CONSTITUTIONAL LAW

2026–27

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V. EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT

The Equal Protection Clause comes at the end of § 1 of the Fourteenth Amendment:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.

In this section, comprising seven classes, we will consider the body of law that has developed to implement this equality guarantee.

Much as with the liberty rights that we considered in section IV, the Supreme Court has devised a differentiated or "tiered" framework for evaluating equal protection claims. And as with liberty rights, "rational basis" review represents the baseline or default mode of review for equal protection claims; in other words, it applies in the absence of some trigger for heightened scrutiny. So we'll start, in section V.A, by considering what rational basis review looks like in the equal protection context.

We'll then consider several lines of cases in which the Court has at least sometimes applied a higher standard of review. Race discrimination is the earliest and most central paradigm for robust enforcement of the Equal Protection Clause, so we'll devote the most attention to that (section V.B). We'll then turn to how the Court's approach to discrimination based on sex or gender has followed and departed from that model (section V.C). And we'll then consider the series of cases that has, without formally adopting "heightened scrutiny," invalidated laws that discriminate on the basis of sexual orientation as well (section V.D). Finally, we'll turn to the distinct line of cases—prefigured by *Skinner v. Oklahoma* (*supra*, p. IV-65)—in which the Court has based heightened scrutiny, not on the *axis* of discrimination (such as race or sex), but on the *interest* with respect to which some people have allegedly been disfavored (section V.E).

A. Rational Basis Review (31 PAGES)

Rational basis review under the Equal Protection Clause ordinarily parallels the deferential review that will now be familiar from the post-*Lochner* economic liberty cases. In fact, *Williamson v. Lee Optical Co.* (*supra*, p. IV-56) is a canonical example in both contexts. As you might recall, the Oklahoma law at issue there prohibited opticians from fitting glasses or duplicating lenses without a prescription from an ophthalmologist or optometrist. But the same law that imposed this requirement also expressly exempted "sellers of ready-to-wear glasses" from any similar regulation. The district court had held that this preferential treatment of those businesses violated equal protection:

> The legislature must not blow both hot and cold! If it be desirable for the public protection that opticians sell merchandise and service only upon written prescriptive authority, the legislature cannot at the same time permit the unsupervised sale of ready-to-wear [glasses].

But, just as with the substantive due process component of the case, the Supreme Court reversed. Justice Douglas's unanimous opinion explained:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch.

This sort of reasoning will be very familiar from our discussion of rational-basis review under the Due Process Clause in section IV.A.2. Indeed, in the absence of some trigger for heightened scrutiny, equal protection analysis generally differs from substantive due process analysis only in that it focuses on the rationality of some legislative *classification* or *difference in treatment*, as opposed to a claimed deprivation of some noncomparative interest.

Still, the rational-basis standard does give rise to some significant questions that are distinctive to the equal protection context. We'll focus on three interrelated issues here. First, does it make sense to resort to the same deferential standard in reviewing claims of unequal treatment that the Court applies to claimed infringements on liberty? In the first case that you'll read below, *Railway Express Agency v. New York* (1949), the majority opinion prefigured *Lee Optical*, but a well-known concurrence by Justice Jackson articulated a rationale for more searching review in the equal protection context. As you'll see, that opinion tees up questions of wider relevance for thinking about how the Court does or should enforce the constitutional equality norm.

Second, there are some notable equal protection cases in which the Court, without purporting to apply heightened scrutiny, has seemed to give the rational-basis standard more "bite." (These cases are known informally as just that—the "rational basis with bite" cases.) What is the logic of these cases, and do they cast any light on the substantive equality norm that the Court might be trying—via the assorted doctrinal categories and formulas that it has developed—to enforce across the board?

Third, precisely because the "rational basis with bite" cases at least purport to eschew heightened scrutiny, they provide an occasion for thinking about a central question of doctrinal design: When and why should the Court afford heightened scrutiny under the Equal Protection Clause in the first place? Exploring some possible answers to that question will leave you better equipped to grapple, in the remainder of section V, with how the Court has implemented its heightened scrutiny doctrine where it *does* apply.

Railway Express Agency v. New York

336 U.S. 106 (1949)

▪ JUSTICE DOUGLAS delivered the opinion of the Court.

Section 124 of the [New York City Traffic Regulations] provides:

> "No person shall operate [upon] any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Appellant is engaged in a nationwide express business. It operates about 1,900 trucks in New York City and sells the space on the exterior sides of these trucks for advertising. That advertising is for the most part unconnected with its own business. It was convicted [for displaying large posters advertising Camel Cigarettes, a circus, and a radio station]. [The state court] concluded that advertising on vehicles using the streets of New York City constitutes a distraction to vehicle drivers and to pedestrians alike and therefore affects the safety of the public in the use of the streets. [For due process purposes, it suffices that the local authorities have judged that this regulation] does have such a relation [and] nothing has been advanced which shows that to be palpably false.

[The] question of equal protection of the laws is pressed more strenuously on us. It is pointed out that the regulation draws the line between advertisements of products sold by the owner of the truck and general advertisements. It is argued that unequal treatment on the basis of such a distinction is not justified by the aim and purpose of the regulation. It is said, for example, that one of appellant's trucks carrying the advertisement of a commercial house would not cause any greater distraction of pedestrians and vehicle drivers than if the commercial house carried the same advertisement on its own truck. Yet the regulation allows the latter to do what the former is forbidden from doing. It is therefore contended that the classification which the regulation makes has no relation to the traffic problem since a violation turns not on what kind of advertisements are carried on trucks but on whose trucks they are carried.

That, however, is a superficial way of analyzing the problem[.] The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case.

[We] cannot say that that judgment is not an allowable one. Yet if it is, the classification has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection. It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered. And the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial. It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.

▪ JUSTICE JACKSON, concurring.

There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems. One says that no state shall "deprive any person of life, liberty, or property, without due process of law." The other declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

My philosophy as to the relative readiness with which we should resort to these two clauses is almost diametrically opposed to the philosophy which prevails on this Court. While claims of denial of equal protection are frequently asserted, they are rarely sustained. But the Court frequently uses the due process clause to strike down measures taken by municipalities to deal with activities in their streets and public places which the local authorities consider as creating hazards, annoyances or discomforts to their inhabitants. See, for example, opinion in *Douglas v. Jeannette* and companion cases[.][*]

The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government — state, municipal and federal — from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Governments. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states, and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

This case affords an illustration. Even casual observations from the sidewalks of New York will show that an ordinance which would forbid all advertising on vehicles would run into conflict with many interests, including some, if not all, of the great metropolitan newspapers, which use that advertising extensively. Their blandishment of the latest sensations is not less a cause of diverted attention and traffic hazard than the commonplace cigarette advertisement which this truck-owner is forbidden to display. But any regulation applicable to all such advertising would require much clearer justification in local conditions to enable its enactment than does some regulation applicable to a few. I do not mention this to criticize the motives of those who enacted this ordinance, but it dramatizes the point that we are much more likely to find arbitrariness in the regulation of the few than of the many.

[In] this case, if the City of New York should assume that display of any advertising on vehicles tends and intends to distract the attention of persons using the highways and to increase the dangers of its traffic, I should think

[*] [In these cases, the Court invalidated local ordinances that required a license for door-to-door solicitation. The holdings rested on the First Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment. —BE]

it fully within its constitutional powers to forbid it all. [Instead] of such general regulation of advertising, however, the City seeks to reduce the hazard only by saying that while some may, others may not exhibit such appeals. The same display [at issue here], for example, advertising cigarettes, may be carried on the trucks of a cigarette dealer and might on the trucks of this appellant if it dealt in cigarettes. [But] it may not be carried so long as the message is not its own but a cigarette dealer's offer to sell the same cigarettes.

[The] equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation[.]

The question in my mind comes to this. Where individuals contribute to an evil or danger in the same way and to the same degree, may those who do so for hire be prohibited, while those who do so for their own commercial ends but not for hire be allowed to continue? I think the answer has to be that the hireling may be put in a class by himself and may be dealt with differently than those who act on their own. But this is not merely because such a discrimination will enable the lawmaker to diminish the evil. That might be done by many classifications, which I should think wholly unsustainable. It is rather because there is a real difference between doing in self-interest and doing for hire, so that it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price. [I]t is not difficult to see that, in a day of extravagant advertising[,] the rental of truck space could become an obnoxious enterprise. [I]n view of the control I would concede to cities to protect citizens in quiet and orderly use for their proper purposes of the highways and public places, I think the judgment below must be affirmed.*

EQUAL PROTECTION AND POLITICAL PROCESS THEORY

Throughout the course thus far, we have seen several suggestions that the principal check against bad laws ought to be some form of democratic accountability, rather than judicially enforced constitutional constraints. Consider, for instance, the suggestions to that effect in *Gibbons v. Ogden* or

* [JUSTICE RUTLEDGE noted he was *dubitante* on the equal protection question but had "acquiesced" in the Court's opinion and judgement nonetheless. "*Dubitante*" means "doubting," and it is still occasionally used to convey that a judge on a multi-member court "doubted a legal point but was unwilling to state that it was wrong." *Dubitante*, Black's Law Dictionary (11th ed. 2019). Given the difficulty of the issues that confront the Supreme Court, and how often the Justices disagree about them, it is striking how rarely the Justices acknowledge any doubts about their own conclusions. For an interesting reflection on the costs of this rhetorical mode, see Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 61–66 (2011). —BE]

Wickard v. Filburn (or Justice Brennan's dissent in *National League of Cities v. Usury*, *supra* p. II-91, drawing on both). Justice Jackson's concurrence in *Railway Express* suggests a possible qualification or corollary of the same line of thought: Maybe deference to the majoritarian political process makes less sense with respect to "the regulation of the few than of the many." After all, even if some burden is patently unreasonable and unfair, imposing it on a minority might be permanently acceptable to the majority. Moreover, when the Court invalidates a statute on equal protection grounds (as opposed to holding that the statute unlawfully deprives affected parties of some noncomparative interest), that ruling arguably interferes much less with the ordinary democratic process. In a sense, all substantive options remain on the table; the Court has intervened in the lawmaking process only to the extent of linking certain parties' fates together.

This is one of the arguments developed at length by John Hart Ely in a very influential book, *Democracy and Distrust*, defending a general "political process theory" of judicial review. As Ely summarized the point:

> The function of the Equal Protection Clause [is] largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves—or at least widespread elements of the constituency on which they depend for reelection.[*]

A nice illustration of the idea here is *Eisenstadt v. Baird* (1972) [*supra*, p. IV-75]. As you might recall, the *Eisenstadt* Court did not actually resolve whether *Griswold* "bar[red] a prohibition on the distribution of contraceptives" because, even if such a prohibition was lawful in principle, Massachusetts allegedly lacked a good reason for imposing its ban with respect to unmarried people only. "The underinclusion," the Court said, "would be invidious," and it pointed to Justice Jackson's *Railway Express* concurrence to explain why. Much as Jackson might have predicted, Massachusetts responded to that ruling not by banning contraception for all adults, but by banning it for none.[†]

Still, there is an important question that this vision of equal protection, as described thus far, leaves open: When exactly should the fact that a law's burdens fall only on "the few" trigger close scrutiny by courts? Consider, for instance, that most people in Oklahoma probably were not burdened by the law at issue in *Lee Optical* at all. And yet that law's singling out of opticians ("the few") for disfavor did not trigger any meaningful scrutiny under the Equal Protection Clause—and Ely and other proponents of political process theory would generally endorse that result. Likewise, in *Railway Express* itself, Justice Jackson ultimately deferred to New York's decision that "the

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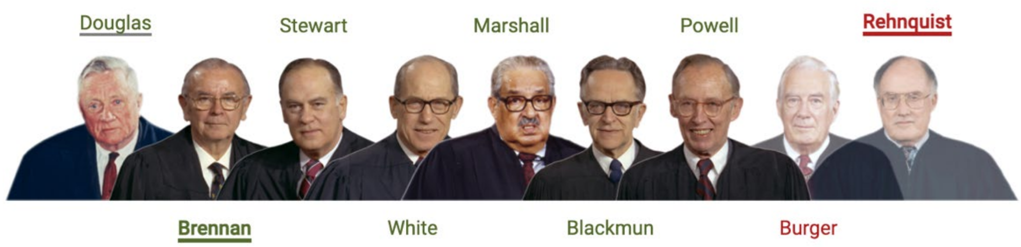
[*] ELY, *supra*, at 170.

