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Equal Opportunity, Not Equal Results: Benign Racial Favoritism to Remedy Mere Statistical Disparate Impact Is Never Constitutionally Permissible

Alamea Deedee Bitran^{*}

“The worst form of inequality is to try to make unequal things equal.”
–Aristotle¹

I. INTRODUCTION

Using a minimum height or weight requirement?² Relying on standardized test results or a selection committee for promotion or hiring decisions?³ Refusing to hire people taking narcotics or with a documented criminal background?⁴ Beware: you could be liable under Title VII⁵ for disparate impact without a shred of discriminatory intent.

Title VII’s disparate impact provision is directly at odds with the Equal Protection Clause⁶ and courts are incorrectly using it as the test for illegal discrimination. Title VII’s disparate impact provision conflicts with the Equal Protection Clause, as it mandates racial classification by imputing liability based on racial proportions, forcing employers to make race-based decisions.

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¹ CLAUDI ALSINA & ROGER B. NELSON, *WHEN LESS IS MORE: VISUALIZING BASIC INEQUALITIES* xiii (2009).

² *See* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (finding a disparate impact on women from minimum height and weight requirements for a correctional officer position).

³ *See Ricci v. DeStefano*, 557 U.S. 557 (2009) (opining that standardized test results for promotion lacked a strong basis in evidence in that specific situation to prevail on a disparate impact claim); *Watson v. Fort Worth*, 487 U.S. 977 (1988) (finding subjective decision making from a selection committee for promotion qualifies as a specific policy or practice under Title VII for disparate impact liability).

⁴ *See New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (declining to find a disparate impact on minorities when job applicants on narcotics were disqualified because the transit authority rebutted statistics with the business necessity of needing alert employees to operate the transit system); *Waldon v. Cincinnati Pub. Schs.*, No. 1:12-CV-00677, 2013 WL 1755664, at *1 (S.D. Ohio Apr. 24, 2013) (finding a disparate impact on minorities from a criminal background check to determine employment opportunities).

⁵ 42 U.S.C. § 2000e-2(k).

⁶ U.S. CONST. amend. XIV, § 1.

The proper test for illegal discrimination that complies with the Equal Protection Clause was set forth in *Yick Wo v. Hopkins*.⁷ In *Yick Wo*, the Supreme Court found that to prevail on a disparate impact claim, a plaintiff must provide evidence of discriminatory animus along with statistical disparities.⁸ Statistical disparate impact alone was insufficient.⁹ Specifically, the Court opined that “whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws.”¹⁰

In May 2015, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court confirmed that within the context of the Fair Housing Act (FHA) to prevail on a disparate impact claim, a plaintiff cannot merely show statistical disparities, and “a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity.”¹¹ In its statutory interpretation of the viability of a disparate impact claim under the FHA, the Court explained the importance of maintaining a “robust causality requirement” because any more lenient causation standard would allow defendants to “resort to the use of racial quotas.”¹²

Although the Court’s *Inclusive Communities Project* decision was a step in the right direction because it confirmed that a meritorious disparate impact claim under the FHA must rely on more than just statistical disparities, the Court’s decision was strictly a statutory one, thus leaving the constitutional problem with disparate impact unresolved.¹³ In response to

⁷ 118 U.S. 356 (1886).

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.* at 373.

¹¹ *See* 135 S. Ct. 2507, 2512 (2015).

¹² *Id.*

¹³ *Inclusive Communities Project* was a strictly statutory-based decision and the Court limited its analysis to determining if disparate impact was a cognizable claim as provided for under the FHA. *See generally id.* at 2516 (noting that it was engaging in a statutory analysis of the FHA, not a constitutional analysis, the Court opined “[t]he issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited”); *see also id.* at 2521 (“Recognition of disparate-impact claims is consistent with the FHA’s central purpose.”); *id.* at 2525 (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court’s interpretation of similar language in Title VII and the ADEA, Congress’ ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose.”); *id.* at 2519 (“Title VII’s and the ADEA’s ‘otherwise adversely affect’ language is equivalent in function and purpose to the FHA’s ‘otherwise make unavailable’ language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word ‘otherwise’ to introduce the

the *Inclusive Communities Project* decision, legal scholar Roger Clegg commented, “[g]iven that the Court was unanimous, then, in recognizing the constitutional problems and bad policy results than can arise from the disparate-impact approach, conservative litigators have no reason not to continue to press courts to reject or at least limit the approach in other cases.”¹⁴

Replacing merit-based selection, Title VII’s disparate impact provision points a litigation revolver at employers, encouraging de facto quota systems with preferential treatment based solely on race. The threat of disparate impact liability incentivizes racial stereotyping and group based discrimination, which is exactly what the Equal Protection Clause prohibits.¹⁵ Title VII’s disparate impact provision incites Equal Protection violations because “if 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 . . . discriminate on the basis of race.”¹⁶ As Chief Justice Roberts opined, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁷ To be constitutional, statutes should preclude “treatment of individuals as simply components of a racial, religious, sexual or national class.”¹⁸

II. THE *INCLUSIVE COMMUNITIES PROJECT* DECISION’S LIMITS: WHAT IT SOLVED AND WHAT IT LEFT UNADDRESSED

Disparate impact liability under the FHA, although recently approved under a statutory analysis, is unconstitutional as applied if courts allow litigants to bring such claims solely based on statistical disparities without a showing of discriminatory intent. By way of a hypothetical, an article illustrated the problem with disparate impact if grounded solely in statistical disparities:

Suppose, for example, that the owner of an apartment complex decides that she does not want to rent units to individuals who have been

results-oriented phrase. ‘Otherwise’ means ‘in a different way or manner,’ thus signaling a shift in emphasis from an actor’s intent to the consequences of his actions.”)

¹⁴ Roger Clegg, *The Supreme Court’s Bad “Disparate Impact” Decision*, NAT’L REV. (June 25, 2015, 3:00 PM), www.nationalreview.com/article/420319/supreme-courts-bad-disparate-impact-decision-roger-clegg (“[T]he law is now better because Justice Kennedy himself recognizes that the disparate-impact approach can lead to very bad results.”).

¹⁵ See Brief Amicus Curiae of the Project on Fair Representation in Support of Petitioners, *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375 (3d Cir. 2011) (No. 11-1507), 2013 WL 6040047.

¹⁶ See *id.* at 3 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (citations and quotations omitted)).

¹⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

¹⁸ See *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

convicted of drug offenses. She makes that decision without regard to race, her policy on its face does not treat people differently because of race, and indeed she enforces it in an evenhanded way, so that it applies equally to all applicants, without regard to race. Should she be liable for racial discrimination under the Fair Housing Act if it turns out that the policy in her neck of the woods has a disproportionate effect on this or that racial or ethnic group?¹⁹

Arguably, under the Court's May 2015 *Inclusive Communities Project* opinion, the answer to this hypothetical would be "maybe." Under *Inclusive Communities Project*, the Court recognized that the FHA does in fact provide for disparate impact liability, a question that courts have grappled with for decades.²⁰

Inclusive Communities Project was a qualified victory for the government because it upheld the viability of disparate impact claims under the FHA pursuant to the Department of Housing and Urban Development's (HUD) new regulations, but it also provided critical caveats that have left the door open to eventually implement the appropriate constitutional test for liability as proposed by this Comment.²¹ The *Inclusive Communities Project* case was a statutory decision, not a constitutional one, as indicated by the Court's elaborate analysis of whether the FHA's text and legislative history provided for disparate impact liability.²²

Prior to granting certiorari in *Inclusive Communities Project*, the Court granted certiorari on two similar cases that questioned the constitutionality of a disparate impact claim under the FHA, but both of those cases settled before the Court could weigh in on the issue.²³ In anticipation of *Inclusive Communities Project* finally deciding the viability of disparate impact under the FHA, commentators predicted that the *Inclusive Communities Project*

¹⁹ John Fund, *The Supreme Court's Disparate Impact Decision Is a Disaster*, NAT'L REV. (June 26, 2015, 4:00 AM), www.nationalreview.com/article/420339/supreme-courts-disparate-impact-decision-disaster-john-fund (quoting Roger Clegg).

²⁰ Courts have grappled with the question of whether or not the FHA provides for disparate impact liability for decades. See generally *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 658 F.3d 375, 377 (3d Cir. 2011); *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2010); *Charleston Hous. Auth. v. USDA*, 419 F.3d 729 (8th Cir. 2005); *Metro. Hous. Dev. Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977) (all being presented with the issue of whether the FHA provides for disparate impact liability).

²¹ See generally *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015); see also Clegg, *The Supreme Court's Bad "Disparate Impact" Decision*, *supra* note 14 ("[T]he law is now better because Justice Kennedy himself recognizes that the disparate-impact approach can lead to very bad results.").

²² See *Inclusive Cmty. Project*, 135 S. Ct. at 2516 ("The issue here is whether, under a proper interpretation of the FHA, housing decisions with a disparate impact are prohibited.").

²³ See *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly*, 134 S. Ct. 636 (2013) (granting certiorari); *Magner v. Gallagher*, 132 S. Ct. 548 (2011) (granting certiorari).

case “could indirectly be the most important public school desegregation case since *Brown v. Board of Education*.”²⁴ Unfortunately, the Court did not decide the constitutional question and limited its holding to whether the FHA permits disparate impact liability, thus leaving the constitutionality of disparate impact claims unaddressed.

