racially-disparate purposes.[122] The reconciliation of those two assertions is that the Equal Protection Clause forbids, for example, racially-uneven impacts only if they are intentional,[123] and that intent can be proven by impact alone in few rare situations.[124] This is why Justice John Paul Stevens argued that, "when the disproportion is as dramatic as in [*Gomillion*] or [*Yick Wo*], it really does not matter whether the standard is phrased in terms of purpose or effect."[125] He further argued "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[126] He agreed, though, that not every

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[116] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886).)

[117] Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). Although the majority decided *Gomillion* under the Fifteenth Amendment, subsequent decisions suggest that Justice Charles Evans Whittaker's concurring opinion correctly relied on the equal protection clause of the Fourteenth Amendment. Shaw v. Reno, 509 U.S. 630, 645 (1993).

[118] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

[119] Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 272 (1979).

[120] *See* City of Mobile v. Bolden, 446 U.S. 55, 130 (1980) (Marshall, J., dissenting) (arguing that, contrary to the plurality's opinion, previous case law is not clear as to whether "proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim.").

[121] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny[.]") (citation omitted); *Arlington Heights*, 429 U.S. at 264–65 (noting *Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially-disproportionate impact").

[122] *See Feeney*, 442 U.S. at 275 ("[T]here are cases in which impact alone can unmask an invidious classification.") (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)); *Arlington Heights*, 429 U.S. at 266) ("Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative[.]") (footnote omitted).

[123] Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially-discriminatory purpose, is unconstitutional solely because it has a racially-disproportionate impact"); *Arlington Heights*, 429 U.S. at 264-65 (noting *Davis* "made it clear that official action will not be held unconstitutional solely because it results in a racially-disproportionate impact"); *Feeney*, 442 U.S. at 272 ("[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").

[124] *See supra* note 108.

[125] Washington v. Davis, 426 U.S. 229, 254 (1976) (Stevens, J., concurring).

[126] *Id.*

disproportionate impact will prove a discriminatory purpose.[127]

c. Showing Purpose by Showing a Motivating Factor

A third way to prove an act's purpose is to prove that a purported purpose was a motivating factor behind the act.[128] A motivating factor need not be the sole or primary factor behind an act.[129] As the Supreme Court explained in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, this inquiry considers all relevant factors, including the act's impact and historical background.[130] Often, the impact is an "important starting point."[131] But impact is not synonymous with purpose. If a disparity is not extreme like in *Yick Wo* and similar cases, then the disparity will be evidence, not proof, of purpose.[132] Again, a court should hold that an official act was based on race, for example, only if the act purposely treats races differently.[133] Therefore, if an official act has an *unintended* racially-disproportionate impact, the act is not based on race.[134]

In several Supreme Court cases, disproportionate impacts were insufficient to prove discriminatory intent.[135] For example, the plaintiff

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[127] *Id.*

[128] *See Arlington Heights*, at 265–66..

[129] *Arlington Heights*, 429 U.S. at 265.

[130] *Arlington Heights*, 429 U.S. at 266–68 . The Court stated that the following non-exhaustive list of factors might be relevant: (1) the impact of the official act, (2) "[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes," (3) "[d]epartures from the normal procedural sequence," (4) "[s]ubstantive departures . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached," and (5) the "legislative or administrative history." *Id.* at 266–68. This Note will refer to an analysis that uses these factors as the "*Arlington Heights* framework."

[131] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977); Pers. Adm'r of Mass.Massachusetts v. Feeney, 442 U.S. 256, 274 (1979) (citing *Arlington Heights*, 429 U.S. at 266) (stating "impact provides an 'important starting point'").

[132] *See* Arlington Heights,, 429 U.S. at 266; Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979). A disparity less extreme than in cases such as *Yick Wo* can prove intent in cases challenging the selection of jury venires. *See* McCleskey v. Kemp, 481 U.S. 279, 293–94 (1987); Arlington Heights, 429 U.S. at 266 n.13.

[133] *See supra* note 123.

[134] *See* Arlington Heights, 429 U.S. at 270–71(holding that a policy with discriminatory consequences is not enough to pose "constitutional significance"—proof of a discriminatory purpose is necessary).

[135] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (concluding that "nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted *because* it would accomplish the collateral goal of keeping women in a stereotypic and predefined place . . . .") (emphasis added); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) ("Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision."); Washington v. Davis, 426 U.S. 229, 246 (1976) ("Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants.").

in *Personnel Administrator of Massachusetts v. Feeney* argued that a Massachusetts law imposed different treatment based on gender.[136] The law facially created a hiring preference for veterans in civil service jobs,[137] which accounted for roughly 60 percent of all public-sector jobs in the state.[138] When the lawsuit started, 98 percent of veterans in the state were male, and more than a quarter of the state's residents were veterans.[139] The plaintiff reasoned that military-hiring policies heavily favored men, the disparate effects of the law at issue were foreseeable, and the law provided a lifelong hiring preference unrelated to job qualifications.[140] The Court held this insufficient to prove gender-based discrimination because the hiring preference burdened non-veterans regardless of gender, and the legislature enacted the law in spite of, not because of, the uneven effect on women.[141]

d. Showing an Act's Purpose by Showing Its Predominant Factor

Proving the predominant factor behind an official act is a fourth way to prove a purpose of the act.[142] To be predominant, a factor must be controlling[143] and all other factors must be subordinate to it.[144] A factor can be predominant without being the only factor behind an act.[145] A predominant factor can be shown through direct and circumstantial evidence under the *Arlington Heights* framework, which considers such

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[136] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 259 (1979).

[137] *Id.* at 259.

[138] *Id.* at 261–62.

[139] *Id.* at 270. Between 1963 and 1973, 43% of civil service jobs in the state went to females and the other 57% to males. *Id.* About 2% of those women hired were veterans, whereas 54% of those men hired were veterans. *Id.*

[140] *Id.* at 276.

[141] *Id.* at 279–81. The Court reasoned that, although the impact on women was sufficiently stark to suggest an intent to discriminate against women, the plaintiff's impact-alone argument failed because the law was explainable on the gender-neutral ground of providing benefits to veterans. *See infra* text accompanying notes 303–07.

[142] *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 546–47 (1999) (holding that, in a dispute over redistricting, "strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision.").

[143] *See* Shaw v. Hunt, 517 U.S. 899, 905 (1996) (citing Miller v. Johnson, 515 U.S. 900, 911, 915–16 (1995)) (holding that the plaintiff bares the burden to demonstrate that race was the predominant factor motivating the legislature's decision to include a significant number of voters within or without a particular voting district); Easley v. Cromartie, 532 U.S. 234, 257 (2001) (citing *Miller*, 515 U.S. at 913).

[144] *See* Shaw, 517 U.S. at 906–07 (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)); Easley v. Cromartie, 532 U.S. 234, 241 (2001) (citing Miller, 515 U.S. at 916). Professor Richard Primus suggested that "predominant motive" might mean "a motive so powerful that it sweeps all other values before it" or "the motive for which the law exists at all." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 549 (2003). According to him, those two meanings can co-exist. *Id.* at 549 & n.225.

[145] *See* Shaw, 517 U.S. at 907.

evidence as historical background.[146] The burden of proving a predominant factor is demanding and more difficult than showing a motivating factor.[147] To prove a purpose under the predominant-factor test, a plaintiff must show that the act at issue is unexplainable on any ground besides the allegedly predominant factor.[148] Accordingly, the predominant-factor test seems like a hybrid test because it uses the *Arlington Heights* framework that is used to meet the motivating-factor test,[149] and it also has the unexplainable-on-other-grounds element of the impact-alone test used in stark-disparity cases such as *Yick Wo*.

Many aspects of the predominant-factor test are unclear.[150] For example, the Court has applied the test only in cases challenging re-districting,[151] so whether the test applies in other contexts is unclear. Also unclear is whether an actor's admission that his act was race-based necessarily proves race was the act's predominant factor.[152] Further, the Court has not explained why such an admission proves or suggests that race was a predominant factor behind the act rather than rendering the act expressly race-based.[153] The best explanation for this distinction is that if the act is motivated by any secondary motivations independent of race, it is not considered an expressly race-based act.[154] Finally, commentators

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[146] *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999); Miller, 515 U.S. at 917–18 (1995) (stating that in assessing a jurisdiction's motivation a court must inquiry into both circumstantial and direct evidence of intent); Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 334 (2001) (the motivating-factor and predominant-factor tests "call for inquiries into legislative history").

[147] *See* Easley v. Cromartie, 532 U.S. 234, 241 (2001) (citations omitted) (noting that the burden of proof on the plaintiffs to show that race was the predominant factor is demanding); *infra* note 283; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545 (2003) (the predominant-factor test "is significantly more deferential to the legislature" than the motivating-factor test is).

[148] *See* Easley v. Cromartie, 532 U.S. 234, 241–42 (2001) (citing Hunt v. Cromartie, 526 U.S. 541, 546 (1999)) (stating that race must have been the predominant factor, not simply a motivating factor).

[149] The *Arlington Heights* framework also applies in certain statutory contexts and to claims of vote dilution brought under the equal protection clause. *See* Hunt v. Cromartie, 526 U.S. 541, 546 n.2 (1999) (asserting that laws that racially gerrymander districting schemes are constitutionally suspect and must be strictly scrutinized).

[150] *See, e.g.*, *infra* note 283; *see also* Bush v. Vera, 517 U.S. 952, 1058 n.7 (1996) (Souter, J., dissenting) (rejecting shape as a sufficient condition for finding a violation, or even a necessary one).

[151] *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 237 (2001) (upholding a redistricting plan for which race was not a predominant factor); Shaw v. Hunt, 517 U.S. 899, 906, 915 (1996) (same); Bush v. Vera, 517 U.S. 952, 962, 973, 986 (1996) (plurality opinion) (same); Miller v. Johnson, 515 U.S. 900, 917, 928 (1995) (striking down a plan for which race was a predominant factor).