[†] Another nice illustration of the basic idea, as Ely noted, is *McCulloch*'s caveat about taxes, such as taxes on real property, that might be imposed on the Bank of the United States *in common with in-state entities*. See *supra* p. II-17.

hireling" could be placed "in a class by himself." The challenge, then, will be to articulate some criterion—beyond just asking whether one thinks the legislative losers really should have won—for when courts should protect "the few" from the results that the political process otherwise doles out. That question looms in the background of *USDA v. Moreno* (1973) and comes to the fore in *Cleburne v. Cleburne Living Center* (1985), both of which you'll read next.

U.S. Department of Agriculture v. Moreno

413 U.S. 528 (1973)



■ JUSTICE BRENNAN delivered the opinion of the Court.

[Section] 3(e) of the Food Stamp Act [excludes from participation] any household containing an individual who is unrelated to any other member of the household. In practical effect, [it] creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest. The latter class of persons is denied federal food assistance.

As initially enacted, § 3(e) defined a "household" as "a group of *related or non-related* individuals [who are] living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." In January 1971, however, Congress redefined the term "household" so as to include only groups of *related* individuals. [The plaintiffs] contend [that] the "unrelated person" provision of § 3(e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.[*]

[*] [As we'll see later, the Court held in *Bolling v. Sharpe* (1954) [*infra*, p. V-45] that its equal protection doctrine limits the Federal Government as well as the states—even though the Equal Protection Clause, by its terms, applies only to the states. The gist of the rationale is that it would not make sense for the Federal Government to be held to a lesser standard, and so the Fifth Amendment's Due Process Clause must include an "equal protection component." —BE]

Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. The purposes of the Food Stamp Act were "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households.["] The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes[.] Thus, if it is to be sustained, the challenged classification must rationally further some *legitimate* governmental interest other than those specifically stated in the congressional "declaration of policy."

[The] legislative history [indicates] that the amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. As a result, [the district court correctly held that] "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to some independent considerations in the public interest, justify the 1971 amendment."

Although apparently conceding this point, the Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program. [The] Government contends that [Congress] might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are "relatively unstable," thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

[I]t is important to note that the Food Stamp Act itself contains provisions, wholly independent of §3 (e), aimed specifically at the problems of fraud and of the voluntarily poor. [The] existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses. Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. [In] practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Traditional equal protection analysis does not require that every classification be drawn with precise "mathematical nicety." But the classification here in issue is not only "imprecise," it is wholly without any rational basis.

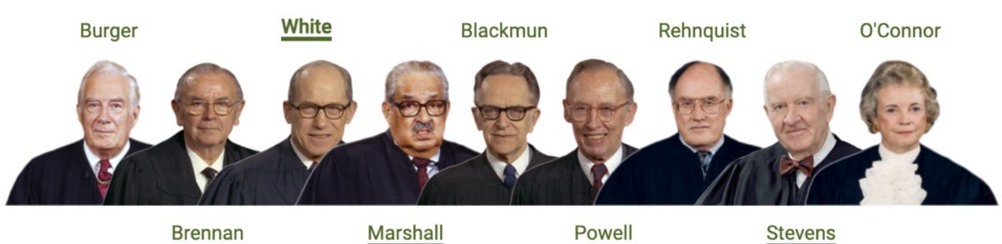
▪ JUSTICE REHNQUIST, with whom [CHIEF JUSTICE BURGER] joins, dissenting.

[Undoubtedly,] Congress attacked the problem with a rather blunt instrument and, just as undoubtedly, persuasive arguments may be made that what we conceive to be its purpose will not be significantly advanced by the enactment of the limitation. But questions such as this are for Congress, rather than for this Court; our role is limited to the determination of whether there is any rational basis on which Congress could decide that public funds made available under the food stamp program should not go to a household containing an individual who is unrelated to any other member of the household.

I do not believe that asserted congressional concern with the fraudulent use of food stamps is, when interpreted in the light most favorable to sustaining the limitation, quite as irrational as the Court seems to believe. A basic unit which Congress has chosen for determination of availability for food stamps is the "household," a determination which is not criticized by the Court. By the limitation here challenged, it has singled out households which contain unrelated persons and made such households ineligible. I do not think it is unreasonable for Congress to conclude that the basic unit which it was willing to support with federal funding through food stamps is some variation on the family as we know it—a household consisting of related individuals. This unit provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps. [The] fact that the limitation will have unfortunate and perhaps unintended consequences beyond this does not make it unconstitutional.[*]

Cleburne v. Cleburne Living Center, Inc.

473 U.S. 432 (1985)



[*] [A concurrence by JUSTICE DOUGLAS based on associational rights is omitted. —BE]

▪ JUSTICE WHITE delivered the opinion of the Court.

A Texas city denied a special use permit for the operation of a group home for the mentally retarded [known as the Featherston home], acting pursuant to a municipal zoning ordinance requiring permits for such homes. The Court of Appeals for the Fifth Circuit held that mental retardation is a "quasi-suspect" classification and that the ordinance violated the Equal Protection Clause because it did not substantially further an important governmental purpose. We hold that a lesser standard of scrutiny is appropriate, but conclude that under that standard the ordinance is invalid as applied in this case.

II

[The] Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the states wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process.

The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest. *McLaughlin v. Florida* (1964) [*infra*, p. V-51]. Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution. *Kramer* v. *Union Free School District No. 15* (1969) [*infra*, p. V-209]; *Shapiro* v. *Thompson* (1969); *Skinner* v. *Oklahoma* (1942) [*supra*, p. IV-65].*

Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment. "[W]hat differentiates sex from such nonsuspect statutes as intelligence or physical disability . . . is that the sex characteristic

* [We will turn to this line of cases—affording heightened scrutiny under equal protection on account of the interest at stake (rather than the classification drawn)—at the end of Section V. —BE]

frequently bears no relation to ability to perform or contribute to society." *Frontiero* v. *Richardson* (1973) (plurality opinion) [*infra*, p. V-125]. Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women. A gender classification fails unless it is substantially related to a sufficiently important governmental interest.*

[We] have declined, however, to extend heightened review to differential treatment based on age:

> "While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Massachusetts Board of Retirement* v. *Murgia* (1976).

The lesson of *Murgia* is that where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.

III

Against this background, we conclude [that] the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation. First, it is undeniable [that] those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: [they] range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the

* [This formulation is known as "intermediate scrutiny," in contrast to the "strict scrutiny" standard that is recited in the preceding paragraph. Both of these are subtypes of "heightened scrutiny." And classifications that trigger heightened scrutiny—or specific classes defined by such classifications—are often termed "suspect." (A classification that triggers intermediate scrutiny is sometimes described as "quasi-suspect," but that term is fairly uncommon today.) —BE]

predicate for such judicial oversight is present where the classification deals with mental retardation.

Second, [both] national and state [lawmakers] have been addressing [the] difficulties [of the mentally retarded] in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary. Thus, the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs but it has also provided the retarded with the right to receive "appropriate treatment, services, and habilitation" in a setting that is "least restrictive of [their] personal liberty." [The] State of Texas has similarly enacted legislation that acknowledges the special status of the mentally retarded by conferring certain rights upon them[.]

Such legislation thus singling out the retarded for special treatment reflects the real and undeniable differences between the retarded and others. [It] may be, as [the plaintiff] contends, that legislation designed to benefit, rather than disadvantage, the retarded would generally withstand examination under a test of heightened scrutiny. The relevant inquiry, however, is whether heightened scrutiny is constitutionally mandated in the first instance. Even assuming that many of these laws could be shown to be substantially related to an important governmental purpose, merely requiring the legislature to justify its efforts in these terms may lead it to refrain from acting at all. Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them. The Education of the Handicapped Act, for example, requires an "appropriate" education, not one that is equal in all respects to the education of non-retarded children; clearly, admission to a class that exceeded the abilities of a retarded child would not be appropriate. [G]iven the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.

Third, the legislative response, which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by courts, much economic and social legislation would now be suspect.

Fourth, if the large and amorphous class of the mentally retarded were deemed quasi-suspect[, it] would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.

Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms. But the appropriate method of reaching such instances is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us. Because mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions, and because both State and Federal Governments have recently committed themselves to assisting the retarded, we will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational. *See Moreno* [*supra*, p. V-66]. Furthermore, some objectives—such as "a [bare] desire to harm politically unpopular group," *id.*—are not legitimate state interests.

IV

[We] now turn to the issue of the validity of the zoning ordinance insofar as it requires a special use permit for homes for the mentally retarded. We inquire first whether requiring a special use permit for the Featherston home deprives respondents of the equal protection of the laws. If it does, there will be no occasion to decide whether the special use permit provision is facially invalid where the mentally retarded are involved, or to put it another way, whether the city may never insist on a special use permit for a home for the mentally retarded in an R-3 ["Apartment House District"] zone.

[The] City does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged[,] private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherston home and it does so [because] it would be a facility for the mentally retarded.

[The decisive question is whether] the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses [would] not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

The District Court found that the City Council's insistence on the permit rested on several factors. First, the Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. ["Private] biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti* (1984).

Second, the Council had two objections to the location of the facility. [For one thing, because] the facility was across the street from a junior high school [the Council] feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home's location was that it was located on "a five hundred year flood plain." This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit[.]

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. [But] there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. [W]hy [the occupants' disabilities] warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify [how] the characteristics of the intended occupants of [the] home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community; and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type.

[The] short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded, including those who would occupy the Featherston facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law.

▪ JUSTICE STEVENS, with whom [CHIEF JUSTICE BURGER] joins, concurring.

The Court of Appeals disposed of this case as if a critical question to be decided were which of three clearly defined standards of equal protection review should be applied to a legislative classification discriminating against the mentally retarded. In fact, our cases have not delineated three—or even one or two—such well-defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so called "standards" adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.

[W]hat has become known as the tiered analysis of equal protection claims [is better understood as] a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion[.] In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

[In] every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.

Every law that places the mentally retarded in a special class is not presumptively irrational. The differences between mentally retarded persons and those with greater mental capacity are obviously relevant to certain legislative decisions. [Even] so, the Court of Appeals correctly observed that through ignorance and prejudice the mentally retarded "have been subjected to a history of unfair and often grotesque mistreatment." [The] record convinces me that[, in this case, the] permit was required because of the irrational fears of neighboring property owners, rather than for the protection of the mentally retarded persons who would reside in [the Featherston] home.