In *Inclusive Communities Project*, the federal government provided low-income tax credits that Texas’ Department of Housing and Community Affairs (Department) distributed to developers.²⁵ A non-profit organization, the Inclusive Communities’ Project, Inc. (ICP), that assists low-income families in finding affordable housing brought a disparate impact claim under the FHA.²⁶ The ICP alleged that the Department’s tax credit distributions caused the continuation of segregated housing patterns by the Department’s allocation of more credits to housing in inner-city areas and too few credits in suburban areas.²⁷

The FHA provides that it is unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to a person because of race.”²⁸ Additionally, the FHA states:

It shall be unlawful for any person or other entity whose business includes engaging in real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.²⁹

Finding that the FHA’s “to otherwise make unavailable” language was the functional equivalent of the Age Discrimination Employment Act (ADEA) and Title VII’s “effects” language which provided for disparate impact, the Court held that the FHA’s text provides for disparate impact liability.³⁰ The Court hypothesized that Congress did not use identical language in the FHA as it did in Title VII and the ADEA, which explicitly

²⁴ See Valerie Strauss, *A Supreme Court Case That Public Education Advocates Should Be Watching*, WASH. POST (Jan. 13, 2015), www.washingtonpost.com/blogs/answer-sheet/wp/2015/01/13/a-supreme-court-case-that-public-education-advocates-should-be-watching.

²⁵ *Inclusive Cmty. Project*, 135 S. Ct. at 2510.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 42 U.S.C. § 3604(a).

²⁹ 42 U.S.C. § 3605(a).

³⁰ See *Inclusive Cmty. Project*, 135 S. Ct. at 2519 (“Title VII’s and the ADEA’s ‘otherwise adversely affect’ language is equivalent in function and purpose to the FHA’s ‘otherwise make unavailable’ language. In these three statutes the operative text looks to results. The relevant statutory phrases, moreover, play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all three statutes use the word ‘otherwise’ to introduce the results-oriented phrase. ‘Otherwise’ means ‘in a different way or manner,’ thus signaling a shift in emphasis from an actor’s intent to the consequences of his actions.”).

provided for disparate impact with clear “effects” language because it “would have made the relevant sentence awkward and unclear.”³¹ Additionally, interpreting the FHA to not provide for disparate impact would render Congress’ various amendments to the FHA superfluous.³²

The Court acknowledged the constitutional aspects at stake with disparate impact claims but did not engage in a comprehensive constitutional analysis, as it grounded its holding in the FHA’s statutory allowance for disparate impact claims.³³ Although the Court found that the FHA authorized disparate impact, it importantly noted that the outer contours of such claims must be limited by constitutional safeguards.³⁴

The majority explained that

disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, *if such liability were imposed based solely on a showing of a statistical disparity*. Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.³⁵

Noting the constitutional limitations on disparate impact claims and further supporting this Comment’s thesis that mere statistical disparities do not pass constitutional muster, the Court held that “disparate-impact liability has always been properly limited in key respects to avoid serious constitutional questions that might arise under the FHA, e.g., if such liability were imposed based solely on a showing of a statistical disparity.”³⁶

Providing a burden-shifting framework with a defense available to those accused of disparate impact violations, the Court explained “[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest their policies serve.”³⁷

³¹ *Id.*

³² *Id.* at 2520.

³³ *See id.* at 2522.

³⁴ *See id.*; *see also* Paul Hancock, *Symposium: The Supreme Court Recognizes but Limits Disparate Impact in Its Fair Housing Act Decision*, SCOTUSBLOG (June 26, 2015, 8:58 AM), www.scotusblog.com/2015/06/paul-hancock-fha.

³⁵ *Inclusive Cmty. Project*, 135 S. Ct. at 2522 (emphasis added) (citations omitted).

³⁶ *Id.* at 2512 (emphasis added).

³⁷ *Id.*

Acknowledging that there are material differences between the FHA and Title VII, and therefore supporting this Comment's premise that disparate impact claims supported solely by statistics are unconstitutional, the Court stated "the Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes."³⁸ To guard against abuse³⁹ of disparate impact claims by holding individuals "liable for racial disparities that they did not create," the Court emphasized that "racial imbalance does not, without more, establish a prima facie case of disparate impact."⁴⁰ Noting that disparate impact is not without limits, the Court instructed that the judiciary "should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision."⁴¹

The majority's opinion in *Inclusive Communities Project* left the elephant in the room unanswered: is disparate impact constitutional? This Comment argues that disparate impact, without requiring more than mere statistics to form a cognizable claim, is unconstitutional, specifically in the workforce. Supporting the proposition that disparate impact has no place in the workforce under Title VII, Justice Thomas' dissent opined that he would not amplify the error from *Griggs*, which applied disparate impact to Title VII.⁴² His dissenting opinion stated that the *Inclusive Communities Project* majority's basis for upholding the disparate impact regime "is made of sand" and accused disparate impact proponents of "doggedly assum[ing] that a given racial disparity at an institution is a product of that institution rather than a reflection of disparities that exist outside of it."⁴³

Justice Thomas' dissent highlights the unanswered concerns associated with disparate impact. Specifically, constitutional concerns are especially alarming when disparate impact claims are brought within the employment context under Title VII, because multiple factors, not just race, tend to play a role in employment-related decisions. Unrealistically attempting to isolate employment decisions down to race being the sole reason for an employer's actions disregards other disparities that exist that might justify certain employment decisions, such as different skill sets, education, or even nepotism, all lawful reasons for employment decisions.

³⁸ *Id.* at 2523.

³⁹ *Id.* at 2524 ("The limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims. . . . Remedial orders that impose racial targets or quotas might raise more difficult constitutional questions.")

⁴⁰ *Id.* (quotations omitted).

⁴¹ *Id.* at 2524.

⁴² *Id.*

⁴³ *Id.* at 2526, 2529.

III. RELEVANT SCHOLARSHIP & CASE LAW: EQUAL PROTECTION & TITLE VII

Two legal scholars, Roger Clegg and Professor Richard Primus, have attacked disparate impact and written scholarship on its unconstitutionality. Roger Clegg opined that “the disparate impact theory continues to be used in a manner that far exceeds the legitimate purpose of countering hidden discrimination.”⁴⁴ Disparate impact liability without proof of discriminatory intent aims to mandate “equal results.”⁴⁵ Conversely, the Equal Protection Clause ensures “equal opportunity,” not “equal results.”⁴⁶

To illustrate the problematic unconstitutional effect of disparate impact, Roger Clegg explained:

If a business, agency or school has standards for hiring, promoting, admissions or offering a mortgage that aren't being met by individuals in some racial and ethnic groups, there are three things that can be done. First, the standards can be relaxed for those groups. That is what racial preferences do. Second, the government can attack the standards themselves. That is what the disparate-impact approach to enforcement does. Third, one can examine why a disproportionate number of individuals in some groups aren't meeting the standards—such as failing public schools or being born out of wedlock—and do something about it.⁴⁷

In another article in which he commented on the *Inclusive Communities Project* decision, Roger Clegg emphasized the Catch-22 situation that disparate impact places employers in: either eliminate innocent policies to avoid a lawsuit or start paying very close attention to your racial proportions and adjust accordingly to avoid a lawsuit:

The disparate-impact approach pushes potential defendants to do one or both of two things: Get rid of perfectly legitimate selection criteria or apply those criteria in a race-conscious way so that the resulting

⁴⁴ Roger Clegg, *Disparate Impact in the Private Sector: A Theory Going Haywire*, 5 PERSPECTIVES ON LEGIS., REG. & LITIG. 12 (2001).

⁴⁵ See 42 U.S.C. § 2000e-2(k).

⁴⁶ See generally *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970) (“[T]he Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate.”); *United States v. Com. of Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (“Women need not be guaranteed equal ‘results’ in this respect, but the Equal Protection Clause does require equal opportunity to obtain these results.”); *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass’n*, 647 F.2d 651, 665 (6th Cir. 1981) (“[T]he equal protection clause requires at least an equal opportunity for female athletes to play any contact sport.”).

⁴⁷ Roger Clegg, “*Disparate Impact at Harvard Law School*”, CTR. FOR EQUAL OPPORTUNITY (Apr. 21, 2015, 08:00 AM), www.ceousa.org/issues/other-issues/disparate-impact/891-disparate-impact-at-harvard-law-school.

racial double standard will ensure that the numbers come out right. In other words, we're supposed to stop judging people by the content of their character, and start judging them by the color of their skin. And the fact of the matter is, there is probably no selection criterion—not a single one—that does not have a disparate impact on some group or subgroup.⁴⁸

Similarly, Professor Richard Primus reasoned that disparate impact undoubtedly raises constitutional concerns.⁴⁹ Specifically, he reasoned:

A statutory regime that directs government officials (overtly) and private employers (tacitly) to monitor the racial composition of workforces, and that is in some way concerned with the allocation of employment opportunities among racial groups, does raise equal protection issues on the currently prevailing understanding of equal protection.⁵⁰

This Comment joins scholarship such as Roger Clegg and Professor Richard Primus by examining in depth disparate impact's unconstitutional effects and further analyzing the dangers of disparate impact permeating not only the employment sphere, but now extending to other spheres such as the housing and educational spheres.

A. Equal Protection Case Law

The single most important constitutional principle that guards individual rights is the concept of “equal protection of the laws,” found in the Fourteenth Amendment's Equal Protection Clause.⁵¹ The Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵² Equal Protection, via reverse incorporation through the Fifth Amendment's due process clause, applies to both the federal government and the states.⁵³ The Equal Protection Clause does not mandate that everyone receive the same treatment.⁵⁴ Instead, it demands that similarly situated individuals are

⁴⁸ Roger Clegg, *A Decision with a Disparate Impact Against Common Sense*, WASH. EXAM'R (June 29, 2015, 12:44 PM), www.washingtonexaminer.com/a-decision-with-a-disparate-impact-against-common-sense/article/2567234.