[152] The Court held that such an admission at least strongly suggests the official act was race-based. *See* Miller v. Johnson, 515 U.S. 900, 918–19 (1995). Whether such an admission necessarily establishes an act was race-based is unclear. *See Bush*, 517 U.S. at 1000 (Thomas, J., concurring in the judgment) ("[I]n *Miller v. Johnson* . . . Georgia's concession that it intentionally created majority-minority districts was sufficient to show that race was a predominant, motivating factor in its redistricting.") (citing *Miller*, 515 U.S. at 918–19).

[153] *See supra* note 106 and accompanying text.

[154] The Court suggested such an admission does not necessarily establish a racial purpose in a "mixed motive" case, which is a case in which the action at issue was not "purely race-based," for example. *See Bush*, 517 U.S. at 959–65 (plurality opinion) (quotation marks omitted) (explaining that the record in question did not reflect a history of purely race-based districting revisions, but

have noted the lack of clarity as to when the motivating-factor test applies instead of the predominant-factor test.[155] All of this confusion should be unsurprising, given that the Supreme Court first used the predominant-factor test in *Miller v. Johnson*, in which the district court created this test[156] by misinterpreting the motivating-factor test.[157] This perhaps explains why Justices Antonin Scalia and Clarence Thomas seemed to think the *Miller* Court was using the motivating-factor test instead of creating a test that placed a higher burden on plaintiffs.[158]

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rather was one that depicted mixed motive, and therefore careful review was necessary to determine whether the districts were subject to strict scrutiny); *see also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 312 (2001). In such a case, a court must consider all motives to determine whether race was the predominant motive. *See Bush*, 517 U.S. at 959–65 (plurality opinion). Regardless of the wisdom of such a rule, *see id.* at 1002 n.2 (Thomas, J., concurring in the judgment) (the state's admission to relying on race should suffice to show a racial purpose), the "mixed motive" terminology is imprecise and thus does not clearly explain why an admission is dispositive in the context of an expressly race-based act and not in the context of an act predominantly motivated by race. For example, a prison's admitted policy of racially segregating inmates is expressly race-based although it has non-racial motives – *e.g.*, it is motivated by a desire to increase prison safety. *See* Johnson v. California, 543 U.S. 499, 502, 509 (2005); *see supra* note 106. However, the prison's policy is necessarily dependent on race—although many measures can increase prison safety, trying to achieve that end by racially segregating inmates is necessarily a race-based measure. By contrast, a re-districting decision might involve many factors that are independent of race, such as maintaining existing political subdivisions and avoiding contests between incumbents. *See Miller*, 515 U.S. at 906. Therefore, an act is a "mixed motive" one if it had motives independent of, say, race, whereas an act is expressly race-based if its means were dependent on race. Of course, either type of act triggers strict scrutiny. *See infra* notes 160, 161.

[155] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545–46 (2003) (pondering why the Court applied the predominant-factor test in *Miller v. Johnson* but the motivating-factor test in *Arlington Heights*). Note that the "predominant factor" language can determine whether an act is subject to strict scrutiny and separately determine whether the act satisfies that standard. For example, a facially race-neutral act is subject to strict scrutiny if it were predominantly motivated by race, whereas a facially race-based act has survived strict scrutiny at least once because race was not a predominant factor behind the policy. The predominant-factor test would not determine whether to apply strict scrutiny to the latter policy—instead, strict scrutiny would apply to that policy because it was expressly race-based. *See id.* at 546 & n.220; *see also supra* notes 104–06 and accompanying text.

[156] *See Miller*, 515 U.S. at 909–10, 916 (discussing that the district court required the plaintiffs to prove race was the predominant factor in order to trigger strict scrutiny and then adopting that predominant-factor test).

[157] The district court held that a re-districting decision is based on race if race was a "substantial or motivating consideration," which means that "race was *the overriding, predominant force.*" Johnson v. Miller, 864 F. Supp. 1354, 1372 (S.D. Ga. 1994), *aff'd and remanded*, *Miller*, 515 U.S. 900 (footnote omitted). The Supreme Court has stated that a motivating factor is also known as a substantial factor. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270–71 n.21 (1977)). However, the Court has explained that a motivating factor need not be dominant among other factors. *See Arlington Heights*, 429 U.S. at 265–66.

[158] Justices Scalia and Thomas joined the five-justice majority opinion in *Miller*. *Miller*, 515 U.S. at 902. One year later, they refused to join the plurality opinion that consisted of the other three justices from the *Miller* majority. Bush v. Vera, 517 U.S. 952, 956–86 (1996) (plurality opinion); *id.* at 999–1003 (1996) (Thomas, J., concurring in the judgment). Their disagreement with the plurality opinion stemmed from whether the predominant-factor test is more difficult to meet or otherwise different from the motivating-factor test. *See id.* at 959 (plurality opinion). *See also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 312–13 (2001) (explaining that Justice Thomas refused to join the plurality opinion in *Bush v. Vera* since it applied the predominant-factor test).

2. *Determining Which Level of Scrutiny the Act's Purpose Triggers*

Courts typically use a three-tiered system of judicial scrutiny for analyzing equal-protection claims: strict scrutiny, intermediate scrutiny, and rational-basis scrutiny.[159] This three-tiered system applies to written or unwritten policies that expressly impose different treatment.[160] Additionally, it applies when the predominant-factor test determines an act's purpose.[161] It also applies in cases that rely on impact alone to determine an official act's purpose.[162]

But a different type of review applies when the motivating-factor test determines an official act's purpose.[163] Under this type of review, the equal-protection claimant bears the burden of showing that a particular suspect purpose, such as racial discrimination, was a substantial or motivating factor behind the act.[164] After meeting that burden, the burden then shifts to the act's defender to show by a preponderance of the evidence[165] that the act would have been performed or enacted without the racial factor.[166] In other words, the act's defender must show that the racial factor was not a "but-for" cause behind the act.[167] If the act's defender fails to meet its burden, Supreme Court precedent is

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[159] *See supra* note 18. Strict scrutiny applies to state action that treats people differently based on the suspect grounds of race, national origin, or alienage, and it is satisfied only if the state action is narrowly tailored to achieve a compelling state interest. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Intermediate scrutiny applies to state action that treats people differently based on the quasi-suspect grounds of gender or "illegitimacy," and it is satisfied only if the state action is substantially related to achieving an important state interest. *Id.* at 440-41. Rational-basis scrutiny applies to state action that treats people differently on other grounds, and it is satisfied if the state action is rationally related to achieving a legitimate state interest. *Id.* at 441–42. The government bears the burden of proving why intermediate or strict scrutiny is satisfied. Johnson v. California, 543 U.S. 499, 505 (2005); United States v. Virginia, 518 U.S. 515, 533 (1996).. The equal-protection claimant bears the burden of proving why rational-basis scrutiny is not satisfied. Heller v. Doe by Doe, 509 U.S. 312, 320–21 (1993).

[160] *See supra* notes 105, 106.

[161] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 920 (1995) (applying strict scrutiny to an official act whose predominant factor was race).

[162] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 642–44 (1993) (holding that strict scrutiny applies not only to express racial classifications but also to statutes whose racial purposes are proven by impact alone); *id.* at 645–47 (1993) (holding that the impact-alone case, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), supports application of strict scrutiny when a racial purpose is proven by impact alone).

[163] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

[164] *See* Hunter v. Underwood, 471 U.S. 222, 227–28 (1985) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). The plaintiff might need to make this showing by a preponderance of the evidence. *See Hunter*, 471 U.S. at 225, 227 (describing how the Eleventh Circuit required such a showing, and then approving of the way in which the court applied the *Arlington Heights* framework, but never explicitly stating that the showing must be by a preponderance of the evidence).

[165] *Doyle*, 429 U.S. at 287.

[166] *Hunter*, 471 U.S. at 228 (citing *Doyle*, 429 U.S. at 287).

[167] *See* Hunter v. Underwood, 471 U.S. 222, 232 (1985) (stating that where evidence may show a "but-for" motivation in enacting legislation to curtail discrimination against all blacks an additional purpose to discriminate against poor whites would not render the original motivation void).

unclear as to whether the reviewing court must apply strict scrutiny or declare the act unconstitutional without applying strict scrutiny.[168] Although this "but-for" level of review is a form of heightened scrutiny,[169] it would be lower than strict scrutiny if it led to automatic invalidation because strict scrutiny is the most demanding level of equal-protection review.[170] But automatic invalidation is obviously more demanding than strict scrutiny, so a "but-for" racial motivating-factor likely triggers strict scrutiny, not automatic invalidation.[171] Similarly, an official act that was motivated by a quasi-suspect purpose, such as gender discrimination, is likely subject to intermediate scrutiny rather than automatic invalidation.[172]

IV. AVOIDING A DISPARATE IMPACT AS DIFFERENT TREATMENT THAT LIKELY VIOLATES EQUAL PROTECTION

Ricci v. DeStefano suggests that disparate-impact liability can conflict with equal protection.[173] Justice Scalia's concurring opinion made this potential conflict clear.[174] The logic of this conflict can be boiled down to a simple syllogism. First premise: avoiding a disparate

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[168] *See id.* at 233 (without applying strict scrutiny, striking down an act motivated by race because it would not have been enacted absent the racial factor). Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (same). Some scholars think a court should apply strict scrutiny to an act if the government fails to prove it would have enacted or performed the act absent a racial motivating factor. *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 297, 311, 334 (2001). Although the Court in *Hunter* did not apply strict scrutiny, perhaps it did not mean to suggest that an act is automatically unconstitutional if race were a "but-for" motivating factor. Instead, perhaps the Court did not apply strict scrutiny because the law at issue obviously failed strict scrutiny: the law was enacted to burden African-Americans, and such a purpose obviously is not a compelling state interest. *See Hunter*, 471 U.S. at 233 (the statutory section at issue "was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"). *See also infra* note 275. This reading of *Hunter* makes sense because strict scrutiny is the most stringent level of judicial scrutiny, and automatic invalidation is more stringent than strict scrutiny. *See infra* note 170 and accompanying text. However, perhaps automatic invalidation should not be considered to be any kind of "scrutiny," which means that automatic invalidation could co-exist with the reality that strict scrutiny is the most stringent level of "scrutiny."