▪ JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, concurring in the judgment in part and dissenting in part.

I cannot agree [with] the way in which the Court reaches its result[.] The Court holds that the ordinance is invalid on rational-basis grounds and disclaims that anything is special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation.

[To] be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical* [and its] progeny.

The Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns, for analogous permitted uses appear to pose similar threats. Yet under the traditional and most minimal version of the rational basis test, "reform may take one step at a time[.]" [*Lee Optical*.] The "record" is said not to support the ordinance's classification, but under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation. Finally, the Court finds it "difficult to believe" that the retarded present different or special hazards inapplicable to other groups. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible[.]

The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate in at least two respects. The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review—a small and regrettable step back toward the days of *Lochner*. Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny. Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.

I have long believed that the level of scrutiny employed in an equal protection case should vary with the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Independent School Dist. v. Rodriguez* [*infra*, p. V-217]. When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes. First, the interest [in] establishing group homes is substantial. [Second,] the mentally retarded have been subject to a "lengthy and tragic history" of segregation and discrimination that can only be called grotesque.*

[Our] heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny. [The] structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists, see *Williamson* v. *Lee Optical of Oklahoma, Inc.* (1955), or new businesses as old, see *New Orleans* v. *Dukes* (1976) [(upholding a law that favored longstanding businesses over new ones)]. [But] the Fourteenth Amendment does prohibit other results under virtually all circumstances, such as castes created by law along racial or ethnic lines, and significantly constrains the range of permissible government choices where gender or illegitimacy, for example, are concerned. Where such constraints, derived from the Fourteenth Amendment, are present, and where history teaches that they have systemically been ignored, a "more searching judicial inquiry" is required. *United States* v. *Carolene Products Co.,* n. 4 (1938).

That more searching inquiry, be it called heightened scrutiny or "second order" rational-basis review, is a method of approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. [Heightened] scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past,

* [JUSTICE MARSHALL discussed at length the history of discrimination against people with intellectually disabilities, including sterilization and institutionalization policies urged by the eugenics movement. —BE]

and the threat that they may do so remains, heightened scrutiny is appropriate.[24]

[In] light of the scrutiny that should be applied here, Cleburne's ordinance sweeps too broadly to dispel the suspicion that it rests on a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community. The Court, while disclaiming that special scrutiny is necessary or warranted, reaches the same [conclusion].

SUSPECT CLASSIFICATIONS AND TIERS OF SCRUTINY

Moreno and *Cleburne* tee up a number of questions about the structure of equal protection doctrine, especially about the "tiered" system of review.

1. Implementing Rules and Operative Propositions

In considering *Dickerson v. United States* [*supra* , p. I-19], we briefly encountered the idea of an "implementing rule": a judge-made rule that does not track or specify the contours of an underlying constitutional requirement, but rather seeks to *implement* that requirement in an appropriate way—taking account of considerations such as administrability, the relative costs of false positives and false negatives, and the like.[*] As noted there, the warnings required under *Miranda v. Arizona* (1966) are a classic example. The actual constitutional requirement—what we might call the "constitutional operative proposition"[†]—is that the government may not extract *involuntary* confessions. But even though some unwarned confessions are undoubtedly still voluntary, the *Miranda* Court evidently thought that requiring warnings in every case—and then excluding unwarned confessions

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[24] [The] political powerlessness of a group and the immutability of its defining trait are relevant insofar as they point to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. [For example,] [their] social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas with full concern and respect, despite their formal and complete exclusion from the electoral process.

The discreteness and insularity warranting a "more searching judicial inquiry," *United States* v. *Carolene Products Co.,* n. 4 (1938), must therefore be viewed from a social and cultural perspective as well as a political one. To this task judges are well suited, for the lessons of history and experience are surely the best guide as to when, and with respect to what interests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure. In separating those groups that are discrete and insular from those that are not, as in many important legal distinctions, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner* (1921) (Holmes, J.).

[*] On the idea of an "implementing rule" in the context of *Miranda* and beyond, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001). See also Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 813–15 (2022) (arguing that the Court has no authority to adopt implementing rules of the sort seemingly represented by *Miranda*).

[†] See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 123–28 (2004).

from evidence—was a better way of implementing the constitutional requirement than trying to assess the subtle factual question of voluntariness directly.

Although *Miranda* is an especially stark example, much constitutional doctrine consists of implementing rules rather than efforts to identify and directly apply operative propositions. And as the language of "scrutiny" itself conveys, the tiers of scrutiny are another good example: They are better understood as an apparatus employed *by courts* to *police* whether the underlying demand of equal protection has been (or, really, should be deemed to have been) violated—not an account of the underlying demand of equal protection itself. Yet the Court often fails to appreciate this basic fault line in the different kinds of work that it is doing, and its opinions are sometimes garbled as a result. Consider, for instance, the *Cleburne* majority's explanation of why rational-basis review generally applies to classifications that are based on traits that are often of legitimate interest to the government:

> [Where] individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. *In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.*[*]

The first sentence articulates a reason for *courts* to be "reluctant" about invalidating certain laws—in light of the special concern they should have about false positives, i.e., about wrongful intrusions on legislative authority. But the second sentence then infers something about what "the Equal Protection Clause requires." That is a non sequitur. What the Court seems really to have meant is that, whatever the Equal Protection Clause *itself* may require of states, in the class of cases the Court describes, *courts* will "require only a rational means to serve a legitimate end" instead. Much as *Miranda* "overenforces" the underlying voluntariness requirement, rational-basis review—at least if it is grounded in a bias against judicial interference with legislative choices, as the Court suggests it is here—"underenforces" the Equal Protection Clause.[†]

One way to make this gap stark is to adopt the deliberative perspective of a lawmaker rather than a court (or, for that matter, simply to imagine a world without courts). Suppose you are a state legislator who has sworn an oath to abide by the Constitution and wants to fulfill that oath. You are inclined to vote for a certain bill, but you worry that you might thereby be

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[*] *Supra*, p. V-12 (emphasis added).

[†] The classic treatment of underenforced constitutional norms is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–28 (1978).

"deny[ing] to [an affected group] the equal protection of the laws." Should that worry be allayed as soon as you conclude that the law, if enacted, would withstand rational basis review—i.e., that there exists *some* rational basis on which a *hypothetical* legislature could conclude that the law serves *some* legitimate end? Doesn't that seem like an odd question for you—a real legislator with real objectives—to ask?

All of this points toward two important takeaways. First, the tiers of scrutiny (and the tests of validity that accompany each) will make much more sense, and will be more tractable to critical assessment, if you appreciate them for what they are—implementing rules—and measure them accordingly. Second, even though the merits of these rules crucially depends on one's understanding of the operative proposition that they are supposed to implement, nothing in the tests themselves says, in so many words, what that proposition even is. One reason that *Moreno* and *Cleburne* are illuminating is that, insofar as they seem to identify a constitutional violation *even where the normal implementing rules would not support that result*, they are necessarily forced to opine more directly on what really constitutes a deprivation of "equal protection of the laws" in the first place. See, e.g., *Moreno* [*supra,* p. V-9] ("if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest . . .").

2. Grounds of Suspicion

We can't get to the bottom of what the substantive demand of equal protection might amount to here, but one popular answer is that each person has a "right to equal concern and respect in the design and administration of the political institutions that govern them."* That conception is not dictated by *Moreno* and *Cleburne*, but it fits naturally with them. And it has the virtue of identifying something people are owed equally other than literally equal (i.e., same) treatment, which the Constitution couldn't plausibly demand. In Ronald Dworkin's memorable phrasing, the requirement is that the government treat people *as equals*—meaning, again, as equally worthy of respect and concern—and not that it treat them *equally*.

Suppose, then, that we understand the tiers of scrutiny and their accompanying tests as court-made rules for enforcing, in different factual settings, this more basic equality norm. Whether a law triggers heightened scrutiny should then have something to do with the likelihood that it embodies a failure to treat people as equals. The *Cleburne* majority's account of why heightened scrutiny should be triggered by classifications based on race and sex—but not intellectual disability—can be understood as speaking to that issue. *See supra*, p. V-11. So, too, can Justice Marshall's

* This influential formulation—"equal concern and respect"—traces to the legal theorist Ronald Dworkin. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-73 (1977); ELY, *supra*, at 82. Note how Justice Marshall's *Cleburne* dissent echoes that language. *See supra* p. 18 n.24.

explanation of why heightened scrutiny *should* be triggered in cases like this one. *See supra*, p. V-19.

In fact, despite their different emphases, both of those answers have roots in *Carolene Products*' Footnote 4.[*] As you may recall, the Court suggested there that

> prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Supra, p. IV-55. Whether Justice Marshall was right that heightened scrutiny should apply in *Cleburne* or not, his explanation of this basic idea—which tracks closely with Ely's influential book—is clear and helpful. When a law singles out a stigmatized group for disfavor, there is extra cause to suspect that a lapse of equal respect and concern may be at work: We might worry that benefits and harms to the disfavored individuals were not counted at full weight (or, as the Court suggests in *Moreno*, perhaps that they were even valued negatively). And while generally we might trust that an open political process will aggregate people's interests fairly—so that, for instance, opticians' defeat in the legislative process is not much reason to think that process must have failed to fully *account for* their interests—the same trust would be misplaced when it comes to certain minority groups whose opportunities for coalition-building and interest-group bargaining may be artificially constrained by the prejudice or self-perpetuating stereotypes of others.[†]

From this point of view, then, heightened scrutiny is appropriate when a law discriminates against a group that is subject to "prejudice" of the sort just described, and the point of that scrutiny is to more fully assess—with less bias toward false negatives—whether a lapse of equal respect and concern was involved. One question worth thinking about, especially when we turn to the race cases, is how the substance of the tests that the Court actually applies in heightened-scrutiny cases—such as the demand that the law

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[*] Although only Justice Marshall cited *Carolene Products* here, the Court has made the connection to the *Carolene Products* footnote explicit elsewhere. In explaining why state laws that disfavor foreigners are suspect, for instance, the Court said:

> Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis. *Williamson* v. *Lee Optical Co.* [But] the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see *United States* v. *Carolene Products Co.,* n. 4 (1938)) for whom such heightened judicial solicitude is appropriate.

Graham v. Richardson (1971). (Note that while many classifications based on alienage are subject to strict scrutiny, as *Graham* held, there are also some special exceptions to this rule that we aren't covering in this course.)

[†] For an extended version of this argument, see Ely, *supra*, ch. 6.

closely fit an important objective—might serve to gauge whether equal respect and concern was or was not afforded to all.

The final case in this section, *Romer v. Evans* (1996), is yet another in which the Court seems to have employed some form of "rational basis with bite" review. As you read, consider how the distinction between implementing rules and operative propositions might cast light on some of the *Romer* Court's more cryptic statements—including that the law under review "confounds th[e] normal process of judicial review" and that it represents "a denial of equal protection of the laws in the most literal sense." As you'll see, *Romer* also introduces another central challenge for the analysis of equal protection claims: how to distinguish "prejudice" or a lapse of equal respect, on the one hand, from the permissible (even if misguided) moral judgments of a political community, on the other.

Romer v. Evans

517 U.S. 620 (1996)

▪ JUSTICE KENNEDY delivered the opinion of the Court.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson* [*infra*, p. V-36] (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution.