⁴⁹ Richard Primus, *Equal Protection & Disparate Impact: Round Three*, 117 HARV. L. REV. 493 (2003).

⁵⁰ *Id.* at 585–86.

⁵¹ THOMAS BAKER & JERRE WILLIAMS, *CONSTITUTIONAL ANALYSIS IN A NUTSHELL* 394 (2d ed. 2003).

⁵² U.S. CONST. amend. XIV, § 1.

⁵³ *See* *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁵⁴ *Id.*

treated similarly.⁵⁵ Both minorities and non-minorities can bring an Equal Protection claim.⁵⁶

Classifications that advantage or disadvantage one group of people over another are reviewed with a certain level of scrutiny depending on the type of classification made. When a classification “neither proceeds along suspect lines nor infringes fundamental constitutional rights,” it will be constitutional under the Equal Protection Clause “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁵⁷ Rational basis review is the “paradigm of judicial restraint.”⁵⁸ In *Railway Express Agency v. New York*, the Court found that New York’s advertisement restrictions were reasonable and satisfied rational basis review.⁵⁹

Racial classifications, however, are reviewed under a more stringent standard. The strongest suspect class is race, as it an immutable characteristic.⁶⁰ Strict scrutiny, requiring more than reasonableness, mandates that the classification be narrowly tailored to meet a compelling interest.⁶¹ When a classification is based on race, it invokes strict scrutiny review, and the Equal Protection Clause frequently bans such a classification as unconstitutional.⁶²

The Supreme Court established that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.”⁶³ Strict scrutiny review of an Equal Protection claim “is not dependent on the race of those burdened or benefited by a particular classification.”⁶⁴

In *Bakke*, the Court, using strict scrutiny review, struck down a medical school’s quota system that reserved sixteen out of one hundred seats for minorities.⁶⁵ The *Bakke* quota system violated the Equal Protection Clause because the sixteen seats that were reserved for minorities were completely off limits to white applicants.⁶⁶ Minority applicants had access

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993).

⁵⁸ *Id.* at 314.

⁵⁹ 336 U.S. 106 (1949).

⁶⁰ *See Witt v. Dep’t of Air Force*, 527 F.3d 806, 825 (2008) (opining that immutable characteristics are “distinguishing” and define people “as a discrete group”).

⁶¹ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (reasoning “our cases have been explained in opinions by terms ranging from ‘strict scrutiny’ at one extreme to ‘rational basis’ at the other”).

⁶² *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

⁶³ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

⁶⁴ *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)).

⁶⁵ *Bakke*, 438 U.S. at 265.

⁶⁶ *Id.*

to all one hundred seats when applying, whereas white applicants only had access to eighty-four seats.⁶⁷

White applicants, though similarly situated to minority applicants because they were applying to that medical school, were not given similar opportunities, as the sixteen minority seats were entirely off limits to white candidates.⁶⁸ Justice Powell opined that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”⁶⁹ The Court found that race can only be used as a “plus” factor, but not the sole factor, when evaluating a student’s application.⁷⁰ Additionally, Justice Powell emphasized the “importance of considering each particular applicant as an individual.”⁷¹ He reasoned that the “guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”⁷²

Building on its anti-quota precedent, the Court decided *Gratz v. Bollinger* and *Grutter v. Bollinger*⁷³ on the same day, altering the meaning of “strict scrutiny” in the context of higher education. In *Grutter*, the University of Michigan Law School sought to ensure diversity in its student body, but when it denied a white applicant admission, she sued alleging discrimination in violation of the Equal Protection Clause.⁷⁴ The Court opined that “[a]ll government racial classifications must be analyzed by a reviewing court under strict scrutiny.”⁷⁵ The Court found that the University of Michigan Law School had narrowly tailored its admissions program because the university considered race as one factor in its holistic view of its applicants.⁷⁶ Race was not the sole factor.⁷⁷

That same day, the Court struck down the University of Michigan’s undergraduate admissions program because it was not narrowly tailored to the compelling interest of diversity.⁷⁸ In *Gratz v. Bollinger*, two white applicants sued after they were rejected by the University of Michigan, alleging that they were qualified for admission but were rejected because

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 307.

⁷⁰ *Id.* at 317–19.

⁷¹ *Id.* at 289.

⁷² *Id.* at 289–90.

⁷³ 539 U.S. 306, 306 (2003).

⁷⁴ *Id.*

⁷⁵ *Id.* at 308.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 539 U.S. 244, 244 (2003).

they were white.⁷⁹ The white applicants brought an equal protection lawsuit because if they had been a minority with the same qualifications, they would have been offered admission.⁸⁰ The Supreme Court found that the University of Michigan's undergraduate program was allocating points to minority applicants that would ensure their admission over their non-minority competitors.⁸¹ The University categorized African-Americans, Hispanics, and Native Americans to be "underrepresented minorities" and admitted "virtually every qualified applicant" if he or she was a member of one of those ethnicities.⁸²

The University used a point system to determine admissions.⁸³ If an applicant earned one hundred points, he or she was offered admission.⁸⁴ The University awarded twenty points to minority applicants just for being African-American, Hispanic, or Native American.⁸⁵ That one-fifth point boost solely due to checking off an ethnicity box significantly increased minority applicants' chances of reaching one hundred points for admission.⁸⁶

Only twelve points were awarded to an applicant who had a *perfect* SAT score.⁸⁷ Additionally, only five points at most were awarded if an applicant had artistic talents that "rival[ed] that of Monet or Picasso."⁸⁸ The District Court opined that the twenty points allocated to minorities for being minority members was "not the functional equivalent of a quota system because minority candidates were not isolated from review by virtue of those points."⁸⁹ The Supreme Court rejected the District Court's interpretation, and opined that for three years, the University's admission system "operated as the functional equivalent of a quota running afoul of Justice Powell's *Bakke* opinion."⁹⁰

The Court struck down the admissions policy which "automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in

⁷⁹ *Id.*

⁸⁰ *Id.* at 262.

⁸¹ *Id.*

⁸² *Id.* at 244.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ DANIEL E. BRANNEN ET AL., *SUPREME COURT DRAMA: CASES THAT CHANGED AMERICA* 576–80 (2d ed. 2011).

⁸⁸ *Gratz v. Bollinger*, 539 U.S. 244, 273 (2003).

⁸⁹ *Id.* at 258.

⁹⁰ *Id.* at 245.

educational diversity that respondents claim justifies their program.”⁹¹

In *Parents Involved in Community Schools v. Seattle School District No. 1*, racial classifications for high school district placement that were based on race were invalidated under the Equal Protection Clause.⁹² The school district’s allegedly compelling interest in diversity did not justify its mechanical racial classifications.⁹³ Additionally, the school district failed to show that the racial classifications were necessary to achieve diversity.⁹⁴ The Court emphasized the *Grutter* decision’s endorsement of diversity as a compelling interest did not mean that diversity was “focused on race alone.”⁹⁵ Instead, diversity must encompass “all factors that may contribute to student body diversity” such as “having overcome personal adversity and family hardship.”⁹⁶

Outside of the higher education context, racial classifications rarely satisfy strict scrutiny review. In *City of Richmond v. Croson*, the Court evaluated a City’s affirmative action plan which mandated contractors subcontract at least 30 percent of its business to minority business enterprises (MBE).⁹⁷ The Court found that for an affirmative action plan to comply with the Equal Protection Clause, there must be a specific finding of past discrimination that the plan seeks to remedy.⁹⁸ After determining that the City did not have a history of past discrimination, the Court opined that the plan was not narrowly tailored.⁹⁹

Six years later in *Adarand*, the Court struck down an affirmative action plan because the racial classification ran afoul of the Equal Protection Clause and failed to satisfy strict scrutiny review.¹⁰⁰ In *Adarand*, a subcontractor that was not awarded a federal construction project challenged the federal practice of giving contracts to minority contractors.¹⁰¹ Emphasizing the importance of protecting “persons, not groups,” the Court held that an affirmative action plan was not narrowly tailored to meet a compelling interest.¹⁰²

The Court found that “all governmental action based on race—a group classification long recognized as ‘in most circumstances irrelevant and

⁹¹ *Id.* at 270.

⁹² 551 U.S. 701 (2007).

⁹³ *See id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 703.

⁹⁶ *Id.* at 702.

⁹⁷ 488 U.S. 469 (1989).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 200 (1995).

¹⁰¹ *Id.*

¹⁰² *Id.* at 228.

therefore prohibited’—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.”¹⁰³

Since *Croson*¹⁰⁴ and *Adarand*,¹⁰⁵ to comply with the Equal Protection Clause, express racial classifications are only permissible in exceptional circumstances and are subject to strict scrutiny review. Under *Bakke*, “racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”¹⁰⁶ Under *Adarand*, “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.”¹⁰⁷

B. Title VII Disparate Impact Case Law

Title VII provides for disparate impact liability in § 703(k)(1)(A):

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.¹⁰⁸

To make a *prima facie* disparate impact case, a plaintiff must show that “a facially neutral employment practice has a significantly discriminatory impact.”¹⁰⁹ Additionally, a plaintiff must show “statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”¹¹⁰

When there is a disparate impact as a result of a facially neutral employment practice, Title VII requires employers to articulate a business necessity.¹¹¹ Additionally, Title VII requires employers to demonstrate that there are no equally effective ways to accomplish its goal without

¹⁰³ *Id.*

¹⁰⁴ *Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

¹⁰⁵ *Adarand*, 515 U.S. at 202 (finding that “strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by federal, state or local actor”).