[169] *See Arlington Heights*, 429 U.S. at 265–66 ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified.") (footnote omitted).

[170] *See* Miller v. Johnson, 515 U.S. 900, 920 (1995) (noting strict scrutiny is the "most rigorous and exacting standard of constitutional review"); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 441 (1985); United States v. Virginia, 518 U.S. 515, 533 (1996). *See supra* note 168.

[171] *See infra* text accompanying note 273.

[172] Two years after explaining the burden-shifting "but-for" standard that applies in motivating-factor cases, *see Arlington Heights*, 429 U.S. at 270 n.21, the Court seemed to hold that intermediate scrutiny would apply to an act whose "but-for" motivating factor was gender discrimination. *See* Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 273 (1979) (stating intermediate scrutiny would apply to a law "covertly" designed to benefit one gender). This suggests that strict scrutiny would apply to an act that had a racial "but-for" motivating factor. *See supra* note 168.

[173] *See infra* note 179.

[174] Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring).

impact can constitute different treatment based on race. Second premise: different treatment based on race triggers heightened scrutiny under the Equal Protection Clause. Conclusion: avoiding a disparate impact can trigger heightened scrutiny under the Equal Protection Clause.[175]

While this logic is valid, the Court never reached the second premise because it resolved the case on statutory, rather than constitutional, grounds.[176] However, the second premise is well-established.[177] The Court simply assumed, without explanation, that the first premise is true in the Title VII disparate-treatment context,[178] which suggests the premise would be true in the equal-protection context by analogy.[179] Although the first premise is true,[180] the Court's assumption of its correctness is problematic for at least two reasons. First, the Supreme Court in the future may feel that it is not bound by *Ricci* to accept the first premise, at least in the equal-protection context. A lawyer who argues that disparate-impact avoidance violates equal protection could certainly cite to *Ricci* to establish the first premise by analogy,[181]

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[175] *Cf.* Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1506 (2004) (presenting a somewhat similar syllogism that explains why Caucasians may sue under Title VII when subjected to a racially-disparate impact).

[176] Ricci v. DeStefano, 557 U.S. 557, 563 (2009) ("In light of our ruling under the statutes, we need not reach the question whether respondents' actions may have violated the Equal Protection Clause.").

[177] *See, e.g.*, Johnson v. California, 543 U.S. 499, 505–06 (2005) (affirming the difficulty in determining what classifications are motivated by impermissible racial inferiority rather than racial politics yet still requiring the application of strict scrutiny to "*all* racial classifications" (emphasis added)).

[178] Ricci v. DeStefano, 557 U.S. 557, 579 (2009) ("Our analysis begins with this premise: The City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."); *see also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350 (2010) ("[N]o prior decision ever conceived of disparate impact doctrine as an exception to the prohibition on disparate treatment. That is why the Ricci Court had to state the premise in its own voice and without citation.").

[179] Title VII's ban on disparate treatment is not the same as the equal protection clause in every respect. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354-55 (2010); Ricci v. DeStefano, 557 U.S. 557, 582 (2009) ("This suit does not call on us to consider whether the [disparate-treatment] statutory constraints under Title VII must be parallel in all respects to those under the Constitution."). However, much of the *Ricci* Court's reasoning would transfer to the equal-protection context. *See* Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 61–70 (2009). *See also* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1354 (2010) ("Despite the Court's professed intention to avoid equal protection issues, the Ricci premise is properly understood as a constitutional proposition as well as a statutory one. The reason is that constitutional antidiscrimination doctrine—that is, the law of equal protection—has, in the hands of the Supreme Court, the same substantive content as Title VII's prohibition on disparate treatment."); *Id.* at 1344 ("Title VII's prohibition of disparate treatment and the Fourteenth Amendment's guarantee of equal protection are substantively interchangeable. A conflict between disparate impact and disparate treatment is also a conflict between disparate impact and equal protection."). *See also* Michael K. Grimaldi, *Disparate Impact After* Ricci *and* Lewis, 14 SCHOLAR 165, 185 (2011) ("Because both equal protection and disparate treatment ban intentional discrimination, the tensions between disparate treatment and disparate impact create a parallel tension between equal protection and disparate impact."); Okruhlik v. Univ. of Arkansas *ex rel.* May, 255 F.3d 615, 626 (8th Cir. 2001) ("[T]he elements of a claim of intentional discrimination are essentially the same under Title VII and the Constitution") (citing Briggs v. Anderson, 796 F.2d 1009, 1021 (8th Cir.1986)).

[180] *See infra* Part IV.A–B.

[181] *See supra* note 179 and accompanying text.

but the future Supreme Court might reject the analogy or the *Ricci* Court's assumption that the first premise is true.[182] Second, the legitimacy of the *Ricci* Court's acceptance of the first premise is undermined if not adequately supported. The first premise deserves an explanation. This explanation involves the two-step process outlined earlier: determining whether an official act treats one person differently than another, and, if so, then determining whether the act has a suspect purpose.

A. Avoiding a Disparate Impact as Different Treatment

The *Ricci* Court took for granted that avoiding a disparate impact amounts to different treatment.[183] Justice Ginsburg's dissenting opinion at least attempted to challenge that point.[184] Her opinion agreed with the district court's determination that the city's actions "were race neutral in this sense: '[A]ll the test results were discarded, no one was promoted, and firefighters of every race will have to participate in another selection process to be considered for promotion.'"[185] Academics, including Professor Richard Primus, have expressed a similar sentiment.[186]

However, like treatment in some respects does not mean like treatment in every respect.[187] A different framing of the *Ricci* issue could show different treatment.[188] An employer's decision to discard the

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[182] *See* Ricci v. DeStefano, 557 U.S. 557, 609 (2009) (Ginsburg, J., dissenting) ("The Court's order and opinion, I anticipate, will not have staying power."); Allen R. Kamp, Ricci v. DeStefano *and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 39 (2011) (the fact that *Ricci* was decided 5-4 suggests it might be limited after the Court's make-up changes).

[183] *See supra* note 178.

[184] *See* Ricci v. DeStefano, 557 U.S. 557, 624–25 (2009) (Ginsburg, J., dissenting) (finding not "even a hint" of conflict in the Court's precedent or Congress' enactments between disparate-impact provisions and an employer's legal disparate-treatment obligations and concluding that Title VII's ban on disparate-treatment and disparate-impact "must be read as complementary" per Court precedent to find harmonious meaning in interpreting separate provisions of a single Act).

[185] Ricci v. DeStefano, 557 U.S. 557, 619–20 (2009) (Ginsburg, J., dissenting) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 158 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009)). *See also id.* at 608 (Ginsburg, J., dissenting) (noting that no employees were promoted "in preference to" the employees that scored highest on the promotional test).

[186] *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1360 (2010) ("Throwing out test results can be understood as facially neutral when the test results are thrown out for everyone; the discrimination, if any, lies in the motivation for that action."); *id.* at 1351 ("If a written test has a racially-disparate impact and the employer throws out the results--as happened in Ricci--the test results are thrown out for all applicants, regardless of race. . . . Obviously, the decision to throw out the test is race-conscious. But throwing out the test results does not involve 'disparate treatment' in the ordinary-language sense of sorting employees into groups and conferring a benefit on members of one group that was withheld from members of the other group.").

[187] *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 575 n.129 (1982) ("'to treat two people equally in one respect will always be to treat them unequally in others'") (quoting *Developments in the Law - Equal Protection*, 82 HARV. L. REV. 1065, 1164 (1969) (footnote omitted)).

[188] *See supra* Part III.A.

results of a promotional test is going to affect some test-takers differently than others, perhaps absent unusual circumstances.[189] Consider an employer that has one position available and plans to fill it by promoting one of its employees. The employer will interview for the position the five employees who score highest on a promotional test. Twenty employees take the test, and five score higher than the other fifteen. If the employer discards the test results, doing so would treat the five highest scorers differently than the other fifteen test takers. The difference is due to the fact that, under the test results, the five highest scorers had a greater than zero percent chance of receiving the promotion, whereas the other fifteen were left with a zero percent chance. Thus, discarding the test results increased the fifteen lowest scorers' chances of receiving the promotion from zero percent to greater than zero percent.[190] The same is not true of the five highest scorers, who already had a greater than zero percent chance based on the test results, so these five employees were treated differently than the other fifteen.[191] Moreover, the five highest scorers' chances of receiving the promotion decreased when the results were discarded.[192]

The most on-point authority for this argument is *New York City Transit Authority v. Beazer*.[193] In some respects, the Transit Authority's hiring policy that excluded narcotics users from consideration was "equal" because it applied to everyone.[194] But in reality, the policy entailed different treatment, thus implicating the Equal Protection Clause, because it imposed a "special impact" on only some job applicants—namely, narcotics users.[195] The special impact gave narcotics users a zero percent chance of being hired, while it gave everyone else a chance greater than zero percent.[196]

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[189] For example, if all of the test takers received the exact same score, the employer would probably discard the results because they failed to serve their purpose of narrowing the pool of applicants who merit further consideration for a promotion. Under such a scenario, discarding the test results would not be different treatment because each test taker had the same statistical chance of receiving the promotion as every other test taker, both after the results were known and after the results were discarded.

[190] *See, e.g.*, Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257, 1272 (2010) (explaining that when the city in *Ricci* discarded the test results, the employees who failed the test had their "chance for promotion improved to something better than no chance at all").

[191] *Id.* (explaining that the *Ricci* employees who passed the test "would be adversely affected by the decision not to use the test results was clear").

[192] Under the test results, the five highest scorers had on average a 20% chance of receiving the promotion. At best, their chances will remain the same if only they decide to take the next test that the employer uses. But if anyone else competes against them on the next test, then their chances of being promoted will decrease.

[193] N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 570–71 (1979). *See supra* text accompanying notes 65–72 for a discussion of this case.