I

The enactment challenged in this case in an amendment to the [Colorado Constitution] adopted in a 1992 statewide referendum [as] "Amendment 2[.]" The [main] impetus for the amendment [came from] ordinances that had been passed in various Colorado municipalities, [banning] discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services. What gave rise to the statewide controversy was the protection the ordinances afforded to persons discriminated against by reason of their sexual orientation. Amendment 2 repeals these ordinances to the extent that they prohibit discrimination on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." Yet Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians. The amendment reads:

> "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing."

II

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. We rely not upon our own interpretation of the amendment but upon the authoritative construction of Colorado's Supreme Court:

> ["The] immediate objective of Amendment 2 is, at a minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation; and various provisions prohibiting discrimination based on sexual orientation at state colleges. The 'ultimate effect' of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures."

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. [M]ost States have chosen to counter discrimination by enacting detailed statutory schemes.

Colorado's state and municipal laws typify this emerging tradition of statutory protection and follow a consistent pattern. The laws first enumerate the persons or entities subject to a duty not to discriminate. The list goes well beyond the entities covered by the common law. The Boulder ordinance, for example, has a comprehensive definition of entities deemed places of "public accommodation." They include "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind."

[These] statutes and ordinances also [enumerate] the groups or persons within their ambit of protection. [Colorado's] state and local governments have not limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny under our cases. Rather, they set forth an extensive catalogue of traits which cannot be the basis for discrimination, including age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, physical or mental disability of an individual or of his or her associates—and, in recent times, sexual orientation.

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2 [nullifies] specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. [And it] also operates to repeal and forbid all laws or policies providing specific protection for gays or lesbians from discrimination by every level of Colorado government.

[E]ven if, as we doubt, homosexuals could find some safe harbor in laws of general application [such as general bans on arbitrary actions by state government], we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

III

The Fourteenth Amendment's promise that no person shall be denied equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. See *Williamson v. Lee Optical*; *Ry. Express Agency v. New York*. The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain that there existed some relation between the classification and the purpose it served. By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. [Respect] for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'" *Skinner v. Oklahoma* (1942) [*supra*, p. IV-65] (quoting *Yick Wo v. Hopkins* (1886) [*infra*, p. V-55).

[A] second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Moreno*. Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

[We] must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws[.]

▪ JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST and JUSTICE THOMAS join, dissenting.

The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a "'bare desire

. . . to harm'" homosexuals but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objective, and the means chosen to achieve it, are [unimpeachable] under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings)[.]

In holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick* (1986) [(upholding a Georgia sodomy law)], and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is *precisely* the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed). Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil. I vigorously dissent.

I

[The] clear import of the Colorado court's [interpretation of Amendment 2 is] that "general laws and policies that prohibit arbitrary discrimination" would continue to prohibit discrimination on the basis of homosexual conduct as well. [The] amendment prohibits *special treatment* of homosexuals, and nothing more. It would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the "life partner" of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee.

[The majority] ultimately does not dispute all this, but assumes it to be true. The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the state constitution. That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.

[To] take the simplest of examples, consider a state law prohibiting the award of municipal contracts to relatives of mayors or city councilmen. Once such a law is passed, the group composed of such relatives must, in order to get the benefit of city contracts, persuade the state legislature—unlike all other citizens, who need only persuade the municipality. It is ridiculous to consider this a denial of equal protection, which is why the Court's theory is unheard of.

The Court might reply that the example I have given is *not* a denial of equal protection only because the same "rational basis" (avoidance of corruption) which renders constitutional the *substantive discrimination* against relatives (*i. e.,* the fact that they alone cannot obtain city contracts) also automatically suffices to sustain what might be called the *electoral-procedural discrimination* against them (*i. e.,* the fact that they must go to the state level to get this changed). This is of course a perfectly reasonable response, and would explain why "electoral-procedural discrimination" has not hitherto been heard of: A law that is valid in its substance is automatically valid in its level of enactment. But the Court cannot afford to make this argument, for as I shall discuss next, there is no doubt of a rational basis for the substance of the prohibition at issue here. The Court's entire novel theory rests upon the proposition that there is something *special* —something that cannot be justified by normal "rational basis" analysis—in making a disadvantaged group (or a nonpreferred group) resort to a higher decisionmaking level. That proposition finds no support in law or logic.

II

I turn next to whether there was a legitimate rational basis for the substance of the constitutional amendment—for the prohibition of special protection for homosexuals. It is unsurprising that the Court avoids discussion of this question, since the answer is so obviously yes. The case most relevant to the issue before us today is not even mentioned in the Court's opinion: In *Bowers* v. *Hardwick* (1986), we held that the Constitution does not prohibit what virtually all States had done from the founding of the Republic until very recent years—making homosexual conduct a crime. That holding is unassailable, except by those who think that the Constitution changes to suit current fashions.

[Even] assuming that, in Amendment 2, a person of homosexual "orientation" is someone who does not engage in homosexual conduct but merely has a tendency or desire to do so, *Bowers* still suffices to establish a rational basis for the provision. If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual "orientation" is an acceptable stand-in for homosexual conduct. A State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."

[Moreover,] even if the provision regarding homosexual "orientation" were invalid, respondents' challenge to Amendment 2—which is a facial challenge—must fail. [Some] individuals of homosexual "orientation" who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person.

III

[What Colorado] has done is not only unprohibited, but eminently reasonable. [The] Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as un-American. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animus" at issue here: moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.

[There is a close] analogy [for Amendment 2], one that involves precisely the effort by the majority of citizens to preserve its view of sexual morality statewide, against the efforts of a geographically concentrated and politically powerful minority to undermine it. The Constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah *to this day* contain provisions stating that polygamy is "forever prohibited." Polygamists, and those who have a polygamous "orientation," have been "singled out" by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court's disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local-option, basis—unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

[Amendment 2] is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is [an] appropriate means to that legitimate end. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

"Animus" and Moral Condemnation

In *Romer*, like in *Moreno*, the Court held that a law failed rational-basis review because, rather than serving a legitimate interest, it was grounded in "animus" or a "bare desire to harm." In his *Romer* dissent, Justice Scalia challenged that distinction: Why was the basic motive for Amendment 2 better described as animosity towards a group of people, as opposed to a simple moral judgment (whether right or wrong) about particular conduct or ways of life? And if the law's impetus *is* equally describable as a genuine moral judgment, why is that judgment not a constitutionally permissible one?

Scalia may not be the perfect spokesman for this defense of Amendment 2's constitutionality, since the balance of the dissent makes clear that he thinks Colorado's moral disapproval of gay relationships was not just permissible but correct. But it is important to see that one could fervently oppose a law like Amendment 2 and still believe that it is within a political community's democratic authority to enact. Ely, for example, "oppose[d] laws outlawing sexual acts," but argued that there is not "anything unconstitutional about outlawing an act due to a *bona fide* feeling that it is immoral"—for, as Scalia also observed, "most criminal statutes are that at least in part."[*] What exactly distinguishes a law like Amendment 2 (or, for that matter, the criminal sodomy law upheld in *Bowers*) from the various other laws that Justice Scalia mentions (and Ely alludes to), such as laws against polygamy or animal cruelty?

The Court doesn't offer much of a direct answer to this question in *Romer*, although some of what it says might offer the resources for developing one. The question will recur throughout the Court's gay-rights cases, which we'll consider as a group in section V.D.

A. Race

Today, a racial distinction drawn by the government is the quintessential example of a classification that triggers "strict scrutiny" under the Equal Protection Clause. We will consider the evolution and contemporary significance of that doctrine over three classes.

Although the division of the cases into these three chapters is largely chronological, it also tracks a substantive division, because issues of different kinds came to the fore in each of the three different eras. Roughly speaking, the first chapter (section V.B.1) focuses on the use of equal protection as a tool for disestablishing racial hierarchy in the United States. It carries us from *Plessy v. Ferguson*, where the Court upheld *de jure* segregation, to the Court's landmark decisions in *Brown v. Board of Education* and *Loving v. Virginia*. The second chapter (section V.B.2) then turns to the logical next question: What, if anything, does the Equal Protection Clause have to say about laws that do *not* openly classify by race, but that nonetheless have the purpose or effect of maintaining racial subordination? Finally, the third chapter (section V.B.3) considers the modern repurposing of equal protection as a judicial check on other governmental actors' efforts to promote racial integration or counteract racial bias.

1. From Jim Crow to Formal Desegregation (24 PAGES)

THE LEGAL FOUNDATIONS OF JIM CROW AND *PLESSY V. FERGUSON*

As we saw briefly earlier, a central impetus for the Fourteenth Amendment was the southern "Black Codes"—oppressive statutes designed to

[*] JOHN HART ELY, DEMOCRACY AND DISTRUST 255-56 n.92 (1980).

maintain the racial caste system in the absence of slavery. And in the years after the amendment was ratified, the Court did recognize some racist state laws as unconstitutional. The most important case was **Strauder v. West Virginia** (1880), where the Court reversed a Black man's conviction by a jury from which Black men had been excluded by law. Whereas the Fourteenth Amendment had aimed to counteract the subordination of Black people, the Court said, West Virginia's all-white jury statute was "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."

Yet the key to understanding the law in this period is appreciating why *Strauder* was, at least by the lights of the doctrine that developed, an exceptional case. First, the defendant was unambiguously challenging a *state* action—i.e., West Virginia's conviction of him. And second, he was alleging that the state had discriminated against him with respect to what was understood as a "civil" right—the right to a fair trial. As Mark Tushnet explains:

> The lawmakers who discussed equality during Reconstruction accepted midcentury conceptions that distinguished equality with respect to civil rights, to social rights, and to political rights. The core of each conception was also well defined: The core of civil rights included the rights to sue and testify; social rights included the right to select one's associates; voting was the central political right.[*]

There was no consensus about exactly what fit in each of these categories, and different constituencies had different ideas about their relevance to the Fourteenth Amendment in any event. Still, it was at least clear that *Strauder* involved a "civil" rather than "social" right, and *Strauder* was relatively uncontroversial partly for that reason.

The Court was far more hostile to Congress's efforts to counter the subordination of Black Americans outside the domain of specific *state* actions abridging *civil* rights.[†] This became clear in the Court's approach to the Enforcement Acts, enacted pursuant to Congress's newly enumerated "power to enforce, by appropriate legislation, the provisions of [the Reconstruction Amendments]." One of these laws made it a federal crime to conspire to deprive people of rights protected by the federal Constitution (or federal law). When the Federal Government then indicted some of the perpetrators of

[*] Mark Tushnet, *The Politics of Equality in Constitutional Law*, 74 J. AM. HIST. 884 (1987); see, e.g., Cong. Globe, 39th Cong., 1st Sess. 599–600 (1866) (statement of Sen. Lyman Trumbull), https://memory.loc.gov/ll/llcg/070/0700/07050599.tif.

[†] This phrasing could imply that the doctrinal categories came first and the pattern of results flowed logically from them, but one could also understand the categories as devices constructed to curb the radical potential of the Reconstruction Amendments. There is surely some truth in both characterizations. See generally Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–25 (1997).

organized violence against Black Americans on this basis, the Court—building on the logic of the *Slaughter-House Cases*—held in **United States v. Cruikshank** (1875) that the various rights identified in the indictment were actually matters of state, not federal, concern. With respect to the Equal Protection Clause in particular, the Court reasoned that the clause "does not [add] anything to the rights which one citizen has under the Constitution against another." In other words, although *states* were prohibited from denying Black Americans "the equal protection of the laws," that obligation did not warrant the Federal Government in prosecuting murders by white supremacist vigilantes that the state justice systems had left unchecked.