¹⁰⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁰⁷ *Adarand*, 515 U.S. at 224.

¹⁰⁸ 42 U.S.C. §§ 2000e, 703(k)(1)(A).

¹⁰⁹ *See EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1274 (11th Cir. 2000) (citations omitted).

¹¹⁰ *See id.* at 1274–75 (citations omitted).

¹¹¹ 42 U.S.C. § 2000e-2(k)(1)(A).

conferring a disparate impact.¹¹²

The Court's first disparate impact case, *Yick Wo v. Hopkins*, established that for a plaintiff to prevail, statistical evidence of disparate impact must be accompanied by proof of discriminatory animus.¹¹³ In *Yick Wo*, a San Francisco ordinance entrusted the "naked and arbitrary power" in a board to decide which laundries were granted a license to use wooden buildings.¹¹⁴ Approximately 200 Chinese laundry owners applied for licenses but not one of them were granted a license by the board.¹¹⁵ In contrast, all non-Chinese applicants for the laundry license except one were granted a license.¹¹⁶ The Court concluded that the board's actions were "so unequal and oppressive as to amount to a practical denial by the State."¹¹⁷ Additionally, the Court opined that although the law was facially neutral, it was "applied and administered by public authority with an evil eye and an unequal hand."¹¹⁸ The circumstantial evidence that the petitioners presented supported that the board was operating with a discriminatory animus when it denied all 200 of the Chinese laundry owners' applications for licenses.¹¹⁹ After the Court was unable to discern a reason for the license denials "except hostility to the race and nationality," the Court struck down the ordinance under the Equal Protection Clause.¹²⁰

In contrast to the *Yick Wo* constitutional discriminatory animus requirement, Title VII disparate-impact laws prohibit "facially neutral . . . practices that have significant adverse effects on protected groups . . . without proof that . . . those practices" were "adopted with a discriminatory intent."¹²¹ An employer can incur liability under a Title VII disparate impact theory when a facially neutral practice disproportionately impacts a protected class.¹²²

After *Yick Wo*, the Supreme Court addressed disparate impact under Title VII in *Griggs v. Duke Power Co.*,¹²³ when plaintiffs challenged a high school diploma employment requirement. The diploma requirement

112 *Id.*

113 118 U.S. 356 (1886).

114 *Id.* at 366.

115 *Id.*

116 *Id.*

117 *Id.* at 373.

118 *Id.* at 373–74.

119 *Id.*

120 *Id.* at 374.

121 *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986–87 (1988).

122 See *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1278 (11th Cir. 2000) (opining "the central difference between disparate treatment and disparate impact claims is that disparate treatment requires a showing of discriminatory intent and disparate impact does not").

123 401 U.S. 424 (1971).

disparately impacted African American potential applicants.¹²⁴ To avoid liability under Title VII, the company was required to show a “business necessity” and that there were no less discriminatory alternative practices to accomplish that business necessity.¹²⁵ Without an explicit showing of intent,¹²⁶ the Court imposed disparate impact liability reasoning that the diploma requirement was used as a proxy for race.¹²⁷ The Court found that the purpose of Title VII was to remove “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹²⁸ Deviating from its *Yick Wo* rationale requiring a showing of discriminatory animus, the Court held that “good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups.”¹²⁹

Criticizing the Court’s deviation from requiring a showing of discriminatory animus for a disparate impact claim, Justice Thomas accused the Court four decades later of building on bad precedent set forth in *Griggs*, instead of overturning it.¹³⁰ Justice Thomas cautioned, “[w]hatever respect *Griggs* merits as a matter of stare decisis, I would not amplify its error by importing its disparate-impact scheme into yet another statute.”¹³¹

Five years after *Griggs*, the Court declined to impose disparate impact liability absent discriminatory animus in *Washington v. Davis* because the defendants demonstrated that a standardized test was directly related to necessary job skills.¹³² In *Davis*, white police officers scored higher than African American police officers on a qualifying standardized test.¹³³

The African American police officers brought a disparate impact claim against the Metropolitan Police Department.¹³⁴ The Court refused to allow “a law, neutral on its face and serving ends otherwise within the power of government to pursue . . . invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”¹³⁵

¹²⁴ *Id.* at 427.

¹²⁵ *Id.*

¹²⁶ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2543 (2015) (Alito, J., dissenting) (“*Griggs* was a case in which an intent to discriminate might well have been inferred. The company had openly discriminated on the basis of race prior to the date on which the 1964 Civil Rights Act took effect.”) (quotations omitted).

¹²⁷ *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

¹²⁸ *Id.* at 431.

¹²⁹ *Id.* at 432.

¹³⁰ *See Inclusive Cmty. Project*, 135 S. Ct. at 2526 (Thomas, J., dissenting).

¹³¹ *Id.*

¹³² 426 U.S. 229 (1976).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 242.

The Court reasoned,

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 and are justifiable only by the weightiest of considerations.¹³⁶

The Court found that “government actions that are not undertaken for a racially discriminatory motive but have a disproportionate adverse impact on blacks do not trigger the ‘strict scrutiny’ that attends race-based classifications.”¹³⁷ After finding a rational basis for the police exam, the Court held that the exam was valid.¹³⁸ Building on its job related defense, the Court found that a showing of job relatedness can rebut a disparate impact claim supported solely by statistics. In *New York City Transit Authority v. Beazer*, the Court found that the New York Transit Authority successfully rebutted a disparate impact lawsuit.¹³⁹ The Transit Authority had a general policy of refusing to hire people who used narcotics.¹⁴⁰

Plaintiffs claimed the policy disparately impacted minorities because large amounts of minorities were on methadone, which disqualified them from employment with the Transit Authority.¹⁴¹ In response, the Transit Authority rebutted the lawsuit by showing that there was a business necessity for the policy.¹⁴² The Transit Authority needed its workers to be “persons of maximum alertness and competence” because the transit system involved highly safety sensitive tasks.¹⁴³ The Court found that the Transit Authority rebutted the lawsuit and that the policy was not motivated by racial animus.¹⁴⁴

Approximately three decades after *Davis*,¹⁴⁵ the Court faced a momentous disparate treatment claim that originated from an employer’s attempt to avoid liability under a disparate impact claim. In *Ricci v. DeStefano*, seventy-seven New Haven firefighters took an exam for promotion to lieutenant.¹⁴⁶ Of the thirty-four candidates that passed, twenty-

¹³⁶ *Id.* (citations omitted).

¹³⁷ See SAMUEL ESTREICHER & MICHAEL HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW 91 (3d ed. 2008).

¹³⁸ *Id.*

¹³⁹ 440 U.S. 568 (1979).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 571.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 579.

¹⁴⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁴⁶ 557 U.S. 557 (2009).

five were white, six were African American, and three were Hispanic.¹⁴⁷ All ten candidates that were eligible for promotion were white.¹⁴⁸ As a result of the white candidates outperforming the minority candidates, the minority candidates threatened litigation.¹⁴⁹ After public debate, the City of New Haven discarded the test results fearing a disparate impact lawsuit.¹⁵⁰

After the City decided not to certify the test results and denied the passing candidates the right to promotion, seventeen white candidates and one Hispanic candidate filed a disparate treatment lawsuit against the City.¹⁵¹ The white firefighters argued that it is never “permissible for an employer to take race-based adverse employment actions in order to avoid disparate-impact liability.”¹⁵²

The Court reasoned that discarding the test results was impermissible unless the City could prove that it had a “strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.”¹⁵³ The Court qualified its holding by opining, “[w]e also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case . . . we need not decide whether a legitimate fear of disparate impact is ever sufficient to justify discriminatory treatment under the Constitution.”¹⁵⁴

The Court noted that the City lacked a strong basis in evidence to believe it would lose if challenged with a disparate impact lawsuit.¹⁵⁵ Justice Kennedy, writing for the majority, explained that “a threshold showing of a significant statistical disparity, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results.”¹⁵⁶ Kennedy wrote that the City could have successfully defended a disparate impact lawsuit with a business necessity and least discriminatory means showing.¹⁵⁷

Additionally, the Court opined that Congress did not intend to provide an exception for employers to discriminate via disparate treatment to avoid disparate impact lawsuits:

¹⁴⁷ *Id.* at 566.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 574.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 580.

¹⁵³ *Id.* at 563.

¹⁵⁴ *Id.* at 585.

¹⁵⁵ *Id.* at 563.

¹⁵⁶ *Id.* at 559.

¹⁵⁷ *Id.*

Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact. A minimal standard could cause employers to discard the results of lawful and beneficial promotional examinations even where there is little if any evidence of disparate-impact discrimination. *That would amount to a de facto quota system, in which a “focus on statistics . . . could put undue pressure on employers to adopt inappropriate prophylactic measures.”* Even worse, an employer could discard test results (or other employment practices) with the intent of obtaining the employer’s preferred racial balance.¹⁵⁸

IV. TITLE VII’S DISPARATE IMPACT PROVISION VIOLATES THE EQUAL PROTECTION CLAUSE

By imposing liability based on statistical disparities alone, Title VII circumvents the Equal Protection Clause by eliminating a plaintiff’s burden of proving discriminatory animus. Benign racial favoritism to remedy mere statistical disparate impact alone is never constitutionally permissible. Harvard Professor Richard Primus noted, “equal protection has become hostile to government action that aims to allocate goods among racial groups, even when intended to redress past discrimination.”¹⁵⁹ After *Ricci*, “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 government interest.”¹⁶⁰

The Court has not analyzed the conflict between Title VII’s disparate impact provision and the Equal Protection Clause. Justice Scalia opined in his concurrence in *Ricci* that the Court’s decision:

[M]erely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection? . . . [T]he war between disparate impact and equal protection will be waged sooner or later.¹⁶¹

The Court views governmental racial classifications skeptically because they “can only exacerbate rather than reduce racial prejudice” and “delay the time when race will become a truly irrelevant, or at least

¹⁵⁸ *Id.* at 582–83 (emphasis added).