[194] *Id.* at 587–88.

[195] *See id.* at 587–89 (discussing the District Court's interpretation of Transit Authority Rule 11(b) as applying to narcotics users and the constitutional implications of that interpretation).

[196] *See id.* at 570–72 (describing the Transit Authority's "general policy" of refusing to employ narcotics users, including methadone users).

Justice Ginsburg's *Ricci* dissent likely would respond by arguing that discarding promotional test results does not treat employees who passed the test differently than those who failed it, because all of the employees "had no vested right to promotion."[197] The district court in *Ricci* took the same view.[198] But a plaintiff can state an equal protection claim, including in the employment context, without having been deprived of a vested right[199]. In *Beazer*, the narcotics-using job applicants clearly had no vested right in being hired or considered for employment,[200] but the Court considered the equal-protection claim anyway.[201] More generally, people have standing to bring an equal protection challenge to a policy that hinders their chance of receiving a

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[197] Ricci v. DeStefano, 557 U.S. 557, 608 (2009) (Ginsburg, J., dissenting).

[198] Ricci v. DeStefano, 554 F. Supp. 2d 142, 161 (D. Conn. 2006), *rev'd*, 557 U.S. 557 (2009) (rejecting the plaintiffs' argument that they were not similarly situated to the employees who failed the test, because the test results did not give the plaintiffs a vested right to promotion). Note that the *Ricci* plaintiffs should have argued they were similarly situated with the employees who failed the test. An equal protection violation can occur only if similarly-situated individuals are treated differently than each other. *See supra* notes 44–49 and accompanying text. If two individuals are not similarly situated, then treating them differently cannot violate the equal protection clause. *See id.* Thus, the *Ricci* plaintiffs should have argued they were similarly situated with their co-workers who failed the test in the sense that all of them were given the same opportunity to pass the test. *Cf.* Graham v. Long Island R.R., 230 F.3d 34, 40 (2d Cir. 2000) (describing "similarly situated" in an equal protection case in which an employee challenged discipline by her employer as meaning that a plaintiff and "her co-employees were subject to the same performance evaluation and discipline standards" and "engaged in comparable conduct") (citations omitted).

Of course, employees who passed a test are not similarly situated with employees who failed a test in the sense that one group passed the test and the other did not. But employee-plaintiffs should not argue this point. Rather, an employer-defendant should argue this point if its employees who failed the test sue it over its decision to promote the employees who passed the test. Thus, the employer would argue that it complied with equal protection because the two groups it treated differently were not similarly situated with each other. *See* Ruiz v. Cnty. of Rockland, 609 F.3d 486, 494–495 (2d Cir. 2010) (holding employer-defendant did not violate equal protection by disciplining the plaintiff-employee without disciplining other employees who engaged in misconduct, because the plaintiff was not similarly situated with those other employees).

There is nothing inconsistent or incoherent about *Ricci*-type plaintiffs arguing they are similarly situated with employees who failed the test, while an employer makes a seemingly contrary argument when sued by employees who failed the test. Both arguments can be correct because two groups can be similarly situated in one sense and differently situated in another sense. *See supra* notes 84–94 and accompanying text. The "similarly situated" analysis considers whether differently-treated groups are similar in ways relevant to their different treatment. *See id.* If two groups are alike in one respect, they should be treated alike in that respect; if they differ in another respect, they may be treated differently in that respect. *See supra* note 86. Thus, if a lawsuit challenges an employer's decision to discard test results, then the "similarly situated" analysis should consider whether the employees were alike in the sense that they had a similar opportunity to pass the test. This sense is relevant to the decision to discard the test results (*e.g.*, the different treatment at issue). So, if a test were designed to fail persons of a certain race, then the test-takers were not similarly situated in this sense, so discarding the test results would not violate equal protection. *See supra* notes 44– 49 and accompanying text; *cf. infra* note 253. If a lawsuit challenges an employer's decision to promote employees who passed a test, then the "similarly situated" analysis should focus on whether all test-takers were alike in the sense that they were similarly qualified for promotion. This sense is relevant to the decision to hire only some employees (e.g., the different treatment at issue).

[199] *See supra* note 72.

[200] *See supra* note 72.

[201] *Beazer*, 440 U.S. at 587–94.

governmental benefit without having to prove that they would have received the benefit absent the policy.[202]

This analysis merely argues that plaintiffs may state an equal-protection claim against a public employer when it discards or adjusts the results of a promotional test the plaintiffs passed.[203] Plaintiffs would not need to prove, as a threshold matter, that they are similarly situated with the other job applicants or employees who took the test.[204] Instead, being similarly situated, or not, is a conclusion the court would draw based on an application of a particular level of judicial scrutiny.[205] Nothing in this section suggests whether any particular equal-protection claim would likely prevail. That issue will often depend on which level of scrutiny applies, which hinges on whether the employment decision had a suspect purpose.[206]

B. Level of Scrutiny Required for Disparate-Impact Avoidance that Implicates Equal Protection

Stating an equal-protection claim is not synonymous with prevailing under such a claim.[207] The claim's likelihood of success depends on which level of scrutiny applies.[208] Imagine a situation in which an employer used a promotional test like the one in *Ricci*, except the test results were not skewed along any suspect line, such as race. The employees who failed the test could state an equal protection claim against their employer for hiring someone over them.[209] In that lawsuit,

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[202] Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993).

[203] *See supra* note 54.

[204] *See supra* notes 198 & *supra* notes 84–94 and accompanying text. However, the plaintiffs will ultimately need to prove they were similarly situated with the other test-takers if rational-basis scrutiny applies, because that level of scrutiny places the burden of proof on the plaintiffs. *See supra* notes 18, 159.

[205] *See supra* notes 84–94 and accompanying text.

[206] *See supra* Part III.B.2 and *infra* Part IV.B.

[207] *See supra* Part III.B. Indeed, the plaintiffs in *Beazer* and *Martin* lost their equal protection claims under rational-basis scrutiny. *See Martin*, 440 U.S. at 201 (holding that contract nonrenewal was "quite rationally related" to the employer's objective); *Beazer*, 440 U.S. at 593–94 (stating there is no constitutional violation even where the sub-classification at issue is less rationally related to the policy goal than the overarching classification); s*ee also* Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating that rational-basis scrutiny applies to most state action when challenged under the equal protection clause); Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 370 (2001) (holding different treatment "often does not amount to a constitutional violation where rational-basis scrutiny applies").

[208] *See supra* Part III.B.2.

[209] *See generally Beazer*, 440 U.S. 568 (1979) (challenging a policy of not hiring methadone users); Washington v. Davis, 426 U.S. 229 (1976) (challenging use of a verbal skills test as racial discrimination). *See also* Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199–200 (1979) (teacher stated an equal-protection claim by arguing that she was fired for failing to satisfy a continuing-education requirement). *See also supra* notes 54 & 68.

the employer's decision to promote the employees who passed the test likely would be upheld under rational basis scrutiny.[210] Likewise, the employees who passed the test could state an equal protection claim against their employer if it discarded or adjusted the test results,[211] and a court would likely uphold the employer's decision under rational-basis scrutiny. This low level of scrutiny would likely apply in either lawsuit because the fact that the test results were not skewed along any suspect line suggests that the employer's decision to use or discard the test results was not based on a suspect rationale.[212]

The issue of which level of scrutiny should apply to either type of lawsuit becomes more complicated when the test results are racially skewed, like in *Ricci*. The following analysis will focus only on the type of lawsuit that challenges an employer's decision to discard employment-related test results, not the decision to give a particular test or use its results. Determining which level of scrutiny applies depends on the answer to two questions. First, does an employer make a race-based decision when it discards test results because they are racially-skewed? If so, how may a plaintiff prove in a particular lawsuit that the employer's decision was based on race?[213] Each of these two questions will be answered in turn.

1. *Discarding Racially-Skewed Test Results as a Race-Based Act*

Recall the governing standard for determining whether an official act was based on race: an act is based on race if made "at least in part 'because of,' not merely 'in spite of,'" its impact along racial lines.[214] The *Ricci* Court stated that the City of New Haven "made its employment decision because of race. The City discarded the test results solely because the higher-scoring candidates were white."[215] There is a difference between "because of" and "solely because of," and claiming the city acted solely because of race might have been an

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[210] *See Washington*, 426 U.S. at 245 ("Had respondents, along with all others who had failed [the police department's hiring test], whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained.").

[211] *See supra* Part IV.A.

[212] Of course, a plaintiff could prove intentional racial discrimination absent racially-skewed test results. Such results would make the proof easier, though. *See supra* Part III.B.1.

[213] The plaintiff carries the burden of proving that a challenged act was race-based. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 915 (1995) ("Although race-based decisionmaking [*sic*] is inherently suspect, . . . until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed[.]") (citations omitted).

[214] *See supra* note 103 and accompanying text.

[215] Ricci v. DeStefano, 557 U.S. 557, 579–80 (2009).

overstatement.[216] Nevertheless, for equal-protection purposes, heightened scrutiny applies if the decision was made at least in part because of, even if not solely because of, a suspect purpose such as race.

The *Ricci* Court seemed to find no difference between making a decision based on race and based on avoiding racially-skewed results.[217] Although those two things technically are not the same, a decision to avoid racially-skewed results is necessarily a decision at least partly based on race.[218] Some commentators have suggested that a decision is not race-based simply because it is done to avoid racially-skewed results,[219] avoid disparate-impact liability,[220] or give in to political pressure.[221] But those suggestions prove too much because the decision to avoid the skewed test results is necessarily tied to race. Likewise, potential disparate-impact liability in *Ricci* was due to race, and the political pressure was necessarily about race. Eliminating race from the equation would have eliminated the employer's reason to avoid the skewed results and disparate-impact liability, and it would have eliminated the political pressure. That means the employer's discarding of the results was at least partly because of race.

Similarly, other arguments that the *Ricci* employer's decision was

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[216] *See* Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1271–79 (2010) (arguing the decision was not made solely based on race).