That same year, Congress enacted the Civil Rights Act of 1875, an ambitious law forbidding discrimination in access to public accommodations (such as hotels, transportation, and theaters). In the **Civil Rights Cases** (1883)—a consolidated set of cases involving claims under the new law that had been brought throughout the country—the Court held that most of the 1875 Act was unconstitutional in light of the "state action" requirement of *Cruikshank* and other cases.[*] Justice Harlan dissented, writing that he could not "resist the conclusion that the substance and spirit of the recent amendments of the Constitution have been sacrificed by a subtle and ingenious verbal criticism." Eric Foner describes the public response to the Court's ruling:

> The prominent Ohio black leader John P. Green warned that the decision established a precedent for "unsettling the entire legal status of the former slave population." Frederick Douglass wrote to Harlan that his dissent "should be scattered like the leaves of autumn over the whole country." Mass protest meetings took place "from Maine to Florida." At one in Washington that brought together over two thousand persons, Douglass called the decision "a heavy calamity" that "construed the Constitution in defiant disregard of what was intended" by Congress, and left blacks "defenseless" against "vulgar and pitiless prejudice." The Court's studied distinction between state and private action, he pointed out, made no practical difference to "the insulted or outraged . . . colored citizen." At the same gathering, the influential white Republican Robert G. Ingersoll offered a careful rebuttal of Bradley's opinion, insisting that the Court had seriously "undervalued" the Reconstruction amendments, which, he insisted, had been intended to create "affirmative rights" that expanded the scope of national citizenship. Invoking a phrase Harlan would employ in the following decade, Ingersoll declared, "the law became color blind."

[*] The *Civil Rights Cases* have not been overruled—which is why, when the Court later upheld Title II of the Civil Rights Act of 1964, it relied on the Commerce Clause rather than the Fourteenth Amendment. See *supra* section II.B. We will return to the question of congressional power to enforce individual rights at the end of the semester. See *infra* section VI.

> The black press condemned the decision. "It is comforting," wrote the *New York Globe*, referring to Harlan, "to find one man who has not forgotten that we had a great war and that among the many things it forever doomed was colorphobia in the Constitution." The *Cleveland Gazette* predicted that the decision would close "hundreds" of northern hotels and places of amusement to blacks. "In the South, it will make things worse in every way, if such a thing be possible."*

Throughout the 1880s and 1890s, the Federal Government and Northern elites largely retreated from their commitment to Reconstruction. Black people in the South faced widespread violence and were overwhelmingly disenfranchised. And, with integration no longer required by federal law, the southern states began to enact laws enforcing *segregation* in public spaces. These were known as "Jim Crow" laws, after a racist caricature that figured in minstrel shows. The constitutionality of one of these laws came before the Court in *Plessy v. Ferguson*.

Plessy v. Ferguson

163 U.S. 537 (1896)

[An 1890 Louisiana law required "equal but separate" railroad carriages for "white" and "colored" passengers. Homer Plessy was arrested after refusing to vacate a carriage for white passengers. He challenged the law's constitutionality.]

■ JUSTICE BROWN delivered the opinion of the Court.

The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of

* FONER, *supra*.

their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston* (1850), in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, "[that all are] equal before the law [does] not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

[Laws] forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the state.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus[, in contrast to the cases above,] in *Strauder v. West Virginia* (1880) [*supra*, p. V-32], it was held that a law of West Virginia limiting to white male persons [the] right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases.

[It] is also suggested by the learned counsel for [Plessy] that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo v. Hopkins* [*infra*, p. V-55], [a San Francisco ordinance] was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. [Legislation] is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

■ JUSTICE HARLAN, dissenting.

[In] respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved[.]

[It] was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. [The] thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. [The] fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. [If] a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

[The] white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*. [The] recent amendments of the Constitution, it was supposed, had eradicated [the] principles [of *Dred Scott*] from our institutions. But it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision [will] not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution[.]

[Sixty] millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

[If] evils will result from the commingling of the two races [in public spaces], they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

"SEPARATE BUT EQUAL" FROM *PLESSY* TO *BROWN*

Although the Louisiana statute at issue in *Plessy* had prescribed "equal but separate" railroad cars, it is not clear that, under the logic of the Court's decision, the "equal" part of this rule was even necessary. Put another way, "equality was required in *Plessy*, if indeed it was required, only because the Court could conceive of no rational explanation for a state's refusal to provide equal railway facilities for blacks."[*] In a series of cases between *Plessy* and *Brown*, the Court made incremental inroads on Jim Crow by insisting on the "equal" part of the "separate but equal" formula, including by rejecting the reasonableness of asserted reasons for inequality.

In **McCabe v. Atchison, Topeka & Santa Fe Railway Co.** (1914), the Court considered an Oklahoma statute that required segregation of railroad cars; the cars generally had to be "equal in all points of comfort and convenience," but sleeping and dining cars were exempted from this requirement. The state defended that exemption on the ground that there simply was not sufficient market demand among Black passengers to justify Black-only versions of these facilities. The Court rejected that justification:

> This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one.

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[*] Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 230 (1991).

> Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded.

Two decades later, **Missouri ex rel. Gaines v. Canada** (1938) relied on the logic of *McCabe* to hold that, unless Missouri launched an all-Black, state-run law school, it would have to admit Black students to the all-white law school at the University of Missouri. Missouri had argued that there simply wasn't sufficient demand among Black students to justify operating such a school. But the Court again rejected that argument:

> Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. We had occasion to consider a cognate question in the case of [*McCabe*]. [We] found [Oklahoma's] argument to be without merit. It made, we said, the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one.["]
>
> [Here too], petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

The facts of *Gaines* differed from *McCabe* in an important respect: Missouri had offered to cover Black students' tuition at a neighboring state's law school, at least until sufficient demand developed to justify an in-state school. Yet the Court found this substitute inadequate—and, significantly, it deemed it "beside the point" whether the education being offered to the plaintiff was inferior to the one he was being denied. That suggested that even tangible equality of resources would not necessarily satisfy the "separate but equal" standard.

This point was driven home in two more cases concerning graduate-school admissions that were decided just a few years before *Brown*. As David Strauss summarizes these cases:

> Then, [in 1950], the Supreme Court effectively took away whatever breathing room *Gaines* had left for separate but equal. In **Sweatt v.**

> **Painter**, the Court held that a law school that Texas had established for African Americans was not equal to the University of Texas Law School. The Court identified tangible inequalities between the two schools, but the Court then went out of its way to say that "those qualities which are incapable of objective measurement but which make for greatness in a law school" were even "more important." The newly established school could not possibly match the University of Texas in those respects.
>
> **McLaurin v. Oklahoma State Regents**, decided the same day as *Sweatt*, went one step further; it turned entirely on intangible factors. *McLaurin* held that separate but equal was not satisfied when an African American, George McLaurin, was admitted to a previously all-white graduate school but had to sit in a certain seat in the classroom, had to sit alone in the cafeteria, and had a special table in the library. The Court explained that these conditions harmed McLaurin's "ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[*]

One reason for pausing over these cases is that they offer a case study of how constitutional doctrine changes over time. *Brown v. Board of Education* is far more important than any of these incremental steps, but it was not a bolt from the blue. As Strauss says:

> *Plessy* had upheld separate but equal, and that technically remained the law until *Brown*. But consider what the legal landscape looked like when *Brown* came before the Supreme Court. To begin with, the trend was unequivocal: it had been decades since the Court had actually found a system of segregation that it believed satisfied the principle of separate but equal. In case after case, the Court had concluded that separate facilities were not equal.
>
> Even more impressively, consider what options were available—or rather, were not available—to a state that wanted to take advantage of the separate-but-equal principle and segregate its universities. After *McCabe*, a state could not refuse to establish a school for African Americans on the ground that there was too little demand. After *Gaines*, a state could not satisfy its obligation to provide equality by giving a black student a voucher to attend school in another state—even if that other state's schools were just as good. After *Sweatt*, a state could not satisfy separate but equal by establishing a new all-black graduate school, because any such school, however equal tangibly, could not possibly match the intangible assets of the long-established white school. After *McLaurin*, a state

[*] DAVID A. STRAUSS, THE LIVING CONSTITUTION 89-90 (2010).

could not segregate African Americans within the established white school. What was left of separate but equal?[*]

We'll pick up this thread about *Brown* and the "common law" model of constitutional law in a few pages—but first, you'll read *Brown* itself, as well as a companion case, *Bolling v. Sharpe* (1954).

Brown v. Board of Education

347 U.S. 483 (1954)

▪ CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. [In] each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. [The lower courts in three of the cases] denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson* [*supra*, p. V-34]. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate.

[The] plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the 14th Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us

[*] STRAUSS, *supra*, at 90.

that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education [had] advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; [and] compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the 14th Amendment relating to its intended effect on public education.

In the first cases in this Court construing the 14th Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.[5] The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson*, involving not education but transportation. American courts have since labored with the doctrine for over half a century. [In recent] cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines* v. *Canada* (1938)[;] *Sweatt v. Painter* (1950); *McLaurin* v. *Oklahoma State Regents* (1950). In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt* v. *Painter,* the Court expressly reserved decision on the question whether *Plessy* v. *Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt* v. *Painter*, there are findings below that the Negro and white schools involved have been equalized or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. Our decision, therefore, cannot turn on merely a comparison of

[5] *Slaughter-House Cases* (1873) [*supra*, p. IV-32]; *Strauder v. West Virginia* (1880).

these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn [the] profession." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to

> learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.[11] Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of [remedial] decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument [on the question of remedy].

Alongside the four cases resolved in the *Brown* opinion, which involved school segregation in four different states, the Court also decided a fifth, *Bolling v. Sharpe*, that posed the same issue with respect to the segregated schools in Washington, D.C.

[11] K.B. Clark, Effect of Prejudice and Discrimination on Personality Development; Witmer and Kotinsky, Personality in the Making; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion; Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?; Brameld, Educational Costs, in Discrimination and National Welfare, Frazier, The Negro in the United States. And see generally Myrdal, An American Dilemma.

Bolling v. Sharpe

347 U.S. 497 (1954)

▪ CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case challenges the validity of segregation in the public schools of the District of Columbia. [We] have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the state from maintaining racially segregated public schools. *Brown v. Board of Education*. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

[Although] the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause. In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.

Bolling is the source of a doctrine now known as "reverse incorporation." Much as the Fourteenth Amendment "incorporates" various provisions of the Bill of Rights and makes them binding against the states, the thought goes, the Fifth Amendment's Due Process Clause "incorporates" the Fourteenth Amendment's Equal Protection Clause and makes it binding against the Federal Government. The Due Process Clause is thus often said to contain an "equal protection component."

We won't be able to explore this idea in depth, but two points are worth mentioning. First, notice how *Bolling* is, at bottom, a substantive due process case. One longstanding challenge for critics of substantive due process has thus been explaining why, exactly, the Federal Government is barred from engaging in flagrant race discrimination (if it is at all).[*] Second, although *Bolling* implied that there could well be daylight between the Equal Protection Clause and whatever equality norm is implicit in due process, in practice "[the] Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."[†] The question whether that should be so resembles the question, considered in section IV.B.1, of whether "incorporated" rights should be implemented in exactly the same way when they are applied to the state and federal governments.