¹⁵⁹ Primus, *supra* note 49, at 496.

¹⁶⁰ Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2180 (2013).

¹⁶¹ *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

insignificant factor.”¹⁶²

In *Adarand*, the Court reasoned that “[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute.”¹⁶³ Disparate impact liability violates the Equal Protection Clause, as requiring proportional results in employment decisions is not narrowly tailored.

A. The Injustices Perpetrated by Racial Favoritism Outweigh Its Possible Benefits

Professor Allan Ornstein opined that instead of remedying previous injustices, when the federal government enacts affirmative action programs, it fails “to recognize or admit that it is only perpetrating other injustices.”¹⁶⁴ Ornstein opined that “by ignoring differences in qualifications, the federal government is undermining the integrity and scholarly functions of the university.”¹⁶⁵ Illustrative of Ornstein’s thesis, Stuart Gould and Pierre Van den Berghe conducted an affirmative action study in which they sent out identical resumes to 176 graduate programs.¹⁶⁶ The researchers created a fictitious resume for a graduate student “ostensibly finishing up his/her Ph.D. at the University of Washington.”¹⁶⁷

The resume was distributed to all of the schools with the same qualifications, and the only variables were the sex, race, and marital status of the fictitious applicant.¹⁶⁸ Half of the “applicants” volunteered their ethnicity as “Afro-American” while the other half “made no mention of ethnicity or race.”¹⁶⁹ The affirmative action study found that of the ninety-six university replies, the schools that received the African-American fictitious resume responded at 61.4 percent and followed up with a 44.4 percent active interest in pursuing that candidate.¹⁷⁰

In contrast, of the schools that received the resumes of candidates that did not specify an ethnicity, there was a 47.7 percent university response rate with only a 9.5 percent active follow up rate.¹⁷¹ This study is illustrative of the injustices that are perpetrated when employers or universities are

¹⁶² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 299 (1995).

¹⁶³ *Id.*

¹⁶⁴ Allan C. Ornstein, *Quality, Not Quotas*, 13(2) SOC’Y 10 (Jan./Feb. 1976).

¹⁶⁵ *Id.*

¹⁶⁶ Stuart H. Gould & Pierre L. Van der Berghe, *Particularism in Sociology Departments’ Hiring Practices*, 15 RACE & CLASS 106 (1973), <http://rac.sagepub.com/content/15/1/106.full.pdf+html>.

¹⁶⁷ *Id.* at 107.

¹⁶⁸ *Id.* at 108.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

pressured to accept a certain proportion of each race or ethnicity.

Additionally, accepting proportional amounts of each race arguably does not achieve the “diversity” that the proponents of such affirmative action programs claim they seek. A *Stanford Alumni* article explained “if ‘diversity’ were really the goal, then preferences would be given on the basis of unusual characteristics, not on the basis of race. The underlying assumption—that only minorities can add certain ideas or perspectives—is offensive not merely because it is untrue but also because it implies that all minorities think a certain way.”¹⁷² The article’s authors, Stanford Law and the University of Chicago Law graduates, proposed alternative criteria to race to achieve “diversity” such as grades, test scores, athletics, music, clubs, leadership roles, and other extracurricular activities.¹⁷³ The article highlights that by implementing affirmative action programs, it works to the disadvantage of the individuals such programs are designed to protect.¹⁷⁴ The authors explained:

Perhaps the most tragic side effect of affirmative action is that very significant achievements of minority students can become compromised. It is often not possible to tell whether a given student genuinely deserved admission to Stanford, or whether he is there by virtue of fitting into some sort of diversity matrix. When people do start to suspect the worst—that preferences have skewed the entire class—they are accused of the very racism that justifies these preferences. It is a strange cure that generates its own disease.¹⁷⁵

B. Equal Protection Demands People Are Treated as Individuals, Not as Members of a Specific Ethnic or Racial Group

Title VII’s disparate impact provision violates Justice Powell’s *Bakke* opinion, in which he opined that “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.”¹⁷⁶ Mandating certain racial compositions goes against what the Equal Protection Clause demands after *Bakke*, in which the Court “emphasized the importance of considering each particular applicant as an individual.”¹⁷⁷ Justice Powell found that the “guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection,

¹⁷² David Sacks & Peter Thiel, *The Case Against Affirmative Action*, STANFORD ALUMNI, http://alumni.stanford.edu/get/page/magazine/article/?article_id=43448 (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

¹⁷⁷ *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003).

then it is not equal.”¹⁷⁸

Additionally, Title VII’s disparate impact provision violates Justice Powell’s standard because the consequences of liability based on statistics alone forces employers to accord more weight to minorities over non-minorities in promotional or hiring decisions. Like the University of Michigan violated the Equal Protection Clause in *Gratz*¹⁷⁹ by utilizing an overly mechanical system as a way to determine admissions, Title VII’s disparate impact provision unconstitutionally provides for liability absent a showing of discriminatory intent.

Mechanically imputing liability based solely on statistics is not narrowly tailored and runs afoul of the Equal Protection Clause. Further violating Equal Protection precedent, a plaintiff can establish a prima facie case against an employer under Title VII’s disparate impact provision solely on the basis of race, lacking the *Grutter*¹⁸⁰ requirement of a “holistic” review of the case.¹⁸¹

Correctly recognizing the importance in treating people as individuals and not as members of a protected class, Justice Scalia opined that:

In my view, government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. . . . To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.¹⁸²

The distinction between goals and quotas “is a matter of semantics.”¹⁸³ Further, scholars have opined that affirmative action programs actually hurt the intended minority beneficiaries.¹⁸⁴

Following the *Gratz*¹⁸⁵ and *Grutter*¹⁸⁶ precedent, the Equal Protection Clause demands that Title VII’s disparate impact provision be found unconstitutional. The proper test, which was set forth in *Yick Wo*, demands

¹⁷⁸ *Bakke*, 438 U.S. at 289–90.

¹⁷⁹ *See Gratz*, 539 U.S. 244.

¹⁸⁰ *See Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

¹⁸¹ *See* 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).

¹⁸² *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995).

¹⁸³ *Id.*

¹⁸⁴ Heather Mac Donald, *Affirmative Disaster: A Duke Study Documents the Harm Racial Preferences in College Admissions Can Do to the Intended Beneficiaries*, WEEKLY STANDARD (Feb. 20, 2012), www.weeklystandard.com/articles/affirmative-disaster_626632.html.

¹⁸⁵ *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003).

¹⁸⁶ *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003).

a showing of discriminatory intent to prevail on a disparate impact claim.¹⁸⁷

C. Indications the Court Will Eventually Invalidate Title VII's Disparate Impact Provision

Although the Supreme Court has not expressly weighed in on the constitutionality of Title VII's disparate impact regulations, the Court indicated that it would rule them invalid in *Alexander v. Sandoval*.¹⁸⁸ In *Alexander*, the plaintiff alleged that the driver's license exams, which were given in English, had a disparate impact on people not fluent in English.¹⁸⁹

Justice Scalia opined that he could not help but notice "how strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601, when § 601 permits the very behavior that the regulations forbid."¹⁹⁰

Further, in response to its legal problems with affirmative action programs at the University of Michigan, Michigan voters supported a proposition to amend its state constitution to prohibit affirmative action.¹⁹¹ Proposal 2 was an amendment to the Michigan constitution, which was approved in 2006 by 58 percent of Michigan's voters.¹⁹² Michigan Attorney General Bill Schuette explained "our constitution requires equal treatment in college admissions, which is an expression by 58% of Michigan voters in 2006 that says it is fundamentally wrong to treat people differently based on race or the color of their skin."¹⁹³ The Sixth Circuit struck down Proposal 2.¹⁹⁴

The Supreme Court reversed the Sixth Circuit and upheld the constitutionality of Proposal 2, which prohibited "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or

¹⁸⁷ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁸⁸ 532 U.S. 275 (2001); John Martin, *School Discipline and Disparate Impact*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 30 (2012).

¹⁸⁹ *Alexander*, 532 U.S. 275.

¹⁹⁰ *Id.* at 286 n.6.

¹⁹¹ John R. Martin, *Fourteenth Amendment—Equal Protection Clause—Political-Process Doctrine*—Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), 128 HARV. L. REV. 281 (2014), http://cdn.harvardlawreview.org/wp-content/uploads/2014/11/schuette_v_bamn.pdf.

¹⁹² Adam Liptak, *Court Backs Michigan on Affirmative Action*, N.Y. TIMES (Apr. 22, 2014), www.nytimes.com/2014/04/23/us/supreme-court-michigan-affirmative-action-ban.html?_r=0.

¹⁹³ Greg Toppo, *Affirmative Action Fading from College Scene*, USA TODAY (Feb. 12, 2014, 6:01 PM), www.usatoday.com/story/news/nation/2014/02/12/black-history-affirmative-action/5432107.