[217] *Compare* Ricci v. DeStefano, 557 U.S. 557, 580 (2009) ("The City rejected the test results solely because the higher scoring candidates were white."), *with id.* at 593 ("the City was not entitled to disregard the tests based solely on the racial disparity in the results").

[218] *Cf.* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350 (2010) ("Disparate treatment doctrine prohibits race-conscious decisionmaking [*sic*], and disparate impact remedies are always race-conscious. There is accordingly a tension between the two frameworks."); *id.* at 1353 ("If Title VII's prohibition on disparate treatment is understood as a general requirement of colorblindness in employment, then it is easy to see any race-conscious decisionmaking [*sic*] as disparate treatment. Disparate impact doctrine does require race-conscious decisionmaking [*sic*], so it follows that there is a conflict between the two frameworks. It's as simple as that. No court ever took this view before, but many people now and in the future will regard the proposition as obvious.").

[219] Michael J. Zimmer, Ricci*'s "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1276 (2010) ("[T]here is an apparent contradiction between the finding that the City's action was motivated by a desire to avoid disparate impact liability against minority test takers and the conclusion that the motivation for the City's decision was 'solely because the higher scoring candidates were white' if the prior distinction between actions taken 'because of' versus 'in spite of' still pertains.").

[220] *See id.* at 1275 n.37 (quoting Charles A. Sullivan, Ricci v. DeStefano*: End of the Line or Just Another Turn on the Disparate Impact Road?*, 104 NW. U.L. REV. COLLOQUY 201, 207 (2009) ("It seems strange to view the city of New Haven as canceling the test *because* it wanted to disadvantage the white firefighters, although New Haven certainly knew that that would be the result. A better reading of the facts (or at least a plausible one) is that New Haven acted to avoid disparate impact liability *despite* the 'adverse effects upon an identifiable group' of whites.")).

[221] *See* Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1277–78 (2010) (arguing that the *Ricci* employer's best defense against Title VII disparate-treatment liability may have been to admit that its discarding the test results was done due to political pressure); Ricci v. DeStefano, 554 F. Supp. 2d 142, 170 n.12 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009) ("Assuming *arguendo* that political favoritism or motivations may be shown to have been intertwined with the race concern, that does not suffice to establish a Title VII violation.) (citation omitted).

not race-based are unconvincing. One such argument is that the decision was not based on animus.[222] The district court in *Ricci* accepted this argument by relying on the *Feeney* Court's reference to "adverse" effects.[223] Specifically, the *Feeney* Court's definition of "discriminatory purpose" states that an act purposely treats two groups differently if done "at least in part 'because of,' not merely 'in spite of,' its *adverse effects* upon an identifiable group."[224] However, purposeful discrimination is subject to the same level of scrutiny regardless of whether it is adverse or beneficial to any particular group.[225] The Court in *Feeney* made that point somewhat clear when it stated that "[a] racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification."[226] This last quote did not mean that motivation is irrelevant to determining which level of scrutiny applies.[227] Rather, "racial classification" meant any official act that differentiates on the basis of race either expressly or because of the motivations behind it,[228] and "regardless of purported motivation" is subject to the same level of scrutiny regardless of whether it was motivated by a desire to benefit or burden any particular racial group.[229]

Another argument, which the district court accepted in *Ricci*, is that the decision applied to everyone, so it was not based on race.[230] This argument is likely the weakest one because the alleged identical treatment of an act does not determine the act's purpose. The district

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[222] *See* Ricci v. DeStefano, 554 F. Supp. 2d 142, 161–62 (D. Conn. 2006) (rejecting the equal-protection claim because the plaintiffs failed to show the defendant acted out of animus), *rev'd and remanded*, 557 U.S. 557 (2009). *See also* Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257, 1268–70 (2010) (arguing that disparate-treatment liability requires animus and that animus was absent in *Ricci*, and that the employer's decision was taken in spite of, not because of race). He seemed to argue that the decision's lack of animus made it non-race-based. *Id.* Thus, he might share the district court's view.

[223] *See* Ricci v. DeStefano, 554 F. Supp. 2d at 161–62.

[224] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (emphasis added) (footnote omitted); *see also* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 309 (2001) (defining discriminatory purpose as a "state of mind" held by the government towards the government action, and mirroring the model penal code's definition of purpose).

[225] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226–27.

[226] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (citations omitted) (emphasis added).

[227] *Supra* Part III.B.1 & *supra* note 57.

[228] In other words, the act treats groups differently, thus satisfying "step one" of an equal-protection claim. *See supra* Part III.A. Further, the act is race-based under "step two." *See supra* Part III.B.

[229] *See* Shaw v. Reno, 509 U.S. 630, 643–44 (1993) (quoting this passage from *Feeney* to support the principle that strict scrutiny applies to an official act that differentiates based on race regardless of whether the act is race-based expressly or due to the motives behind the act, and regardless of whether the act is intended to benefit or burden any particular group).

[230] Ricci v. DeStefano, 554 F. Supp. 2d 142, 161–62 (D. Conn. 2006), *rev'd and remanded*, 557 U.S. 557 (2009) ("[A]ll applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted. This does not amount to a facial classification based on race.") (footnote omitted).

court conflated[231] the separate issues of whether the employer's decision amounted to different treatment and whether it had an impermissible purpose.[232]

Professor Richard A. Primus developed perhaps the most thoughtful argument as to why an employer's decision to alter racially-skewed test results is not race-based.[233] He supported this argument with a hypothetical scenario that involves two prospective employees, Ms. White and Ms. Black.[234] They applied to work for an employer that used two written tests, Test A and Test B, as the basis for its hiring decisions.[235] Based on each job applicant's combined score on both tests, Ms. White but not Ms. Black qualified to be hired.[236] But to avoid the racially-skewed test results of all applicants, the employer decided to hire applicants based only on Test B.[237] That decision allowed Ms. Black to get hired instead of Ms. White, because the former outscored the latter on Test B.[238]

Professor Primus argued that the hypothetical employer did not treat Ms. White differently than Ms. Black on the basis of race.[239] Essentially, he reasoned that the decision is not like affirmative action.[240] First, job applicants of all races were given the same test, their tests were scored under the same criteria, and the decision to use only Test B's results applied to all applicants.[241] Second, once the employer decided to rely only on Test B's results, it would not have hired Ms. White, regardless of her race. That is, even if Ms. White had been a member of a

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[231] *Id.* ("Plaintiffs' Equal Protection claim . . . lacks merit, with respect to both the racial classification and disparate treatment arguments" because everyone took the same test and everyone's results were discarded). By "disparate treatment," the court meant different treatment for purposes of the equal protection clause, rather than Title VII disparate treatment. *See id.* at 160–61 (analyzing the equal-protection issue after dismissing the Title VII disparate-treatment claim).

[232] *See supra* Part III (discussing those two separate issues).

[233] The following argument by Professor Primus argues that an employer can alter results of hiring tests in order to avoid a racially-disparate impact without making a decision based on race. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 563–65 (2003). However, his hypothetical involving Ms. White and Ms. Black seems to relate to whether the employer's decision amounted to different treatment, rather than relating to whether the decision was based on race. *See infra* note 243 and accompanying text (discussing a disparate impact law's effect on applicants of differing races). He seems to agree with this assessment in subsequent work. *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1350–52 (2010) (arguing that an employer's decision to discard results of hiring tests to avoid a racially-disparate impact "[o]bviously . . . is race-conscious," but it is not disparate treatment).

[234] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564–66 (2003)

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564–65 (2003).

[240] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564, 565 & n.270 (2003).

[241] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 565 (2003).

race that benefitted from the employer's decision to discard Test A's results, she would not have been hired because her Test B score was too low.[242]

Ultimately, however, that reasoning is unconvincing. First, the hypothetical employer still made a race-based decision, the superficial "equality" notwithstanding.[243] Certainly, the laws at issue in *Guinn v. United States*, *Lane v. Wilson*, *Yick Wo v. Hopkins*, and *Gomillion v. Lightfoot* applied "equally" to everyone in the sense that they did not have criteria for one race that were inapplicable to another race.[244] But the Court was correct to hold there were equal protection violations in all four of those cases because, in a different sense, the laws did not apply the same to everyone. Professor Primus is correct that the hypothetical employer treated job applicants the same in several respects. But the employer made a race-based decision because, in another respect, the employer decided to discard Test A's results at least partly due to race.[245] Professor Primus avoids that conclusion by instead focusing on the fact that the hiring decision was not race-based after the employer made the race-based decision to discard Test A's results. However, although the hiring decision is not race-based, "[i]ntentional discrimination is still occurring, just one step up the chain."[246]

Accordingly, the employer's decision to discard Test A's results was race-based, although Ms. White would not have been hired based on Test B alone even if she were of a different race. One step up the chain, the employer decided to ignore Test A at least partly because of the race of the job applicants whose combined scores entitled them to be hired.[247] Thus, that was a race-based decision, even if the arguably separate hiring decision was not race-based.[248] The analysis should not focus on Ms.

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[242] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 565 n.270 (2003) ("Ms. White would have been hired had there been no disparate impact law, but given the existence of such a law, her race is irrelevant to the decision not to hire her. She would not have been hired even if she had been black.").

[243] *See* Anderson v. Martin, 375 U.S. 399, 404 (1964) (holding unconstitutional a law that required ballots to identify political candidates' races because "we view the alleged equality as superficial").

[244] *See supra* notes 114–17 (discussing these cases).

[245] Professor Primus seems to acknowledge this fact. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564 (2003) (under his hypothetical, "the operation of disparate impact doctrine reallocates one position from a white applicant to a black applicant"); *id.* at 565 n.270 ("Ms. White would have been hired had there been no disparate impact law . . . .").

[246] Ricci v. DeStefano, 557 U.S. 557, 594–95 (2009) (Scalia, J., concurring).

[247] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 564 (2003) ("It turns out that Test A has a disparately adverse impact on black applicants as compared with white applicants, and the employer cannot demonstrate that Test A is required by business necessity, so the employer eliminates Test A.").