BROWN AND CONSTITUTIONAL CHANGE

In contrast to "anticanon" cases like *Dred Scott* or *Lochner*, *Brown* is the most central case in the modern "canon." As Michael McConnell has put it, "Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."[‡] For many years, this was widely thought to be a serious embarrassment for originalism in particular. More recently, there have been various efforts to justify *Brown* on originalist grounds, often leveraging some form of the distinction between original *meaning* and original *expected applications* that we considered in section I.B.

Whether a constitutional bar on school segregation can be justified in originalist terms or not, David Strauss argues that the actual line of cases

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[*] In a recent concurrence, Justice Thomas explained that he "now doubt[s] whether [*Bolling*] comports with the original meaning of the Constitution," and that he thinks the Court should revisit it in an appropriate case. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1544 (2022) (Thomas, J., concurring). He suggested, however, that

> [e]ven if the Due Process Clause has no equal protection component, the Constitution may still prohibit the Federal Government from discriminating on the basis of race, at least with respect to civil rights. While my conclusions remain tentative, I think that the textual source of that obligation may reside in the Fourteenth Amendment's Citizenship Clause.

Thomas acknowledged that "[a]dopting this understanding of the Citizenship Clause necessarily prompts additional questions"—including whether the government would be free to discriminate with respect to public benefits (which might not have the necessary connection to citizenship), and "most relevant to *Bolling* itself, [whether] access to public education [is] a 'privilege' or 'immunity' of citizenship" at all. *Id.* at 1551 n.5.

[†] Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[‡] Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

that culminated in *Brown* exemplifies the "common law" method of constitutional adjudication that we also considered in section I.B. He explains by analogy to *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), the famous New York Court of Appeals ruling that allowed injured parties to sue manufacturers for negligence even in the absence of "privity."

> Once we recognize that we have a living constitution, in the sense described by the common law method, we no longer have to regard *Brown* as inexplicable or as a lawless act that just turned out well. That is because *Brown* can be justified as a decision that was reached on the basis of the common law method. The cases leading up to *Brown*—in a development that resembles the line of cases preceding *MacPherson*—had already left "separate but equal" in a shambles. *Brown* was the completion of an evolutionary, common law process, not an isolated, pathbreaking act.
>
> [*Brown*] is strikingly parallel to *MacPherson*. A governing doctrine—privity of contract with the exception for inherently dangerous products, or separate but equal—was the established law. For a while, it was applied with a degree of coherence. But then the coherence began to fray. The decisions holding that certain arrangements were unequal ([including *McCabe* and *Gaines*]) raised questions about exactly what would constitute equality, just as the New York decisions about scaffolds and coffee urns, while making some sense under the old rule, raised questions about what products weren't inherently dangerous. In both instances, the trend was clear. And in both *Brown* and *MacPherson*, the court could fairly say that it was just making explicit the conclusions that the earlier decisions had arrived at in fact, but had not acknowledged in name: there was no distinct category of inherently dangerous products, and there was no such thing as facilities that were segregated but equal.
>
> Like *MacPherson*, *Brown* was not dictated by the earlier cases. But the decision in *Brown* could rely on the earlier cases to show, in effect, that the formal abandonment of the old doctrine was no revolution but just the final step in a common law development. The Court of course was influenced by its views about the morality of segregation. That was entirely proper, though, because those views—consistent with the common law process—were buttressed by the lessons of the past. Earlier Courts, trying to apply separate but equal, kept coming to the conclusion that the particular separate facilities before them were not equal. In concluding that separate could never be equal, the Court in *Brown* was taking one further step in a well-established progression. It was acting not as the interpreter of the views of mid-nineteenth-century politicians,

> but as a court with responsibility for the evolution—in a properly restrained, common law fashion—of the living Constitution.*

On Strauss's account, even very important constitutional changes, like the move from *Plessy* to *Brown,* can happen lawfully—i.e., without breaking the fundamental rules of the social practice of constitutional law—but only if they proceed in the incremental fashion characteristic of common-law decisionmaking in general. That picture of legitimate change (with *Brown* as a central example) offers a useful foil for thinking about various other changes in constitutional law whose legitimacy is contested—including, for instance, the emergence of abortion rights (*supra* section IV.B.1), the emergence of the right to same-sex marriage (*infra* section V.D), the Court's recent repudiation of abortion rights (*infra* section VI.A), and the Court's recent repudiation of affirmative action (*infra* section V.B.3).

THE RESPONSE TO *BROWN* AND THE EMERGENCE OF STRICT SCRUTINY

As you saw above, the *Brown* opinion concluded by setting the cases for reargument on the question of how the Court's ruling—which would require the reorganization of entire school systems—should be implemented. In a second opinion, now known as ***Brown II*** (1955), the Court directed the lower courts to craft remedial decrees in light of "equitable principles" that call for "practical flexibility," but to do so without retreating from the basic commitments of *Brown I*. The ambivalence of these instructions was memorably captured in the Court's directive remanding the cases: the respective district courts were to take such steps "as are necessary and proper to admit [the plaintiffs] to public schools on a racially nondiscriminatory basis *with all deliberate speed*." *Brown II* (emphasis added).

We saw one example of how this remedial process unfolded in *Cooper v. Aaron* (1958) [*supra*, p. I-12], where the courts and even the school board struggled to keep desegregation on track amid fierce opposition from white southerners and state officials. That backlash was emblematic of a broader countermobilization known as "massive resistance." For example, Senators and Representatives from the southern states overwhelmingly signed a "Southern Manifesto" that repudiated *Brown* and urged resistance against the Court's "clear abuse of judicial power."

Formal desegregation ultimately succeeded largely because Congress took action of its own, beginning with the Civil Rights Act of 1964, to secure compliance with *Brown*. Perhaps most importantly, Title VI of the Act excluded any entity that engaged in racial discrimination from federal grant funds.† In the Elementary and Secondary Education Act of 1965, Congress then began funding local schools on a large scale for the first time—money

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* STRAUSS, *supra*, at 85, 91–92.

† This same provision in Title VI is also the main reason why private universities like Harvard can be sued for alleged race discrimination in admissions. *See, e.g.*, *SFFA v. Harvard College* (2023) [*infra*, p. V-108].

that would be unavailable to school districts that continued resisting desegregation.

Different understandings of *Brown*'s holding and rationale emerged in this period. At one level, *Brown* seemed focused on the very concrete, factually documented harm that Black children suffered under Jim Crow, as well as on the social meaning of inferiority that segregation expressed. In a famous and celebrated law-review article, Charles Black defended *Brown* as resting on "a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—[and the] equally plain fact that such treatment is hurtful to human beings."[*] Yet these harm- and meaning-based concerns did not lend themselves to categorical legal abstractions, and so *Brown*'s reliance on them arguably gave rhetorical fodder to the resistance and left open opportunities for unfriendly courts to try to limit *Brown* to its facts.

Faced with a challenge to Louisiana's miscegenation law, for instance, the Louisiana Supreme Court ruled that the law was valid in part because mixed-race children

> have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

State v. Brown (La. 1959) (quoting *Brown*). Likewise, when the Georgia General Assembly purported to "impeach" the Justices who had decided *Brown*, its resolution complained that they had "expressly predicated [their] determination of the rights of the people of the several sovereign states of the American union upon the psychological conclusions of Kotinsky, Brameld and Myrdal, and their ilk, rather than the legal conclusions of Taft, Holmes, Van Devanter, Brandeis and their contemporaries upon the bench."

As Reva Siegel has recounted, the modern doctrinal rule that treats racial classifications as presumptively unconstitutional emerged against this backdrop.[†] "In this climate," a general rule of that sort was seen "as having the virtue of cooling debate." Siegel notes, for instance, that an important early statement of this "anticlassification" conception of *Brown*'s holding came when southern school districts challenged the standards adopted under the 1964 Act. The challengers had claimed that these standards went beyond what *Brown* had really demanded, but the Fifth Circuit upheld them in *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966). Siegel explains:

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[*] Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

[†] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470 (2004).

Writing for the Fifth Circuit, Judge John Minor Wisdom, the great architect of Southern desegregation, endorsed this recharacterization of *Brown* in his influential *Jefferson County* opinion. In the course of upholding the Department of Health, Education, and Welfare's guidelines for enforcing Title VI of the Civil Rights Act of 1964, Judge Wisdom argued that challenges to *Brown*'s findings about the harms of segregation during the decade since the decision was handed down now counseled a different approach, one in which courts would condemn "state-imposed separation by race [as] an invidious classification and for that reason alone . . . unconstitutional." Drawing on the work of Wechsler, Pollak, Black, and Fiss [all noted law professors or judges], as well as Supreme Court precedent in the years after *Brown*, Judge Wisdom observed:

> The *Brown I* finding that segregated schooling causes psychological harm and denies equal educational opportunities should not be construed as the sole basis for the decision. So construed, the way would be open for proponents of the status quo to attempt to show, on the facts, that integration may be harmful or the greater of two evils. Indeed that narrow view of *Brown I* has led several district courts into error. We think that the judgment "must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed." The relief *Brown II* requires rests on recognition of the principle that state-imposed separation by race is an invidious classification and for that reason alone is unconstitutional. Classifications based upon race are especially suspect, since they are "odi[o]us to a free people". In short, compulsory separation, apartheid, is per se discriminatory against Negroes.

For Judge Wisdom, changing the way the courts expressed the principle at the heart of equal protection law did not reflect a change of values so much as a sober judgment about the best means of vindicating such values when a substantial number of citizens were contesting the legitimacy of judicial decrees endeavoring to give such values practical force. Because "proponents of the status quo" could appropriate harm talk to defend the status quo, Judge Wisdom advocated the use of classification talk to redress the harms of which *Brown* spoke. In proposing to characterize segregation as an invidious classification that was "per se discriminatory against Negroes," Judge Wisdom was seeking to end the debate about *Brown*'s rationale by declaring that segregation was a per se constitutional wrong.

Thus, in the period when the Supreme Court adopted the strict scrutiny framework and began to emphasize classification as the core of the equal protection violation in *Brown*, many understood

> the presumption against racial classification as a strategy for insulating a body of constitutional law concerned with status harm inflicted on blacks against unremitting charges of jurisprudential illegitimacy.

The Supreme Court itself embraced and applied a rule singling out racial classifications as "suspect" in **McLaughlin v. Florida** (1964), a decade after *Brown*. *McLaughlin* held that Florida's criminal bar on interracial cohabitation violated equal protection because every legislative classification must at least be "reasonable in light of its purpose," and the classification here—i.e., the singling out of certain instances of cohabitation based on race—was not. Although ordinarily "the widest discretion is allowed [to] the legislative judgment," the Court explained, "we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." That "strong policy" rendered racial classifications "constitutionally suspect," such that only some "overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise," could save the statute. Here, the Court concluded, there was none.[*]

McLaughlin clearly teed up challenges to structurally parallel state laws prohibiting interracial marriage. In the 1950s, the Court had extended *Brown* from schools to various other public facilities—buses, beaches, swimming pools, and the like—mostly by summarily affirming, without an opinion, lower court rulings to that effect. But in *Naim v. Naim* (1956), the Court had conspicuously ducked the marriage question by declining to review a decision upholding Virginia's miscegenation law, with one Justice purportedly remarking that "one bombshell at a time is enough."