¹⁹⁴ *Coal. to Defend Affirmative Action Integration & Immigrant Rts. & Fight for Equal, by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 470–71 (6th Cir. 2012) (en banc).

public contracting.”¹⁹⁵ The Court concluded that via state amendment, voters “may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions.”¹⁹⁶

The highly publicized *Schuette*¹⁹⁷ ruling was in line with the Ninth Circuit’s logic from over a decade earlier, which also found that a state constitutional ban on affirmative action did not run afoul of the Equal Protection Clause.¹⁹⁸ In *Coalition for Economic Equity v. Wilson*, the Ninth Circuit analyzed Proposition 209, an amendment to the California Constitution.¹⁹⁹ The proponents’ argument for passing Proposition 209 was featured on the Ballot Pamphlet stating:

A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. Today, students are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some “goal” or “timetable.” Contracts are awarded to high bidders because they are of the preferred RACE. That’s just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination!²⁰⁰

Remaining faithful to Supreme Court precedent on judicial review, the Ninth Circuit found California’s Proposition 209 constitutionally in line with the Equal Protection Clause. The Court opined that “[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.”²⁰¹

¹⁹⁵ *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal, by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1629 (2014).

¹⁹⁶ *Id.* at 1630.

¹⁹⁷ *See id.*

¹⁹⁸ *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 696–97 (emphasis added).

²⁰¹ *Id.* at 699.

V. UNLESS THE COURT INVALIDATES DISPARATE IMPACT UNDER TITLE VII, INDUSTRIES WILL BE CONTINUOUSLY THREATENED WITH A LITIGATION REVOLVER SOLELY PREMISED ON RACIAL OUTCOMES

A. Disparate Impact's Abuse Pursuant to Title VII in the Employment Sphere

The EEOC, DOJ, and individuals are using Title VII's disparate impact provision as a means of bringing disparate impact lawsuits across industries. Lower courts are bombarded by disparate impact lawsuits yielding various conflicting results.²⁰² Further, many states have adopted statutes authorizing the same practices that are frequently challenged by disparate impact lawsuits. For example, numerous states have authorized the use of criminal background checks for certain careers, yet under Title VII, such background checks could incite a disparate impact lawsuit.²⁰³

Disparate impact lawsuits ultimately harm those that they seek to protect because “[e]mpirical evidence suggests . . . that employers who are discouraged from checking into the criminal backgrounds of job applicants may simply avoid hiring from pools that they (correctly or incorrectly) perceive as high risk.”²⁰⁴ An article noted that Title VII was never meant to provide for disparate impact liability solely based on statistical disparities and emphasized that mandating de facto quota systems detracts from what should be the focus of employment related decisions: an applicant's job qualifications.²⁰⁵ Indicating that job qualifications, not race, should be the focus of employment decisions, the co-managers on Title VII's Senate floor, Senators Joseph Clark and Clifford Case, stated it “expressly protects the employer's right to insist that any prospective applicant, Negro or white,

²⁰² Compare EEOC v. Freeman, No. RWT 09cv2573, 2013 WL 4464553, at *11 (D. Md. Aug. 9, 2013) (opining that the idea of criminal background checks conferring a disparate impact is “laughable”), with Waldon v. Cincinnati Pub. Schs., No. 1:12-CV-00677, 2013 WL 1755664, at *1 (S.D. Ohio Apr. 24, 2013) (finding a disparate impact on minorities from a criminal background check to determine employment opportunities).

²⁰³ See, e.g., MD. CODE ANN., FAM. LAW. § 5-561(b)(1)-(11) (West 2012) (requiring a criminal background check on employees at a child care center, juvenile detention, school, foster care, recreation center, camp, home health agency); 24 PA. STAT. ANN. § 1-111 (West 2012) (requiring a criminal background check on employees in public, private, vocational, and technical schools); FLA. STAT. ANN. § 489.518 (West 2004) (requiring a criminal background check on applicants for alarm system jobs); Waldon v. Cincinnati Pub. Schs., No. 1:12-CV-00677, 2013 WL 1755664 (S.D. Ohio Apr. 24, 2013); see also Ingrid Cepero, *Banning the Box: Restricting the Use of Criminal Background Checks in Employment Decisions in Spite of Employers' Prerogatives*, 10 FIU L. REV. 729 (2015) (arguing the validity of disparate impact claims arising from criminal background checks).

²⁰⁴ Brief Amici Curiae of Gail Heriot, Peter Kirsanow, and Todd Gaziano in Support of Petitioner, Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mt. Holly, 658 F.3d 375 (3d Cir. 2011) (No. 11-1507), www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/11-1507_pet_amcu_gh-pk-tg.authcheckdam.pdf.

²⁰⁵ Fund, *supra* note 19.

must meet the applicable job qualifications. . . . Indeed, the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.”²⁰⁶

In *EEOC v. Kaplan Higher Learning Education Corporation*, the EEOC brought a Title VII disparate impact lawsuit against Kaplan alleging that Kaplan’s use of credit reports in its hiring process had a disparate impact on black applicants.²⁰⁷ Kaplan chose to use credit reports as a means of screening job applicants after Kaplan previously discovered system breaches involving misappropriated funds by former dishonest employees.²⁰⁸

Kaplan used credit checks to determine whether applicants were “under financial stress or burdens that might compromise their ethical obligations.”²⁰⁹ Referring back to *Watson v. Fort Worth Bank & Trust*,²¹⁰ the district court opined that the EEOC would need to show (1) a specific employment practice being challenged, and (2) establish with statistics that the identified employment practice caused the exclusion of a group because of their race.²¹¹

The EEOC attempted to use an expert witness who opined that more black applicants were flagged for review than white applicants under the credit check screening.²¹² Because they were flagged for their credit history, the expert’s opinion was unpersuasive, as there was a legitimate explanation for why those individuals were flagged.²¹³

In granting summary judgment to Kaplan, the district court opined that “[b]ecause plaintiff fails to present admissible evidence showing that the use of credit reports ‘caused the exclusion of applicants . . . because of their membership in a protected group,’ plaintiff cannot set forth a prima facie case of disparate impact discrimination.”²¹⁴ The Sixth Circuit affirmed the district court, finding that “[t]he EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.”²¹⁵

206 *Id.*

207 No. 1:10 CV 2882, 2013 WL 322116, at *1 (N.D. Ohio Jan. 28, 2013).

208 *Id.*

209 *Id.*

210 487 U.S. 977, 994 (1988).

211 *Kaplan*, 2013 WL 322116, at *4.

212 *EEOC v. Kaplan Higher Learning Educ. Corp.*, 748 F.3d 749, 752 (6th Cir. 2014).

213 *Id.*

214 *Kaplan*, 2013 WL 322116, at *12.

215 *Kaplan*, 748 F.3d at 754.

In addition to the *Kaplan*²¹⁶ case, the EEOC sued Peplemark, alleging that its policy of denying employment to applicants with felony records conferred a disparate impact on African Americans.²¹⁷ The alleged policy of refusing to hire applicants with felony records did not even exist.²¹⁸ The magistrate judge granted Peplemark fees and costs of \$751,942.48.²¹⁹ After the magistrate judge opined that the complaint “turned out to be without foundation from the beginning,”²²⁰ the district judge adopted the magistrate judge’s recommendation.²²¹ The Sixth Circuit affirmed and found that the EEOC’s disparate impact claim was “frivolous,” “unreasonable,” and “groundless.”²²²

The *Kaplan*²²³ and *Peplemark*²²⁴ cases are two examples of many in which Title VII’s disparate impact theory can be abused and used to punish facially neutral policies absent discriminatory intent. Extending Title VII’s disparate impact liability to other statutes, the Department of Justice (DOJ) has interpreted Title VII and the FHA to provide for disparate impact liability.

Former Attorney General Eric Holder transformed the DOJ “into a routine instrument of social and racial policy” using a “disparate impact analysis to force racial adjustments on cities, police and fire departments and banks.”²²⁵ The disparate impact lawsuits were brought without “proven racial discrimination, as traditionally required[,]” and only used “arcane statistical analyses.”²²⁶

B. Disparate Impact’s Alarming Extension into Schools Pursuant to Title VII

Title VII is frequently used by the DOJ as a basis for regulations on a disparate impact theory.²²⁷ Title VII of the Civil Rights Act of 1964 § 601 provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

²¹⁶ *Id.*

²¹⁷ *EEOC v. Peplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013).

²¹⁸ *Id.* at 587.

²¹⁹ *Id.*

²²⁰ *Id.* at 589.

²²¹ *Id.* at 590.

²²² *Id.* at 592.

²²³ *EEOC v. Kaplan Higher Learning Educ. Corp.*, No. 1:10 CV 2882, 2013 WL 322116, at *754 (N.D. Ohio Jan. 28, 2013).

²²⁴ *EEOC v. Peplemark, Inc.*, 732 F.3d 58, 5844 (6th Cir. 2013).

²²⁵ *Eric Holder’s Legacy of Politics*, WALL ST. J. (Sept. 25, 2014, 7:52 PM), <http://online.wsj.com/articles/eric-holders-legacy-of-politics-1411689140>.

²²⁶ *Id.*

²²⁷ Clegg, *A Decision with a Disparate Impact Against Common Sense*, *supra* note 48.