[248] Professor Primus wrote that his hypothetical had an "absence of differential group treatment at the moment of the employment decision." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 565 (2003). But, under the facts of his hypothetical, the employer would hire any employee who received a certain combined score on Tests A and B. *Id.* at 564. When the employer discarded Test A's results, it decided to hire anyone with a particular score on Test B. *Id.* Hence, both before and after Test A was discarded, the test scores alone would

White's race alone.[249] For example, in *Personnel Administrator of Massachusetts v. Feeney*, the Court held the law at issue was not gender-based because there was no evidence of intent to discriminate against women[250]. The Court paid no attention to the fact that the law would have burdened Ms. Feeney even if she were male because she was a non-veteran,[251] although Professor Primus's logic would assign great weight to that fact.[252]

2. *How Plaintiffs May Show an Employer's Decision Was Based on an Impermissible Purpose*

Recall the four methods to show that an official act has an impermissible purpose.[253] Also recall that the method used will partly determine which level of scrutiny applies.[254]

a. Showing an Employment Decision's Express Purpose by Showing an Employer's Writing or Admission

The way to most clearly show an act's purpose is by showing its

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determine whether any particular applicant would be hired. Therefore, the decision to ignore Test A and hire everyone with a certain score on Test B essentially was the "moment of the employment decision." *Id.* Nothing the employer subsequently did would affect which applicants got hired. *Id.* at 565. In other words, the decision to discard Test A was the hiring decision—and it was race-based. But even if the decision to discard Test A is somehow distinct from the hiring decision, the former decision is still race-based, even if the latter is not.

[249] *Supra* note 242 and accompanying text.

[250] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279–281(1979).

[251] *See supra* text accompanying note 112 (discussing *Feeney*).

[252] If a public employer learned its tests were designed to create racially-skewed results, the employer's race-based decision to discard the test results would not violate equal protection. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (upholding statues tailored to achieve a governmental purpose). Justice Scalia has correctly explained why remedying one's own racial discrimination complies with the equal protection clause: "[A] State may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment). *See also supra* note 198 (declaring that equal protection violations can only occur amongst similarly-situated individuals).

[253] *See supra* Part III.B.1.

[254] If a racial purpose is shown to be a motivating factor, then the employer's decision would be subject to a burden-shifting test possibly followed by strict scrutiny. If shown any other way, strict scrutiny would apply to the decision. *See supra* Part III.B.2.

express purpose.[255] This can be done most easily by pointing to a writing. In the employment context, an expressly racial purpose seems more likely to be part of an affirmative action program than an employer's *post hoc* decision, such as discarding test results, that avoids a racially-disparate impact.[256] Thus, an employer's admission is the most likely way to prove that the employer's decision to discard or alter the results of an employment-related test was expressly race-based.[257] Although some commentators have questioned whether the Supreme Court in *Ricci* required the plaintiffs to prove the employer's decision was race-based,[258] the Court seems to have ruled that the decision was expressly race-based due to the employer's admission.[259] Because the employer's decision implicated the Equal Protection Clause[260] and was expressly race-based, it would be subject to strict scrutiny.[261]

But a plaintiff may have difficulty getting such an admission from an employer because an employer can lie about its reasons for acting.[262] Similarly, an employer may not be consciously aware of its reasons for acting.[263] Hence, using another method of proof may be necessary to successfully prove a suspect purpose.

b. Showing an Employment Decision's Purpose by Showing Its Motivating Factor

Absent an expressly race-based decision, a plaintiff could show an

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[255] *See supra* Part III.B.1.a.

[256] *See, e.g.*, United States v. Brennan, 650 F.3d 65, 96–104 (2d Cir. 2011) (discussing the difference between an affirmative action program and an *ex post* decision to avoid a disparate impact).

[257] *See* Johnson v. California, 543 U.S. 499, 502–03, 508–09 (2005) (finding an unwritten prison policy to be expressly race-based because the prison admitted to the existence of the policy). *See also* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 539 (2003) (suggesting that an express admission may not be the most compelling way to prove that an employer's decision was race based, although this view was taken before *Johnson* was decided).

[258] *See, e.g.*, Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 107 (2010) ("[B]y imputing race-specific harm to a race-neutral decision, the Ricci plaintiffs were given a racial preference: Unlike ordinary Title VII plaintiffs, they were relieved of any requirement to demonstrate pretext or prove an impermissible racial motive.") (citing Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257 (2010)). Professors Harris and West-Faulcon are correct that the Court did not seem to require the *Ricci* plaintiffs to prove the race-based decision was motivated by animus, which is a requirement under Title VII. Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1268–69 (2010). But the *Ricci* employer's decision was still race-based.

[259] *See* Ricci v. DeStefano, 557 U.S. 557, 579 (2009) (the employer's decision was "express, race-based"); *id.* at 566 (discussing the employer's stated race-based concerns with the test results).

[260] *See supra* Part IV.A. (explaining how discarding a test negatively affects those that passed).

[261] *See supra* note 160 and accompanying text.

[262] *See* Batson v. Kentucky, 476 U.S. 79, 105-06 (1986) (Marshall, J., concurring).

[263] *See* Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

employer's decision was race-based because race was a motivating factor behind the decision.[264] Some commentators have questioned whether the motivating-factor test applies in a *Ricci*-type situation. According to Professor Richard Primus, the predominant-factor test, rather than the motivating-factor test, might apply in a lawsuit that challenges an action taken to avoid a disparate impact against racial minorities.[265] He noted that the motivating-factor test applied in *Arlington Heights*, a case in which racial minorities were burdened by the state action at issue.[266] By contrast, in a case in which state action benefits historically disadvantaged groups, the plaintiffs bear the more-difficult burden of proving that race was the state's predominant motive in cases challenging re-districting that seek to help racial minorities.[267]

However, the motivating-factor test applies in the employment context.[268] Professor Primus acknowledged that case law does not confirm or reject his view that the applicable level of proof depends on whether the challenged act intended to help racial minorities.[269] He noted other possible explanations for why the motivating-factor test is inapplicable in cases challenging re-districting.[270] Further, he seemed to acknowledge that the Supreme Court has refused to apply the motivating-factor test only in cases challenging re-districting.[271] Indeed, the Court has explained that "*outside the districting context*, statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are *motivated by* a racial purpose or object."[272] Finally, because the fact that a challenged act intends to benefit a

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[264] *See supra* Part III.B.1.c.

[265] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545–51 (2003).

[266] *Id.* at 546–47.

[267] Id. (distinguishing Miller v. Johnson, 515 U.S. 900 from Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252) ("*Arlington Heights* states a rule for laws intended to burden members of historically disadvantaged groups, and Miller states a rule for laws intended to benefit such groups. . . . In such a case, a racially-allocative motive might provoke strict scrutiny only when that motive eclipses all others and becomes predominant. In a case where the intent to discriminate against African Americans was a motivating factor in the drawing of a district, strict scrutiny might apply under the principle of Arlington Heights.")

[268] *See* Miller v. Johnson, 515 U.S. 900, 913 (1995) (holding that, outside the districting context, statutes are subject to strict scrutiny so long as they are "motivated by" a racial purpose).

[269] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 547 (2003).

[270] Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545–46 & n.216 (2003).

[271] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 547 n.218 (2003); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1360 n.101 (2010) (citing only to re-districting cases for the proposition that the predominant-factor test could apply in cases challenging official actions taken to avoid disparate impact).

[272] Miller v. Johnson, 515 U.S. 900, 913 (1995) (emphases added) (citing Shaw v. Reno, 509 U.S. 630, 644 (1993)); *see also* Hunt v. Cromartie, 526 U.S. 541, 547 (1999) ("[I]n this context [of re-districting], strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision").

particular racial group does not alter the applicable level of scrutiny,[273] that fact likewise should not alter the plaintiff's burden of proving a racial purpose behind the act.[274]

Although the motivating-factor test can apply in a challenge to an employer's action taken to avoid a racially-disparate impact, how it would apply is unclear. Significant facts could include that an employer knew the results of a test, the results were racially-skewed, and the employer took action to avoid or mitigate that skew, such as discarding test scores or adjusting them. These facts alone could establish race was a motivating factor.[275] Even if the employer convinced the court that its action had a race-neutral reason, that would not necessarily establish that race was not a motivating factor.[276] If race were a motivating factor, the employer would prevail if it proved by a preponderance of the evidence that it would have taken the action without the racial motive.[277]

c. Showing an Employment Decision's Purpose by Showing Its Predominant Factor

In addition to showing race was the express purpose or a motivating factor of an employer's decision, a plaintiff could try to prove race was the action's predominant factor.[278] Of course, proving that race was the predominant factor behind the employer's action would necessarily also

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[273] *See supra* notes 222–29 and accompanying text; *see also supra* note 213.

[274] *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 311–12, 320–21 (2001) (the motivating-factor test applies outside of the re-districting context, including in cases challenging racial preferences in university admissions). Professor Primus seemed to hold a contrary view due to his desire to benefit racial minorities. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 499, 502 (2003). Of course, state action that sought to benefit racial minorities would more likely be upheld if plaintiffs had to prove a racial predominant factor rather than motivating factor. *See supra* note 147 and accompanying text. However, Professor Primus understated a plaintiff's burden of proving a racial motivating factor. He claimed that "a showing that racial allocation was a motivating factor . . . would trigger strict scrutiny under *Arlington Heights*." Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 545 (2003) (footnote omitted). Actually, if race were a motivating factor behind an act, the act would trigger strict scrutiny, if at all, only if the racial factor were a "but-for" cause of the act. *See supra* note 168.

[275] *See, e.g.*, Lauren Klein, Ricci v. DeStefano: *"Fanning the Flames" of Reverse Discrimination in Civil Service Selection*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 391, 397–98 (2009) (discussing Biondo v. City of Chicago, 382 F.3d 680, 684 (7th Cir. 2004); Dallas Fire Fighters Assoc. v. City of Dallas, 150 F.3d 438, 441 (5th Cir. 1998); Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1269 (11th Cir. 2003)).