In *Loving v. Virginia* (1967), three years after *McLaughlin* and thirteen after *Brown*, the Court finally returned to that issue. As you read *Loving*, consider Siegel's observation about the "cooling" potential of classification talk and how the Court's rhetoric resembles or departs from its indictment of school segregation in *Brown* (or Black's more general indictment of Jim Crow in the article noted above).

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[*] Another case sometimes cited as the origin of a "racial classification" rule is *Korematsu v. United States* (1944), which infamously upheld military orders forcing people of Japanese ancestry into concentration camps. There, the Court had said that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny." But even as stated, this rule was limited to "civil rights" (perhaps including freedom of movement in *Korematsu*), and in any event the scrutiny actually applied was anything but "rigid." See Klarman, *supra*, at 233–34. *McLaughlin* was thus "the first time the Court . . . both articulated *and* applied a more rigorous review standard to racial classifications, requiring as justification an 'overriding' state purpose as well as a showing that the classification was 'necessary,' rather than just rationally related, to the proffered governmental interest." *Id.* at 255.

Loving v. Virginia

388 U.S. 1 (1967)

[Mildred Loving, a Black woman, and Richard Loving, a white man, married under the laws of the District of Columbia in 1958. Upon returning to their home state of Virginia, they were convicted of violating Virginia's criminal ban on interracial marriage.]

▪ CHIEF JUSTICE WARREN delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by [Virginia] to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand.

[Virginia] is now one of 16 States which prohibit and punish marriages on the basis of racial classifications. Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.

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[The] State does not contend [that] its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. [Instead], the State argues that the meaning of the Equal Protection Clause is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race.

[Because] we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. [In] the case at bar, [we] deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. [The] clear and central purpose of the 14th Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*; *Strauder v. West Virginia* [*supra*, p. V-32].

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. [At] the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

[There] is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

[II]

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner v. Oklahoma* [*supra*, p. IV-65]. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State. These convictions must be reversed.

■ JUSTICE STEWART, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin v. Florida* (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

2. Purpose and Effect (23 PAGES)

The rule that emerges from *McLaughlin v. Florida* and *Loving v. Virginia*—that laws distinguishing people by race receive "strict scrutiny"—is central to the architecture of modern equal protection law. Although this "anticlassification" conception of equal protection emerged from the Court's effort to disestablish the system of racial subordination in the South, it has proved over time to be a mixed blessing for advocates of that basic "antisubordination" purpose. For one thing, a rule against racial classifications was of no use in challenging *de facto*, rather than *de jure*, segregation. In the North, school-assignment policies were based on neighborhoods, rather than race, but residential segregation meant that the schools were segregated all the same. If *Brown* was about the wrong of racial classification by government—rather than the on-the-ground harms of attending racially segregated schools—it had nothing to say about that.*

A central question in the next phase of the Court's equal protection cases, therefore, was what *besides* a formally race-based distinction might be held unconstitutional. After all, if equal protection was going to aid in disestablishing the legacy of slavery and Jim Crow—rather than just prohibiting Jim Crow laws themselves—it would have to do so by invalidating at least some formally neutral policies, either because of how they came about or because of the pattern of their effects. Below, you'll read the Court's main decisions on those two related issues—that is, on the relevance of discriminatory purpose and of discriminatory effects to the constitutionality of a state law.

Yick Wo v. Hopkins

118 U.S. 356 (1886)

[A San Francisco ordinance made it unlawful to operate a laundry in a wooden building without a permit. Yick Wo was arrested and convicted for

* A second challenge is that the "anticlassification" rule could affirmatively interfere with governmental efforts to take account of race for purposes of *integration*, such as antidiscrimination rules or affirmative-action policies. We will turn to that issue in section V.B.3.

violating the ordinance. He challenged the conviction and introduced evidence showing that all 200 Chinese applicants had been denied permits for laundries, and only one of the approximately 80 white applicants was denied a permit.]

■ JUSTICE MATTHEWS delivered the opinion of the court.

[The Supreme Court of California] considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. [They] seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons.

[This case concerns the ordinance] in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinance as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

[The] present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution.

Although *Yick Wo* rested on the stark pattern of inequality in the results of permit applications, it seems to have inferred from those results that San Francisco was *purposely* discriminating against Chinese applicants. Indeed, the Court's opinion implies that the unstated rule of decision for permit applications was simply to reject Chinese applicants and accept others. It was almost a hundred years before the Court squarely addressed whether a pattern of results could constitute unlawful discrimination even absent an inference of discriminatory purpose. And when it did, the issue arose first in the context of the statutory cause of action for employment discrimination, under Title VII of the Civil Rights Act of 1964.

Below, you'll read *Griggs v. Duke Power Co.* (1971), the Court's seminal decision recognizing "disparate impact" liability under Title VII, and then *Washington v. Davis* (1976), where the Court declined to extend the same logic to the equal protection context.

Griggs v. Duke Power Co.

401 U.S. 424 (1971)

[Title VII of the Civil Rights Act of 1964 prohibited race discrimination in employment. Prior to Title VII's effective date, Duke Power Company had openly discriminated on the basis of race in hiring and assigning employees at a North Carolina plant: Black employees were assigned only to the "Labor Department," the lowest-paid job category. After Title VII came into effect, Duke began requiring a high school diploma or passing scores on two tests for anyone seeking a role other than in the Labor Department. These requirements disqualified Black applicants and employees at substantially higher rates than others.]

■ CHIEF JUSTICE BURGER delivered the opinion of the Court.

The objective of Congress in the enactment of Title VII [was] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

[On] the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools[.] [Congress] did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. [Discriminatory] preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has—to resort again to the fable—provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job performance ability. [The evidence] shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

[The] Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

Griggs recognized what is now known as "disparate impact" liability under Title VII. Congress later codified the Court's holding in the Civil Rights

Act of 1991. As amended, the statute now provides that discrimination is established if a plaintiff shows that "a [defendant] uses a particular employment practice that causes a disparate impact on the basis of race," and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[*]

When *Griggs* was decided, the Court had not sharply separated the logic of statutory discrimination claims from claims under the Equal Protection Clause. As one casebook explains:

> During the early 1970s, and especially in the wake of *Griggs*, many lower federal courts held that government decisions that inflicted disproportionately harmful effects on minorities violated the Equal Protection Clause unless the government could show a sufficiently important interest that justified the regulation. Similarly, lower courts applied the disparate impact test of *Griggs* in public employment cases brought under the Equal Protection Clause. Congress extended Title VII to state and local governments in the Equal Employment Opportunity Act of 1972, but many courts assumed that the tests under Title VII and the Constitution were the same. As the First Circuit explained, "[w]e cannot conceive that the words of the Fourteenth Amendment, as it has been applied in racial cases, demand anything less." *Castro v. Beecher*, 459 F.2d 725, 732-733 (1st Cir. 1972).
>
> In this period, courts also regularly looked to foreseeable effects in finding unconstitutional purposes. **Keyes v. School District No. 1** (1973) was the Court's first school desegregation decision outside the South. The Court held that "the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate." Many courts finding segregation under *Keyes* inferred unlawful purpose from the foreseeable consequences of a school board's actions. Segregative effects raised an inference of segregative purposes, shifting the burden of explanation to the school board.[†]

A few years later, however, the Court held that *Griggs* should not be extended to the equal protection context after all.

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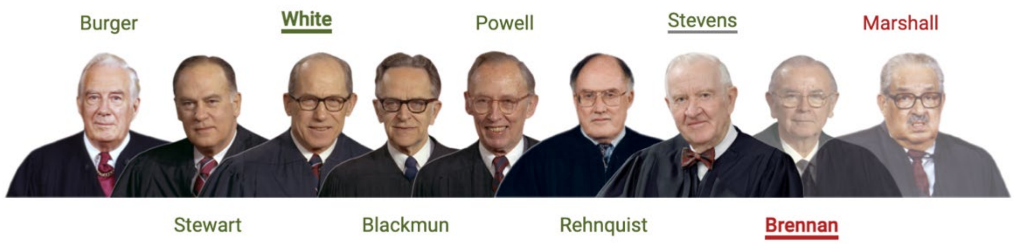
[*] 42 U.S.C. § 2000e-2(k)(1)(A).

[†] BLBAS, p. 1089.

Washington v. Davis

426 U.S. 229 (1976)



[Two Black applicants who had been rejected for positions as D.C. police officers challenged the District's reliance on "Test 21," a written exam used throughout the U.S. Civil Service, as a violation of equal protection. (At the time the lawsuit began, Title VII did not apply to public employees.) The Court of Appeals, applying *Griggs*, ruled in their favor. Regardless of the District's purpose, the court reasoned, the test had a racial disparate impact and could not be shown to adequately measure job performance.]

■ JUSTICE WHITE delivered the opinion of the Court.

Because the Court of Appeals erroneously applied the legal standards applicable to Title VII cases in resolving the constitutional issue before it, we reverse its judgment in respondents' favor.

[As] the Court of Appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today.

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

Almost 100 years ago, *Strauder v. West Virginia* established that the exclusion of Negroes from grand and petit juries in criminal proceedings violated the Equal Protection Clause, but the fact that a particular jury or a series of juries does not statistically reflect the racial composition of the community does not in itself make out an invidious discrimination forbidden by the Clause.

[The] school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is "a current condition of segregation resulting from intentional state action." "The differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." The Court has also recently rejected allegations of racial discrimination based solely on the statistically disproportionate racial impact of various provisions of the Social Security Act because "[t]he acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be."

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins* [*supra*, p. V-55]. It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an "unequal application of the law . . . as to show intentional discrimination." A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of eligible Negro jurors in a community or with racially non-neutral selection procedures. With a prima facie case made out, "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."

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. It is also not infrequently true that the discriminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds. Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. 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, *McLaughlin v. Florida* (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

[Various] Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. The cases impressively demonstrate that there is another side to the issue; but, with all due respect, to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.

As an initial matter, we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies "any person . . . equal protection of the laws" simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups. Had respondents, along with all others who had failed Test 21, whether white or black, brought an action claiming that the test denied each of them equal protection of the laws as compared with those who had passed with high enough scores to qualify them as police recruits, it is most unlikely that their challenge would have been sustained. Test 21, which is administered generally to prospective Government employees, concededly seeks to ascertain whether those who take it have acquired a particular level of verbal skill; and it is untenable that the Constitution prevents the Government from seeking modestly to upgrade the communicative abilities of its employees rather than to be satisfied with some lower level of competence, particularly where the job requires special ability to communicate orally and in writing. Respondents, as Negroes, could no more successfully claim that the test denied them equal protection than could white applicants who also failed. The conclusion would not be different in the face of proof that more Negroes than whites had been disqualified by Test 21. That other Negroes also failed to score well would, alone, not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective police recruits.

Nor on the facts of the case before us would the disproportionate impact of Test 21 warrant the conclusion that it is a purposeful device to discriminate against Negroes and hence an infringement of the constitutional rights of respondents as well as other black applicants. As we have said, the test is neutral on its face and rationally may be said to serve a purpose the Government is constitutionally empowered to pursue. Even agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race[.]

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices. [However] this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed. We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this.

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to more affluent whites.[14]

Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

■ JUSTICE STEVENS, concurring

While I agree with the Court's disposition of this case, I add these comments on the constitutional issue[.]