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²²⁸

Citing to *Bakke*,²²⁹ the Supreme Court noted that “only intentional discrimination was forbidden by § 601.”²³⁰ To bring disparate impact claims, the DOJ uses § 602, which authorizes federal agencies to enforce § 601 with regulations.²³¹ The Court has cautioned against conjuring up causes of action that are not authorized by statute by specifically stating that “[a]gencies may play the sorcerer’s apprentice but not the sorcerer himself.”²³²

Although Title VII does not reference disparate impact or have an “effects” language, the DOJ and the Department of Education are regulating schools under a disparate impact theory pursuant to § 602. Specifically, § 602 states:

Each Federal department and agency which is empowered to extend Federal financial assistance . . . is authorized and directed to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

The Civil Rights Data Collection (CRDC) March 2012 statistics were accompanied by a quote illustrating the DOJ’s mission to use mere statistics to bring disparate impact claims. On the last page of its data collection report, the CRDC quotes Arne Duncan, the United States Secretary of Education: “The power of the Civil Rights Data Collection is not only in the numbers themselves, but in the impact it can have when married with the courage and will to change.”²³³

In a study comparing student enrollment rates to suspension rates across the twenty largest school districts, the CRDC reduced students down to their ethnicity as a defining sole characteristic.²³⁴ According to the CRDC, Miami-Dade County has a student enrollment of 9 percent whites, 25 percent African American, and 65 percent Hispanic.²³⁵ The CRDC alleges that Miami-Dade County suspends 4 percent whites, 50 percent

²²⁸ 42 U.S.C. § 2000(d).

²²⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

²³⁰ *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001).

²³¹ 42 U.S.C. § 2000d-1; *see also Alexander*, 532 U.S. at 275.

²³² *Id.* at 291.

²³³ Press Release, Dep’t of Educ., Off. for C.R., The Transformed Civil Rights Data Collection (CRDC) (Mar. 12, 2012), www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf.

²³⁴ *Id.*

²³⁵ *Id.*

African Americans, and 46 percent Hispanics.²³⁶ Based solely off of statistics, the DOJ brings civil rights lawsuits against schools that receive federal funding.²³⁷ When referring to statistics collected by the CRDC, U.S. Secretary of Education Duncan claims: “[t]hose facts testify to racial gaps that are hard to explain away.”²³⁸

Clegg cautions that disparate impact lawsuits will eliminate “perfectly legitimate policies because they have politically incorrect results,” or eliminate “the statistical imbalances through the use of surreptitious quotas.”²³⁹ Disparate impact lawsuits now extending from Title VII into the educational sphere will encourage less discipline or “school systems getting their numbers right by punishing white students who ought to not be punished or—more likely—by not disciplining black students who should be.”²⁴⁰

Confirming Clegg’s policy concerns, a Pennsylvania elementary school teacher, Allen Zollman, spoke out against the disparate impact lawsuits at the United States Commission on Civil Rights meeting in February 2011.²⁴¹ Zollman explained the difficulties associated with making sure the proportion of students disciplined were evenly distributed across races:

Ultimately each instance of misbehavior in the classroom is unique and requires a customized response. It doesn’t matter what the ethnicity of the student is. If the child acts out and creates a distraction the other students will not learn. We’re talking about disparate impact. For a teacher, what is the greater disparate impact? When one student can say in effect, “indulge me or I will shut you down and there’s nothing you can do about it,” then 29 other children are prevented from learning. That is the greater disparate impact.²⁴²

Agreeing with Zollman’s concerns, political analyst Michael Barone criticized disparate impact liability from disproportionate school discipline statistics.²⁴³ Michael Barone reasoned,

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ Arne Duncan, U.S. Sec’y of Educ., Remarks on the 45th Anniversary of “Bloody Sunday” at the Edmund Pettus Bridge, Selma, Alabama (Mar. 8, 2010), www2.ed.gov/news/speeches/2010/03/03082010.html.

²³⁹ Roger Clegg, *The Dangers of Disparate Impact*, WASH. TIMES (Oct. 20, 2010), www.washingtontimes.com/news/2010/oct/20/the-dangers-of-disparate-impact-policy.

²⁴⁰ *Id.*

²⁴¹ U.S. COMM’N ON C.R., SCHOOL DISCIPLINE & DISPARATE IMPACT (2011), www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

²⁴² *Id.*

²⁴³ Michael Barone, *The Perverse Effects of Disparate-Impact Doctrine*, NAT’L REV. (Feb. 14, 2014), www.nationalreview.com/article/371083/perverse-effects-disparate-impact-doctrine-michael-barone.

teachers and principals are now on notice that they may get into trouble if they suspend or penalize black students in disproportion to their numbers. It is not hard to imagine the likely results: quotas on student discipline and a double standard, if, as appears likely, black students misbehave at higher rates than non-blacks.²⁴⁴

Using Title VII's *McDonnell Douglas*²⁴⁵ burden shifting framework, once a school is accused of illegal discrimination with a disparate impact lawsuit, the school is required to articulate a "substantial, legitimate educational justification."²⁴⁶

Individuals are now bringing disparate impact lawsuits against schools if their children are suspended, claiming schools have a discriminatory agenda against minorities.²⁴⁷ For example, Latwaska Hamilton alleges that Hillborough County's Benito Middle School was discriminating on the basis of race when it asked her fourteen year-old son to transfer after four suspensions.²⁴⁸

Michael Barone attacked the concept of disparate impact and its unrealistic requirement that racial balances remain proportionate at all times despite other variables such as different skill sets across races.²⁴⁹ He stated,

Ultimately, disparate-impact analysis rests on what ordinary citizens instinctively recognize as a fiction, the notion that in a fair society you would find the same racial and ethnic mix in every school, every occupation, and every neighborhood. This runs against the sometimes uncomfortable fact that abilities and interests are not evenly distributed among ethnic and racial groups.²⁵⁰

Additionally, a professor brought a lawsuit on a disparate impact theory claiming that a fence along the United States-Mexico border could have a "disparate impact on lower-income minority communities."²⁵¹ Without Supreme Court guidance, there will be no stopping which industries and institutions are threatened with a litigation revolver via disparate impact lawsuits extending past Title VII.

²⁴⁴ *Id.*

²⁴⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²⁴⁶ Ricardo Soto, Principal Deputy Assistant Sec'y, Off. for C.R., U.S. Dep't of Educ., Address Before the U.S. Comm'n on Civil Rights' Briefing on School Discipline & Disparate Impact (Feb. 11, 2011), in U.S. COMM'N ON C.R., *supra* note 241, at 55.

²⁴⁷ Zack Peterson, *Federal Complaint Questions How Hillsborough Disciplines Minority Students*, TAMPA BAY TIMES (June 29, 2014), www.tampabay.com/news/education/federal-complaint-questions-how-hillsborough-disciplines-minority-students/2186514.

²⁴⁸ *Id.*

²⁴⁹ Barone, *supra* note 243.

²⁵⁰ *Id.*

²⁵¹ *Gilman v. U.S. Dep't of Homeland Sec.*, No. 09-0468, 2014 WL 984309, at *8 (D.D.C. Mar. 14, 2014).

C. Disparate Impact's Permeation of the Housing Sphere Under the FHA

In addition to unconstitutionally instating de facto quotas in schools, the disparate impact revolver has now extended from Title VII to the FHA,²⁵² mandating “equal results” in the housing arena with the purported blessing of the Supreme Court’s recent *Inclusive Communities Project* case.²⁵³ When presented with the opportunity to evaluate a disparate impact claim in the context of the FHA, the Court noted that there are constitutional constraints to prevent quotas, but ultimately decided the case on statutory grounds without explicitly providing a constitutional test for disparate impact liability.²⁵⁴ After signing amendments to the FHA, President Reagan cautioned:

I want to emphasize that this bill does not represent any congressional or executive branch endorsement of the notion, expressed in some judicial opinions, that title 8 violations may be established by a showing of disparate impact of discriminatory effects of a practice that is taken without discriminatory intent. Title 8 speaks only to intentional discrimination.²⁵⁵

President Reagan’s qualifying statement noting that liability should only attach to intentional discrimination is indicative of the precautions that courts must take on disparate impact cases. In *Inclusive Communities Project*, the Supreme Court opined that the text of the FHA provides for disparate impact liability but more than mere statistical disparities are required to prevail on such a claim to ensure that defendants do not resort to the use of racial quotas.²⁵⁶

Over two decades before *Inclusive Communities Project*, in *Town of Huntington v. Huntington Branch, NAACP*, the Court affirmed the Second Circuit’s finding of disparate impact liability under the FHA.²⁵⁷ Oddly, the Court qualified its holding suggesting the Court did not entirely agree with allowing for disparate impact liability.²⁵⁸ The Court explained that it agreed with the appellate court’s finding of disparate impact liability because the defendant could not offer a legitimate reason for refusing to amend a zoning ordinance. Notably, the Supreme Court opined that it did not necessarily agree with the appellate court’s test for disparate impact, but that liability

²⁵² 42 U.S.C. § 3604(a).

²⁵³ *See* Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2512 (2015).

²⁵⁴ *Id.* at 2512.

²⁵⁵ Remarks on Signing the Fair Housing Amendments Act of 1988 (Sept. 13, 1988), <https://reaganlibrary.archives.gov/archives/speeches/1988/091388a.htm>.

²⁵⁶ *See Inclusive Cmty. Project*, 135 S. Ct. at 2512.

²⁵⁷ 488 U.S. 15, 18 (1988).

²⁵⁸ *Id.*

was so glaring within the context of the facts of that case that it affirmed the appellate court:

Since appellants conceded the applicability of the disparate-impact test for evaluating the zoning ordinance under Title VII, we do not reach the question whether that test is the appropriate one. Without endorsing the precise analysis of the Court of Appeals, we are satisfied on this record that disparate impact was shown.²⁵⁹

A district court has even stated that a disparate impact claim was “nothing more than wishful thinking on steroids.”²⁶⁰

VI. WHAT IS THE “MORE” THAT IS NEEDED TO MAKE A DISPARATE IMPACT CLAIM BASED ON STATISTICS CONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE?