[276] *See* text accompanying *supra* note 129; *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

[277] *See* Hunter v. Underwood, 471 U.S. 222, 227–28 and 232 (1985). The plaintiff might need to make this showing by a preponderance of the evidence. *See id.* at 225, 227 (noting the court of appeals required such a showing and later noting the court of appeals correctly used the *Arlington Heights* framework). *See also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[278] *See supra* Part III.B.1.d.

prove that race was a motivating factor.[279] But a plaintiff who proves a racial motivating factor would have good reason to try to prove that race was the predominant factor: the former proof shifts the burden of proving race was not a but-for cause of the action to the defendant, whereas the latter proof triggers the more rigorous strict scrutiny.[280] If a plaintiff fails to prove race was an express purpose behind the action and fails to prove the action's impact alone reveals a racial purpose, then the predominant-factor test would be the final way to trigger strict scrutiny on the ground of racial discrimination.[281]

Unfortunately, the Supreme Court has not clearly explained how or whether the predominant-factor test applies outside of the re-districting context.[282] Commentators have read *Ricci* to apply the predominant-factor test in the Title VII context[283] and have read *Parents Involved in Community Schools v. Seattle School District No. 1* to use the same test in an equal-protection challenge to race-based assignments of students to public schools.[284] However, no opinion in *Parents Involved* mentioned that test, probably due to the fact that the state action at issue was a written policy that was expressly, facially race-based.[285] Somewhat similarly, the majority opinion in *Ricci* mentioned only one time that race was the predominant factor behind the employer's action at issue.[286] However, the *Ricci* Court also stated that the employer's decision was expressly race-based.[287] Perhaps the *Ricci* Court meant that the employer's decision was race-based both expressly and under the predominant-factor test. For two reasons, relying on the predominant-factor test might have been useful in *Ricci* while being unnecessary in *Parents Involved.* First, assigning students to schools based on race is a more clearly race-based act than is discarding employment-test results to avoid a racially-disparate impact.[288] Second, a written policy might serve

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[279] *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 312 n.101 (2001) (citing Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion); *id.* at 1000 (Thomas, J., concurring in the judgment)).

[280] *See supra* Part III.B.2.

[281] *See supra* Part III.B.2.

[282] *See, e.g.*, Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289, 336 (2001) ("The Supreme Court has not provided much guidance on how one might go about establishing that a particular legislative motivation was 'predominant,' as opposed to merely a 'but for' cause [that is, a motivating factor], beyond pointing out the obvious fact that it is more difficult to make such a showing[.]"); *see also* text accompanying *supra* note 151 (noting that the Supreme Court applied this test only in the re-districting context).

[283] *See, e.g.*, Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 70-72 (2009); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1360–61 (2010).

[284] Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 70–72 (2009).

[285] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007).

[286] *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009).

[287] *See* Ricci v. DeStefano, 557 U.S. 557, 579 (2009) (stating the employer's decision was "express, race-based").

[288] *See supra* Part IV.B.1.

as more definitive proof than an admission does that a particular act was race-based.[289] Accordingly, those commentators seem correct that the predominant-factor test can apply outside of the re-districting context.[290]

Because the predominant-factor and motivating-factor tests consider the same evidence,[291] a challenge to an employer's decision to alter or discard test results should consider the nature of the results and whether the employer was aware of them before making the decision. For example, if the employer knew that the test results were racially-skewed before discarding them or adjusting them in a way that mitigated or eliminated the skew, that knowledge would at least strongly suggest that race was the decision's predominant factor.[292] The existence of other factors could, but would not necessarily, prevent a finding that race was the predominant factor.[293]

d. Showing an Employment Decision's Purpose by Showing Its Impact

The final way a plaintiff could show an employer's action was race-based is by relying solely on the action's impact.[294] In *Ricci*, for example, the employer's decision to discard the test results both burdened and benefited employees from several racial and ethnic groups.[295] In particular, the employer's decision to discard the test results for open lieutenant positions burdened ten candidates who were eligible for immediate promotion, all of whom were Caucasian.[296] The decision also burdened at least three African-American candidates who passed the test and thus could have been promoted in the event of a future vacant lieutenant position.[297] The decision benefited eighteen Caucasian, thirteen African-American, and twelve Hispanic candidates that failed the test.[298] Similarly, the decision to discard the captain test results burdened seven Caucasian and two Hispanic candidates; it benefited as many as eighteen Caucasian, eight African-American, and six Hispanic

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[289] *Cf. supra* notes 152–54 and accompanying text.

[290] But this does not mean that the predominant-factor test applies to the exclusion of the motivating-factor test in any context besides re-districting. *See supra* Part IV.B.2.b.

[291] *See supra* note 146 and accompanying text (explaining that both require inquiries into legislative history).

[292] *See supra* note 275.

[293] *See supra* note 145 and accompanying text.

[294] *See supra* Part III.B.1.b.

[295] *See* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1351 (2010).

[296] Ricci v. DeStefano, 557 U.S. 557, 566 (2009).

[297] Ricci v. DeStefano, 557 U.S. 557, 566 (2009). Thirty-four total candidates passed the lieutenant test. *Id.* Twenty-five of them were Caucasian, six were African American, and three were Hispanic. *Id.*

[298] *See id.* (Discarding the test results also benefited the firefighters that passed the test but stood little chance of being promoted).

candidates.[299]

Although the *Ricci* employer's decision to discard the results for both tests disproportionately burdened Caucasian firefighters, the disparity is not clearly sufficient to prove the decision was race-based. In the rare cases where the Supreme Court ruled a disparity was stark enough to prove intentional racial discrimination, the benefits went almost exclusively to one race and the burdens went almost exclusively to another race.[300] Instead, *Ricci*'s disparity may be more comparable to that in *Feeney*, which lacked sufficient proof of intentional discrimination against women: the law at issue burdened almost all women and a majority of men, although it benefited men almost exclusively.[301]

However, being analogous to *Feeney* does not mean the disparity in *Ricci* would have been insufficiently stark to prove race-based intent. The *Feeney* Court stated: "If the impact of this statute could not be plausibly explained on a neutral ground, *impact itself would signal* that the real classification made by the law was in fact not neutral [e.g., was gender-based]."[302] In other words, the *Feeney* plaintiff's impact-alone argument[303] failed to prove the law purposely burdened women because the law could be explained on the gender-neutral ground of benefiting veterans—not because the impact was insufficiently stark.[304] This reading of *Feeney* would be incorrect if "signal" meant "raise an inference of," rather than "prove," gender discrimination.[305] But the Court likely meant "signal" to mean "prove." The Court explained: "Just as there are cases in which *impact alone* can unmask an invidious classification, *cf.* [*Yick Wo*], there are others, in which—*notwithstanding impact*—the *legitimate non-invidious purposes* of a law cannot be

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[299] *See id.*

[300] *See supra* Part III.B.1.b.

[301] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) ("[T]his is not a law that can plausibly be explained only as a gender-based classification. . . . Veteran status is not uniquely male. Although few women benefit from the preference the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans-male as well as female-are placed at a disadvantage. Too many men are affected by [the statute], to permit the inference that the statute is but a pretext for preferring men over women.").

[302] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (emphasis added) (citing Washington v. Davis, 426 U.S. 229, 242 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). By "not neutral," the Court meant "gender-based." *See id.* at 274 ("The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based.").

[303] The Court here was considering the plaintiff's impact-alone argument. *See Feeney*, 442 U.S. at 274–75. The Court considered the plaintiff's motivating-factor argument in a different section of its opinion. *See id.* at 276–80.

[304] *See supra* notes 109–112 and accompanying text (explaining that an impact-alone argument requires a stark disparity and also requires that the official act not be explainable on permissible grounds).

[305] *See* Pers. Adm'r of Mass.v. Feeney, 442 U.S. 256, 279 n.25 (1979) (explaining that sometimes a disparity will create an inference of intentional discrimination and that an inference is not synonymous with proof).

missed. This is one."[306] Thus, the Court quite clearly held the impact-alone argument failed because a gender-neutral basis could explain the law, although the law's impact on women was sufficiently stark under the impact-alone test.

Accordingly, if a disparity in a case such as *Ricci* is approximately as stark as the one in *Feeney*,[307] the plaintiff in the *Ricci*-type case would be able to satisfy the stark-disparity prong of the impact-alone test.[308] The remaining issue would be whether the employer's decision to discard or alter test results was not explainable on any ground besides race.[309] If there is no plausible race-neutral explanation, the employer's action would be subjected to strict scrutiny.[310]

V. CONCLUSION

Turning the Equal Protection Clause's principle of equality into a

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[306] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 275 (1979) (emphasis added).

[307] The racial disparity of the *Ricci* employer's decision to discard the test results was not as stark as the disparities in cases such as *Yick Wo*, and some scholars have suggested the disparity was not as stark as the one in *Feeney* either. *See* Michael J. Zimmer, Ricci's *"Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 BYU L. REV. 1257, 1274–75 (2010) (suggesting the disparity in *Feeney* was more stark than the one in *Ricci*). However, the disparities in *Ricci* and *Feeney* were comparable with each other. The official act in *Feeney* burdened both genders and benefited one gender almost exclusively. Similarly, the official act in *Ricci* benefited people of all racial and ethnic groups that took the test and burdened members of one of those groups almost exclusively.

Of course, if the racial impact of the *Ricci* employer's decision to discard the test results were insufficiently stark under the impact-alone test, the decision could still be deemed race-based due to the employer's admission or under the predominant-factor or motivating-factor test.

[308] *See supra* text accompanying note 112 (explaining the two prongs of an impact-alone argument).

[309] The second prong likely places the burden on the defendant to produce an innocent explanation for the disparity. *See supra* note 112.

