EQUAL PROTECTION AND INTERSECTIONALITY—A REPLY TO PROFESSOR YARBROUGH

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Professor Marilyn Yarbrough's thought-provoking piece discusses law's unwillingness or inability to address discrimination against African-American women.[1] Some courts have rejected legal protection for a new classification at the intersection of race and gender, instead forcing African-American women to prove discrimination on one basis or the other. In response, Professor Yarbrough proposes a new test under federal civil rights statutes and the Equal Protection Clause that balances the classification, the importance of the benefit or right involved, and the significance of the government's interest.

This Reply addresses Professor Yarbrough's proposal as it relates to the Equal Protection Clause. I believe that the Court's current three-tier Equal Protection Clause test adequately addresses the problem cases she raises. Instead, I suggest that intersectionality poses special problems in determining whether discrimination has occurred at all—problems that a balancing approach does not address. Ultimately, I suggest that these problems should be the focus of further analysis, not a new equal protection test.

I. INTERSECTION OF RACE AND GENDER

In examining the intersection of race and gender, Professor Yarbrough asks how the law treats discrimination against African-American women.[2] She notes that some federal courts have held that the federal civil rights statutes do not protect the specific class "African-American women;" these courts read the statutes to prohibit discrimi-

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1. *See* Marilyn v. Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029 (1997).

2. *See id.*

nation based on either race or gender, but not on both.[3] With discrimination against African-American women, however, the classification does not include either all African-Americans or all women.[4] Thus, the argument goes, discrimination against African-American women is neither race discrimination nor gender discrimination.

Professor Yarbrough argues that these civil rights cases reveal a flaw in current civil rights and Equal Protection Clause jurisprudence. Regardless of the outcome under the civil rights statutes, the flaw does not carry over to the equal protection context. This can be seen in the landmark equal protection case *Loving v. Virginia*.[5] In *Loving*, the state made two arguments that its anti-miscegenation statute did not discriminate based on race.[6] First, the state argued that its law did not discriminate against all African-Americans, only against those African-Americans who wanted to marry a white person.[7] Second, the state argued that its statute punished whites and African-Americans equally for the same conduct; neither race was treated differently.[8] The Court rejected both of these arguments.[9]

The first argument failed because it could be made of *any* law that discriminates based on race. For example, a law that forbid African-Americans from voting would not discriminate against all African-Americans—only those African-Americans who chose to vote. In this trivial sense, no law discriminates *solely* on the basis of race. Use of additional criteria—such as desire to vote or to marry—does not remove the racial aspect of the classification. Using race—even as one of several qualifiers—is discrimination that falls within the Equal Protection Clause.[10]

The state's second argument fails for the same reason. While whites and African-Americans may receive the same treatment, race

3. *See* DeGraffenreid v. General Motors Assembly Div., 413 F. Supp. 142, 143 (E.D. Mo. 1976).

4. *See id.* at 145.

5. 388 U.S. 1, 2 (1966).

6. *See id.* at 7–8.

7. *See id.*

8. *See id.*

9. *See id.*

10. The Court has made it clear that a mixed motive will not save government action from strict scrutiny under the Equal Protection Clause. *See* Hunter v. Underwood, 421 U.S. 222, 224–25 (1985). *Hunter* involved a 1901 Alabama law that disqualified a person convicted of "any crime . . . involving moral turpitude" from voting. *Id.* at 223. The history of the law showed that it was passed, in part, to keep African-Americans from voting. *See id.* at 226–27. The history, however, also revealed that the law may have been passed for an additional reason—to keep poor whites from voting. *See id.* at 231. Despite this mixed motive, the Court applied strict scrutiny. *See id.* at 231–32.

is used to deny one person a right accorded all others. The state discriminated based on race because it "proscribe[d] generally accepted conduct if engaged in by members of different races."[11] Again, the key was the government's use of race; strict scrutiny applied.[12]

Loving clarifies how the Equal Protection Clause applies to the intersection of race and gender. If the government discriminates against African-American women, race will be part of the classification. That all African-Americans are not burdened does not matter; use of race, even in part, triggers the highest level of equal protection review: strict scrutiny.[13]

An example from Professor Yarbrough's paper illustrates that strict scrutiny offers strong protection for African-American women. Consider an African-American woman denied the opportunity to play soccer. To defend its actions under strict scrutiny, the government must show that excluding African-American women was *necessary* to achieve a compelling government purpose.[14] It is difficult to conceive of any interest—whether compelling or merely legitimate[15]—that would be served by excluding African-American women from sports. Thus, strict scrutiny should leave little doubt about the unconstitutionality of the exclusion.