Disparate impact based solely on statistics runs afoul of the Equal Protection Clause and the Court’s *Yick Wo* decision which required a showing of discriminatory animus for a disparate impact claim.²⁶¹ Because the facts of every case differ, and there are many different ways a plaintiff can show discriminatory animus, this Comment does not have a formula that conveniently contours the specific parameters for determining when a claim is constitutionally permissible and when it is not. That would be unrealistically attempting to draw arbitrary lines in the sand.

Instead, this Comment proposes that mere statistics are absolutely never constitutionally permissible, no matter how noble the purpose of the benign favoritism might be. That is the outer limit of what never constitutes a constitutional disparate impact claim. An example of this outer limit would be claims that rest solely on statistical disparities, such as the claims discussed in Section V(B) of this Comment being brought against schools when a disproportionate number of one racial group is assigned more detentions than another racial group, are never constitutionally permissible.²⁶²

Some claims that might satisfy the “something more” in addition to statistical disparities to indicate discriminatory animus would have to be similar to the standard set forth in *Yick Wo*.²⁶³ Section III(B) of this Comment discusses *Yick Wo*, and that the Court found that in addition to alarmingly one sided statistics, the “conclusion cannot be resisted that no

²⁵⁹ *Id.*

²⁶⁰ See Lawrence Hurley, *Court Rejects Obama Housing Bias Rule as “Wishful Thinking”*, REUTERS (Nov. 3, 2014), <http://mobile.reuters.com/article/idUSKBN0IN24C20141103?irpc=932>.

²⁶¹ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²⁶² See *infra* Section V(B) discussing disparate impacts abuse in the education sphere.

²⁶³ See *Yick Wo*, 118 U.S. 356.

reason for it exists except hostility to the race and nationality to which the petitioners belong.”²⁶⁴ Therefore, if there is no other possible lawful explanation for the statistical disparities other than discriminatory animus, then a disparate impact claim could satisfy the Equal Protection Clause’s demands.

Once a plaintiff satisfies the constitutional safeguard of “something more” to show a defendant’s discriminatory animus, not just statistical disparities, this Comment urges courts to adopt a burden shifting framework similar to the one established in *McDonnell Douglas* to evaluate the claim.²⁶⁵ Although the *McDonnell Douglas* framework is traditionally a model for disparate treatment, some courts have already adopted a similar framework within the disparate impact context, as it allows courts to “consider the strength of the plaintiff’s showing of discriminatory effect against the strength of the defendant’s interest in taking the challenged action.”²⁶⁶

If a plaintiff brings a constitutionally permissible disparate impact claim, a defendant should be able to defend with a “sufficient business interest in the disputed practice.”²⁶⁷ Once a defendant presents a legitimate reason, such as: (1) all students who disobey classroom rules are disciplined regardless of their race,²⁶⁸ (2) we do not want to hire people that are on narcotics to operate trains regardless of their race,²⁶⁹ or (3) we promote people who perform the highest on job-related standardized tests regardless of their race,²⁷⁰ the burden will shift to the plaintiff to show that the purported legitimate reason is actually pretext for discrimination. Only then, if the plaintiff can prove that the defendant’s legitimate reason is pretext for discrimination, can a plaintiff prevail on a disparate impact claim.

Unfortunately, the Court continues to dance around the constitutional implications of disparate impact claims by deciding cases on statutory grounds instead of head on addressing if such claims are constitutional, as seen in both *Inclusive Communities Project* and *Ricci*. In *Inclusive*

²⁶⁴ *Id.* at 374.

²⁶⁵ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

²⁶⁶ See *Johnson v. City of Memphis*, 770 F.3d 464, 471 (6th Cir. 2014) (“Courts assess the viability of these claims using a three-step burden-shifting framework akin to the familiar McDonnell–Douglas standard.”); *Graoch Assocs. #33, L.P. v. Louisville/Jefferson Cty. Metro Human Relations Comm’n*, 508 F.3d 366, 372, 374 (6th Cir. 2007) (“In disparate-impact cases under Title VII, we apply a different version of the McDonnell Douglas burden-shifting framework than in disparate-treatment cases. We follow the same three steps: the plaintiff states a prima facie case; the defendant responds; the plaintiff rebuts the response.”).

²⁶⁷ See *Hollis v. Chestnut Bend Homeowners Ass’n*, 760 F.3d 531, 539 (6th Cir. 2014) (using a burden shifting framework similar to McDonnell Douglas to evaluate a disparate impact claim).

²⁶⁸ See *infra* Section V(B).

²⁶⁹ See *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979).

²⁷⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

Communities Project, the Court explained that disparate impact is not immune from constitutional constraints.²⁷¹ The Court opined in *Inclusive Communities Project*, “[w]ithout adequate safeguards at the prima facie stage, disparate-impact liability might cause race to be used and considered in a pervasive way and ‘would almost inexorably lead’ governmental or private entities to use ‘numerical quotas,’ and serious constitutional questions then could arise.”²⁷² In *Ricci*, the Court noted “[o]ur statutory holding does not address the constitutionality of the measures taken here in purported compliance with Title VII. We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.”²⁷³

Justice Scalia’s *Ricci* concurrence hit the nail on the head: the Court’s “resolution of this dispute merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?”²⁷⁴

VII. CONCLUSION

In conclusion, Title VII’s threat of disparate impact liability incentivizes racial stereotyping and group based discrimination in employment, which is exactly what the Equal Protection Clause prohibits.²⁷⁵ The Equal Protection Clause ensures equal opportunity, not equal results.

The constitutionally appropriate test for disparate impact was established in *Yick Wo*, which required a showing of discriminatory intent, not just mere statistical disparities.²⁷⁶ Although intent can arguably be challenging to prove, that is not a reason for holding employers unconstitutionally liable for discrimination under a disparate impact theory.

Statistics absent a showing of discriminatory intent should be outright rejected as conceivable disparate impact claims and found unconstitutional under the Equal Protection Clause because one type of racial bias cannot be remedied by another.²⁷⁷ A Wall Street Journal editorial explained that unless disparate impact is eventually found unconstitutional,

²⁷¹ See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

²⁷² *Id.*

²⁷³ See *Ricci v. DeStefano*, 557 U.S. 557, 584 (2009).

²⁷⁴ *Id.* at 594.

²⁷⁵ See Brief for Project on Fair Representation et al., *supra* note 15.

²⁷⁶ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

²⁷⁷ See *Disparate Scalia*, WALL ST. J. (Jan. 22, 2015, 7:00 PM), www.wsj.com/articles/disperate-scalia-1421971209.

“municipalities, landlords, bank lenders, you name it, will inevitably adopt tacit racial quotas to ensure the numbers work out and thus avoid a possible HUD drive-by.”²⁷⁸

Like *Parents Involved in Community Schools*,²⁷⁹ where a school board violated the Equal Protection Clause by not narrowly tailoring its means of achieving diversity, Title VII’s disparate impact provision is not narrowly tailored to a compelling interest. Although there is an argument to be made drawing similarities between diversity being a compelling interest in the employment and higher education realms, such an argument falls short when looking at the underlying goals of both institutions. The employment realm, unlike higher education, lacks the inherent need for diverse views to broaden classroom teaching of young minds. Instead, the employment sphere is more akin to the *Parents Involved in Community Schools* generalized situation, in which using race alone to achieve diversity was not narrowly tailored to satisfy the Equal Protection Clause.²⁸⁰ The Court opined in *Parents Involved in Community Schools* that diversity cannot be achieved by focusing on race alone, and instead must incorporate other factors such as adversity.²⁸¹

Title VII’s disparate impact provision focuses liability solely on race, and although diversity is in some contexts a compelling interest, such generalized and mechanical racial classifications are not narrowly tailored. Unless invalidated, Title VII’s disparate impact provision will continue to unconstitutionally threaten employers solely based on statistics and continue extending beyond Title VII into the education and housing spheres. As Justice Thomas noted, “[t]he decision in *Griggs*²⁸² was bad enough, but this Court’s subsequent decisions have allowed it to move to other areas of the law.”²⁸³

Proponents of disparate impact are attempting to connect disproportionate results in school discipline to disproportionate results in the housing sphere. For example, an amicus brief in support of the Petitioners in the *Inclusive Communities Project* case stated “racial isolation in schools is directly connected to racial isolation in housing patterns.”²⁸⁴

²⁷⁸ *Id.*

²⁷⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 702.

²⁸² *Griggs* was a seminal case that endorsed disparate impact liability in the employment context pursuant to Title VII.

²⁸³ *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2531 (2015) (Thomas, J., dissenting).

²⁸⁴ Brief for John. R. Dunne, et al. as Amici Curiae Supporting Respondents, *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2014) (No. 13-1371), 2014 WL 7405726.

Unless the Court invalidates disparate impact on constitutional grounds, disparate impact proponents will continue to infiltrate the employment sphere with litigation solely based on statistical disparities. By mechanically imposing liability from statistics showing disproportionate race-based results, Title VII's disparate impact provision in itself violates the constitutional right to equal protection.

When Title VII's disparate impact provision is eventually challenged, the Court should find disparate impact based solely on statistics unconstitutional. Without proof of discriminatory animus, as indicated by *Yick Wo*, disparate impact encourages impermissible and unconstitutional quotas in violation of the Equal Protection Clause. An attack on one amendment's scope, is inadvertently an attack on every amendment, leaving the entire constitution possibly to be picked apart for scraps and burned to the ground. There is absolutely no lawful justification for making any class of people's rights more worthy of protection than others.