[310] *See supra* notes 160, 161, 162 and accompanying text. Recall that proving a racial purpose in an equal-protection claim under the impact-alone theory is significantly more difficult than proving Title VII liability for a racially-disparate impact. The equal-protection claim might require a more stark disparity than the disparate-impact claim does. *See* Washington v. Davis, 426 U.S. 229, 246–48 (1976); *see also supra* Parts II & III.B.1.b. After the plaintiff shows a sufficient racial disparity, the equal-protection claim requires the plaintiff to persuade the court that the disparity is unexplainable on any ground besides race, which is a high burden on the plaintiff. *See supra* note 112; *supra* Part III.B.1.b. By contrast, the disparate-impact doctrine imposes no such requirement but instead requires the defendant to prove that business necessity justifies the policy that resulted in the racial disparity. *See supra* Part II. That is a high burden on the defendant. *See* Ricci v. DeStefano, 557 U.S. 557, 620–24 (2009) (Ginsburg, J., dissenting). If the defendant satisfies that burden, it would still be liable if the plaintiff shows the defendant refused to adopt a policy that would result in a smaller racial disparity. *See supra* Part II.

This footnote summarizes only how a plaintiff may rely solely on a racial disparity to prevail on a Title VII disparate-impact claim or an equal-protection claim. This footnote does not involve the separate issue of how a defendant may attempt to use disparate-impact avoidance as a legal justification for otherwise violating the equal protection clause or Title VII's disparate-treatment provision. *See supra* note 10 and accompanying text.

workable legal doctrine is not easy to do.[311] The current system of tiers of scrutiny is not necessarily wise or justified.[312] Once that framework is accepted, deciding which level of scrutiny should correspond to which particular types of classification requires normative judgments.[313] When a court applies one of those tiers of scrutiny, it must make more normative judgments to decide whether the distinctions between the differently-treated groups are sufficient to justify the different treatment.[314]

Those complexities are somewhat lessened in the employment context because there is widespread agreement that employment decisions should be made based on merit.[315] Although meritocracy might seem in tension with equality because it presumes that people are unequal,[316] it is consistent with the principle of equality, which requires that like people be treated alike. When someone treats more-capable people differently than less-capable people, the principle of equality is satisfied because one group is different than the other in relevant respects.[317] However, determining capability is not necessarily an easy task. Some scholars have argued that the United States is not nearly the meritocracy that many assume it is,[318] partly because many employment decisions are based on impermissible discrimination,[319] sometimes sub-

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[311] *See* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing A Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 81 (2002) ("[T]he Equal Protection Clause presents massive and unavoidable interpretive difficulties of its own").

[312] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 585 & n.167 (1982).

[313] *See* Richard A. Epstein, *Liberty, Equality, and Privacy: Choosing A Legal Foundation for Gay Rights*, 2002 U. CHI. LEGAL F. 73, 81 (2002).

[314] *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 563 (1982) ("Even if one is disposed to frame constitutional values in terms of equality, therefore, one cannot avoid the task of identifying and assessing the substantive constitutional rights that determine when people are 'alike' and when 'unalike.'"); *see also id.* at 539 n.8 ("[T]o say that goods should be distributed according to merit, or needs, or works, or wants is simply to say that the substantive criterion that defines the respect in which all people are alike is merit, or needs, or works, or wants").

[315] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 280 (1979) (noting that there exists a "widely shared view that merit and merit alone should prevail in the employment policies of government"); Nicole J. DeSario, *Reconceptualizing Meritocracy: The Decline of Disparate Impact Discrimination Law*, 38 HARV. C.R.-C.L. L. REV. 479, 489 (2003) (quoting Andrew Mason, *Equality of Opportunity, Old and New*, 111 ETHICS 760, 764 (2001)) (noting that meritocracy "is 'an idea that is widely held and deeply embedded in the practices of liberal democracies'"); Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1304 (2012) (footnote omitted) (citations omitted) ("It is well-established that the overwhelming majority of Americans—of all groups and races—subscribe to some extent to meritocracy beliefs. Indeed, meritocracy beliefs are so widespread in the United States that they are frequently referred to as the dominant or national American ideology."). *But see See* Susan Lorde Martin, *Patronage Employment: Limiting Litigation*, 49 SAN DIEGO L. REV. 669, 674–77 (2012) (discussing the view that patronage creates a more-capable civil service system than meritocracy does).

[316] *See, e.g.*, Mark Tushnet, *The Meritocratic Egalitarianism of Thurgood Marshall*, 52 HOW. L.J. 691, 691 (2009) ("Meritocracy is sometimes thought to be incompatible with equality because meritocracy implies hierarchy").

[317] *See supra* note 198.

[318] *See, e.g.*, Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968–97 (1996).

[319] *See* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85

consciously by well-meaning employers.[320] Others have argued that employment tests are unreliable predictors of capability.[321]

But the disparate-impact doctrine is not the answer.[322] That doctrine goes far beyond prohibiting or remedying intentional discrimination,[323] so it causes state action that differentiates among people on the basis of race.[324] That is inconsistent with meritocracy and the equality of a free society.[325] The disparate-impact doctrine's frequent attack on written, objective tests in the employment context[326] is especially troubling because those tests play an important role in preventing discrimination that is more possible under subjective tests.[327]

MINN. L. REV. 587, 599–612 (2000) (arguing that race and sex discrimination still play a significant role in hiring and promotion decisions); *see generally* Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 586 (1996) (arguing that there is still significant gender bias in the legal profession).

[320] Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745–49 (2005); Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1284–89 (1995).

[321] Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1261–76 (1995).

[322] Some scholars have argued that whether one supports or opposes the disparate-impact doctrine often hinges on whether one thinks that racial discrimination is still prevalent in American society. *E.g.*, Helen Norton, *The Supreme Court's Post-Racial Turn Towards A Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 201–02 (2010). The doctrine's supporters think it is necessary for smoking out covert discrimination, and the doctrine's opponents think it is unjustified because there is little discrimination to smoke out. *See id.* Perhaps that is where the debate over the disparate-impact doctrine mainly lies, but that is not where it should lie because smoking out *intentional* discrimination is not the doctrine's purpose. *See supra* note 37 and accompanying text. The main problem with the disparate-impact doctrine is that its burdens of proof allow a plaintiff to prevail without proving racial discrimination to an acceptable degree of certainty. *See supra* note 309. By contrast, the burdens of proving racial discrimination in an equal-protection claim are appropriate because they are high enough to ensure that a plaintiff prevails only upon proving that such discrimination actually occurred. *See supra* note 309 and *supra* Part III.B.1. This argument against the disparate-impact doctrine does not hinge on how much intentional racial discrimination still happens in the United States, since this argument does not hinge on how many disparate-impact plaintiffs prevail against defendants innocent of such discrimination. Instead, this argument focuses on the danger that a defendant innocent of such discrimination will nevertheless be found liable therefor. As a matter of principle, that danger makes the disparate-impact doctrine unacceptable. If racial discrimination is rare in the United States, that fact would support this argument about burdens of proof, but this argument can stand alone without any resort to empiricism. By analogy, allowing a criminal defendant to be convicted if a preponderance of the evidence proves his guilt would be unacceptable, even if the same number of wrongful convictions occurred under that burden of proof as under the beyond-a-reasonable-doubt standard. That lower standard would be improper as a matter of principle because it creates too much of a danger of wrongful conviction. Similarly, the disparate-impact doctrine creates too much of a danger that an innocent defendant will be wrongly held liable for racial discrimination, a very serious determination.

[323] *See supra* note 37 and accompanying text.

[324] *See supra* Part IV. *Cf. supra* note 252 (explaining why remedying intentional discrimination complies with equal protection).

[325] *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'") (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[326] *E.g.*, Ricci v. DeStefano, 557 U.S. 557, 633 (2009) (Ginsburg, J., dissenting); Doreen Canton, *Adverse Impact Analysis of Public Sector Employment Tests: Can A City Devise A Valid Test?*, 56 U. CIN. L. REV. 683, 683 (1987).

[327] *See* Doreen Canton, *Adverse Impact Analysis of Public Sector Employment Tests: Can A City Devise A Valid Test?*, 56 U. CIN. L. REV. 683, 683 & n.3 (1987) ("'Little will be gained by

If a plaintiff can prove that an employment test intentionally discriminated on a suspect basis, such as race, then a court may invalidate the test on that ground.[328] But if a test falls short of such discrimination, then the employer may voluntarily decide to replace the test with one that better measures job-related ability.[329] Using the disparate-impact doctrine to invalidate an employment test that does not entail such discrimination has a tendency to produce racial quotas or other forms of racial balancing,[330] which are "patently unconstitutional."[331]

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minorities if courts so discourage the use of tests that the doors to political selection are reopened.'") (quoting Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1022 (1st Cir. 1974)).

[328] *See supra* notes 7 & 35 and accompanying text; *see also supra* note 252.

[329] *See* Ricci v. DeStefano, 557 U.S. 557, 644 (2009) (Ginsburg, J., dissenting) ("These cases present an unfortunate situation, one New Haven might well have avoided had it utilized a better selection process in the first place."); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 83 (2009) (supporting "the voluntary, non-preferential efforts by public or private employers to eliminate policies and practices that tend to limit equal employment opportunities without adequate business or public policy justification"); Hayden v. Cnty. of Nassau, 180 F.3d 42, 54 (2d Cir. 1999) (designing an entrance examination with race-neutral means to mitigate racial disparities of past examinations "do[es] not discriminate against non-minorities"). By refusing to use a particular test again, an employer does not differentiate among employees, so a lawsuit that challenges this decision would not proceed past "step one." *See also supra* note 57 (discussing equal-protection cases that failed to proceed past "step one").

[330] Ricci v. DeStefano, 557 U.S. 557, 581–82 (2009); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 74–75 (2009). *See* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993 (1988) (plurality opinion) ("If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability [for disparate impact], such measures will be widely adopted."); Biondo v. City of Chicago, Ill., 382 F.3d 680, 684 (7th Cir. 2004) ("If avoiding disparate impact were a compelling governmental interest, then racial quotas in public employment would be the norm[.]").

[331] Grutter v. Bollinger, 539 U.S. 306, 330 (2003).