II. SO, WHAT'S THE PROBLEM?

If strict scrutiny applies to discrimination against African-American women, and strict scrutiny provides strong protection against such discrimination, is everything fine with the current equal protection doctrine? Probably not. The cases and articles cited in Professor Yarbrough's paper suggest that problems lie in other aspects of equal protection. The remainder of this Reply explains how current equal protection analysis poses problems for intersectionality and suggests directions for further analysis.

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11. *Loving*, 388 U.S. at 11.

12. *See id.* (stating "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny'").

13. *See* Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 24 (1989) (stating that "[a]s long as race is part of the group identity, any classification which limits their opportunities should be reviewed under the highest level of scrutiny").

14. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

15. Under rational basis review, the most lenient level of equal protection scrutiny, a state's interest need only be "legitimate." *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–63 (1981).

A. The Threshold Question of Discriminatory Intent

Let us turn to the threshold question in equal protection analysis: What classification is the government using to discriminate? The answer to this question determines the applicable level of equal protection scrutiny. As noted above, if race is part of the classification, strict scrutiny applies. But, how will we know what classification the government is using? In some cases, the answer will appear on the face of the law itself. This was the case in *Loving*: the statute specifically said that whites and African-Americans could not marry.[16] These are easy cases.

But, not all discrimination is overt. Government action could be facially neutral—not specifically mention race—yet, nonetheless, have a disparate impact on one race. This happened in *Washington v. Davis*, where the District of Columbia used a verbal ability and reading comprehension test in hiring police officers.[17] The record showed that a higher percentage of African-American applicants failed the test than did white applicants.[18] African-American applicants that had been excluded by the test argued that the racially disparate test results constituted race discrimination under the Equal Protection Clause.[19]

The *Washington* Court rejected disparate impact as a test for race discrimination.[20] Instead, the Court held that strict scrutiny applies only when the government *intended* to distinguish between people based on their race.[21] Racially disparate impact might be relevant to determining intent, but is not enough, on its own, to trigger strict scrutiny.[22]

Today, few laws facially discriminate against African-American women.[23] So, under *Washington v. Davis*, an African-American woman must prove—by historical, statistical, or other evidence—that

16. *See Loving*, 388 U.S. at 4 (stating that the state anti-miscegenation statute applied to "any white person intermarry[ing] with a colored person, or any colored person intermarry[ing] with a white person").

17. 426 U.S. 229, 234–35 (1976).

18. *See id.*

19. *See id.* at 236.

20. *See id.* at 238–39.

21. *See id.* at 239–41.

22. *See id.* at 242. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* Indeed, the Court has found that a grossly disparate racial impact can alone be evidence that the government intended to discriminate based on race. *See* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).

23. *See* Scales-Trent, *supra* note 13, at 22 (explaining this was not always so by saying "[i]t is unlikely that a statutory classification which explicitly limits the opportunities of black women can be found today, although such classifications did exist in the past").

the government has intentionally treated her differently, at least in part, because of her race. This aspect of the current equal protection doctrine gets to the heart of the problem raised by Professor Yarbrough.

B. *What to Do About Washington v. Davis?*

As Professor Yarbrough explains, Professor Kimberle Crenshaw has described the unique problems African-American women face under current anti-discrimination law.[24] Professor Crenshaw notes that African-American women can be discriminated against on multiple bases—race, gender, or some intersection of both grounds. She explains:

> Black women can experience discrimination in ways that are both similar to and different from those experienced by white women and Black men. Black women sometimes experience discrimination in ways similar to white women's experiences; sometimes they share very similar experiences with Black men. Yet often they experience double-discrimination—the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women—not the sum of race and sex discrimination, but as Black women.[25]

It is not always clear which basis, if any, the government is using to discriminate.[26] *Washington v. Davis*, however, requires litigants to prove *which* basis (or bases) was on the government's mind.[27] As Professor Kimberle Crenshaw explains: "If Black women cannot conclusively say that 'but for' their race or 'but for' their gender they would be treated differently, they are . . . told to wait in the unprotected margin until they can be absorbed into the broader, protected categories of race and sex."[28]

According to Professor Crenshaw, African-American women also suffer because their experiences may not be seen as discrimination. She argues that race discrimination is defined by the perspective of African-American men, and gender discrimination is defined by the perspective of white women.[29] Neither perspective—either alone or

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24. *See* Yarbrough, *supra* note 1, at 1036–37 (discussing Professor Crenshaw's work on intersectionality).

25. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149.

26. *See id.*

27. *See supra* notes 17–22 and accompanying text.

28. Crenshaw, *supra* note 25, at 152.

29. *See id.* at 154–57.

in combination with the other—accurately reflects the perspective of African-American women.[30] Professor Crenshaw illustrates this point as follows:

> For example, Black women have traditionally worked outside the home in numbers far exceeding the labor participation rate of white women. An analysis of patriarchy that highlights the history of white women's exclusion from the workplace might permit the inference that Black women have not been burdened by this particular gender-based expectation. Yet, the very fact that Black women must work conflicts with norms that women should not, often creating personal, emotional and relationship problems in Black women's lives.[31]

By imposing the perspective of white feminists, the unique perspective of African-American women is ignored.

Professor Crenshaw's work suggests that we can improve equal protection analysis by recognizing the unique perspective of African-American women. Recall that the Supreme Court currently requires intentional discrimination to trigger strict scrutiny. We could refine this analysis by expanding "intentional discrimination" to include government imposition of one group's limited perspective (white feminists) more generally (all women). To see how this might work, consider Professor Yarbrough's example of women's collegiate athletic programs. Professor Yarbrough describes the following dilemma:

> Efforts to raise participation rates for women [in intercollegiate athletics], one of several ways to satisfy Title IX/gender equity compliance concerns, have relied on the so-called "country club" (golf, tennis, swimming) or "prep school" (lacrosse, field hockey) sports, or sports that depend on already enrolled students, the so-called "walk-on" sports. To the extent that educationally and economically disadvantaged women (categories to which a large percentage of African-American women and girls belong) lack any opportunity to participate in either category, reliance on these solutions to gender equity debates again contributes to their invisibility.[32]

The word "invisibility" nicely captures the problem. When a university has no sports programs for women, all women are discriminated against, and the university's goal is to provide athletic opportunities for "women." Taking the dominant white feminist perspective, the university then pursues its goal by instituting "country club," "prep," or "walk-on" sports. The university portrays its action as achieving equality for "women." Yet, the university acted on a narrow view of

30. *See id.* at 149–50.
31. *Id.* at 156.
32. Yarbrough, *supra* note 1, at 1033.

"women;" African-American women were invisible to the decision makers.

Equal protection analysis could address the invisibility of African-American women by considering their perspective in deciding whether government action intentionally discriminates.[33] In the above example, a court should consider Professor Yarbrough's argument that use of country club, prep, and walk-on sports effectively excludes African-American women. This government action—assuming it is a public university—is as an *intentional* adoption of the dominant perspective that, in turn, intentionally excludes the perspective of African-American women. These intentional government choices could count as intentional discrimination subject to strict scrutiny.

III. CONCLUSION—A DIFFERENT FOCUS

Discussions about intersectionality and the Equal Protection Clause are best focused on the threshold question: On what basis does the government action discriminate? A move to a balancing approach, as suggested by Professor Yarbrough, does not address the invisibility of African-American women. As Professor Yarbrough notes, part of the balancing test is "to weigh and to balance carefully . . . the character of the *groups* whose opportunities are denied."[34] This approach still requires identification of the "group" that is discriminated against, and this presumably means the group that the government intended to discriminate against.[35] If African-American women are invisible at this threshold point—when the court determines which "group" is discriminated against—their perspective will go unseen in the balance. In sum, a balancing test offers only false hope, unless we first address the threshold question and *Washington v. Davis*.[36]

33. One could also argue that this unconscious racism supports overruling *Washington v. Davis*. *See generally* Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that the equal protection doctrine should take into account unconscious racism).

34. Yarbrough, *supra* note 1, at 1039 (quoting J. Harvie Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 991 (1975)) (emphasis added).

35. Justice Powell, a proponent of an equal protection balancing test while on the Court, has joined each of the Court's opinions that require intentional discrimination for application of the Equal Protection Clause. *See* Washington v. Davis, 426 U.S. 229, 231 (1976) (race); Personnel Adm'r v. Feeney, 442 U.S. 256, 258 (1979) (gender).

36. 426 U.S. 229 (1976).