[The] requirement of purposeful discrimination is a common thread running through the cases summarized [by the Court]. [Frequently] the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand,

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[14] Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 300 (1972), suggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule. Silverman, Equal Protection, Economic Legislation, and Racial Discrimination, 25 Vand. L. Rev. 1183 (1972). See also Demsetz, Minorities in the Market Place, 43 N. C. L. Rev. 271 (1965).

to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.

My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Yick Wo v. Hopkins* [it] really does not matter whether the standard is phrased in terms of purpose or effect. Therefore, although I accept the statement of the general rule in the Court's opinion, I am not yet prepared to indicate how that standard should be applied in the many cases which have formulated the governing standard in different language.

[Here, the evidence] is not sufficient to overcome the presumption that a test which is this widely used by the Federal Government is in fact neutral in its effect as well as its "purpose" as that term is used in constitutional adjudication.[*]

Davis is a pivotal case because it squarely holds that, absent a facial classification triggering heightened scrutiny, some form of intent or purpose is the touchstone of an equal protection claim. It is worth considering why the Court might have opted for such a different rule in the equal protection context compared to the rule it had adopted a few years earlier in *Griggs*. Note that Chief Justice Burger and Justices Stewart, White, and Blackmun are all in the majorities in both cases, so the explanation is not just a change in personnel. What set of considerations struck them as so different here?

One partial explanation is that the gap between *Griggs* and *Davis* might actually be smaller than it has generally been thought to be. Ian Haney López argues:

> Widely denounced for demanding the nearly impossible, the direct proof of purposeful animus, *Davis* merits reconsideration. [Multiple] elements of *Davis* demonstrate instead that, like *Keyes* [mentioned above, *supra* p. V-59], it merely formalized [what Haney Lopéz calls the "contextual intent approach"] used by the Court in civil rights cases since *Brown*.
>
> First, *Davis* relied squarely on Brennan's decision in *Keyes*, embracing a contextual approach to intent. Quoting Brennan's

[*] [Justice Brennan, joined by Justice Marshall, dissented on unrelated statutory grounds. —BE]

holding that the critical element in assessing claims of discrimination was a "purpose or intent to segregate," *Davis* further explained: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts . . . ." Indeed, the Court explained that the "totality of the relevant facts" might include "the fact, if it is true, that the law bears more heavily on one race than another," thus adopting the position that discrimination could be inferred from disproportionate impact.

This reliance on *Keyes* helps explain the curious dissent by Brennan and Marshall. Though they might have been expected to object to any sharp curtailment of equal protection, when Brennan and Marshall dissented in *Davis*, they focused instead on orthogonal issues and failed to object to the intent test.

Second, writing for the majority, Justice Byron White did not just extol contextual intent, he employed it—albeit to find no discrimination:

> [W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race . . . .

As in previous civil rights cases, the Justices looked to the totality of the circumstances to evaluate, and in this case reject, the allegation of discrimination.

[Finally,] in concurrence, Stevens proposed measuring intent in terms of the foreseeable consequences of the state's actions, identifying that method as more probative than a search for subjective intent. Stevens urged attention to "objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." This position corresponded to the established norm that government purposes could be divined from the foreseeable impact of challenged policies[.]

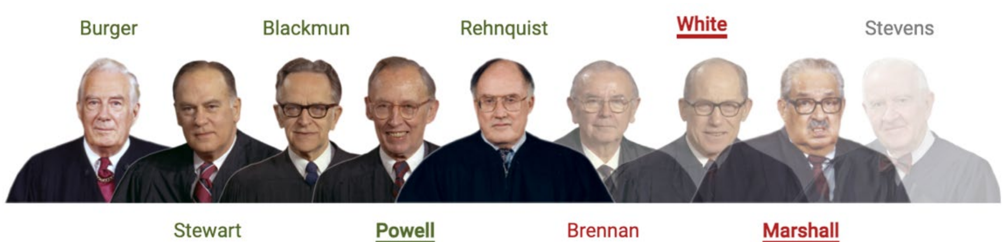
Davis, like *Keyes*, elevated a purpose to discriminate as the key to proving a constitutional violation. Also like *Keyes*, *Davis* was not interested in direct evidence of impure thoughts. Instead, it searched for illicit purposes through a contextual evaluation of the circumstances surrounding the challenged government action.[*]

[*] Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

From this point of view, the pivotal turn came not in *Davis* but in *Personnel Administrator of Massachusetts v. Feeney* (1979), decided a few years later, where the Court built on *Davis* but articulated a different notion of "intent." Before turning to *Feeney*, though, consider how *Arlington Heights v. Metropolitan Housing Development Corp.* (1977), which quickly followed *Davis*, might illustrate the "contextual intent" inquiry that Haney López describes.

Arlington Heights v. Metropolitan Housing Development Corp.

429 U.S. 252 (1977)



■ JUSTICE POWELL delivered the opinion of the Court.

[A nonprofit real estate developer challenged the refusal by the Village of Arlington Heights to rezone land from single-family to multi-family housing. The developer intended to build affordable housing, and it alleged that the Village's resistance to the project was based on race.]

I

Arlington Heights is a suburb of Chicago, located about 26 miles northwest of the downtown Loop area. Most of the land in Arlington Heights is zoned for detached single-family homes[.] [MHDC is a developer that undertook an affordable housing project to be known as Lincoln Green.]

The planned development did not conform to the Village's zoning ordinance and could not be built unless Arlington Heights rezoned the parcel to R-5, its multiple-family housing classification.

[During] the spring of 1971, the Plan Commission considered the proposal at a series of three public meetings, which drew large crowds. Although many of those attending were quite vocal and demonstrative in opposition to Lincoln Green, a number of individuals and representatives of community groups spoke in support of rezoning. Some of the comments, both from opponents and supporters, addressed what was referred to as the "social issue"—the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate-income housing, housing that would probably be racially integrated.

Many of the opponents, however, focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the Village's apartment policy, adopted by the Village Board in 1962 and amended in 1970, called for R-5 zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts. Lincoln Green did not meet this requirement, as it adjoined no commercial or manufacturing district[.]

III

Our decision last Term in *Washington* v. *Davis* made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. [*Davis*] does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes.

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it "bears more heavily on one race than another," *Davis*—may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo v. Hopkins* [*supra*, p. V-55]. [But absent] a pattern as stark as that in [*Yick Wo,*] impact alone is not determinative, and the Court must look to other evidence.

The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes. Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

[The] foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed. With these in mind, we now address the case before us.

IV

[The Court's discussion of the lower courts' findings is omitted. —BE]

We also have reviewed the evidence. The impact of the Village's decision does arguably bear more heavily on racial minorities. Minorities constitute 18% of the Chicago area population, and 40% of the income groups said to be eligible for Lincoln Green. But there is little about the sequence of events leading up to the decision that would spark suspicion. Single-family homes surround the 80-acre site, and the Village is undeniably committed to single-family homes as its dominant residential land use. The rezoning request progressed according to the usual procedures. The Plan Commission even scheduled two additional hearings, at least in part to accommodate MHDC and permit it to supplement its presentation with answers to questions generated at the first hearing.

The statements by the Plan Commission and Village Board members, as reflected in the official minutes, focused almost exclusively on the zoning aspects of the MHDC petition, and the zoning factors on which they relied are not novel criteria in the Village's rezoning decisions. [The] Village originally adopted its buffer policy long before MHDC entered the picture and has applied the policy too consistently for us to infer discriminatory purpose from its application in this case. Finally, MHDC called one member of the Village Board to the stand at trial. Nothing in her testimony supports an inference of invidious purpose.

In sum, the evidence does not warrant overturning the concurrent findings of both courts below. [MHDC] simply failed to carry [its] burden of proving that discriminatory purpose was a motivating factor in the Village's decision.[21] This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory "ultimate effect" is without independent constitutional significance.[*]

According to Haney López, "*Arlington Heights* demonstrated a crucial limit" of the "contextual intent" approach: It "provided a way to discern racial discrimination, but it could hardly mandate appropriate findings from

[21] Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered. If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. In such circumstances, there would be no justification for judicial interference with the challenged decision. But in this case respondents failed to make the required threshold showing.

[*] [JUSTICE MARSHALL (joined by JUSTICE BRENNAN) and JUSTICE WHITE each dissented on the ground that the Court should have vacated the judgment and remanded for reconsideration in light *Davis*, which was decided after the Court of Appeals had ruled. —BE]

Justices who were often obtuse about basic racial dynamics." Consider how his characterization of the factual context contrasts with the Court's:

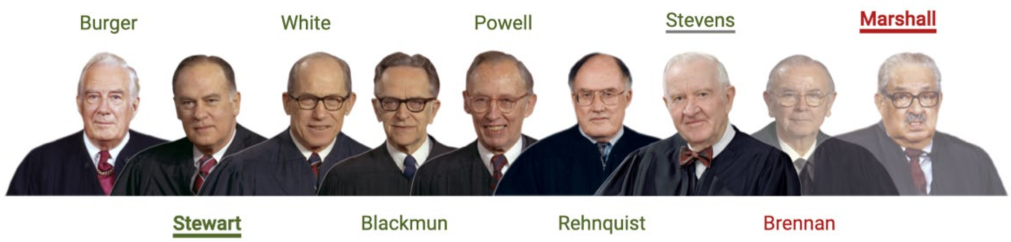
> In contentious public hearings, community members argued about "the 'social issue'—the desirability or undesirability of introducing . . . housing that would probably be racially integrated." Many of those in attendance "were quite vocal and demonstrative in opposition [to the new housing]." Despite cataloguing a list of factors that should be examined under contextual intent, in the end Powell's opinion did little more than acknowledge that "[t]he impact of the Village's decision does *arguably* bear more heavily on racial minorities." Proceeding from this extremely limited racial analysis, the majority found no constitutional violation. Yet the Chicago conurbation in the early 1970s seethed with racial tensions, including animosities shouted in community hearings and expressed in the pull of voting booth levers.
>
> Many of these tensions tied back directly to the kinetics of White flight. Twenty-six miles to the northwest of Chicago, Arlington Heights underwent a demographic shift of a striking racial character during the 1960s. As the Black population of Chicago increased, Whites fled to the suburbs. As the district court reported, "[t]he four-township northwest Cook County area, of which Arlington Heights is a part, had a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were black. Indeed, the percentage of Blacks in this area actually decreased over this ten-year span . . . ." In Arlington Heights itself, the 1970 census counted over 64,000 residents, of whom precisely 27 were African American. By refusing to acknowledge this reality, *Arlington Heights* joined a steady progression of backlash cases in which the Court averted its eyes from persistent racial stratification. Despite their formalization of the contextual approach to measuring intent, *Davis* and *Arlington Heights* rested in large part on the surmise that racism, largely past, could only take the simple form of individual bigotry against individual victims.[*]

The next case, *Personnel Administrator of Massachusetts v. Feeney* (1979), arose from an equal protection challenge based on sex rather than race. But it is a leading articulation of the discriminatory purpose standard—building directly on *Davis* and *Arlington Heights*—and it governs in both contexts today, so you'll read it here.

[*] Haney López, *supra*.

Personnel Administrator of Massachusetts v. Feeney

442 U.S. 256 (1979)



[A Massachusetts law required the state civil service to consider qualifying veterans ahead of others for any open position. Helen Feeney challenged this hiring preference on the ground that it overwhelmingly excluded women from consideration for the best civil service jobs—which, she argued, violated her right to equal protection.]

■ JUSTICE STEWART delivered the opinion of the Court.

When this litigation was commenced, [over] 98% of the veterans in Massachusetts were male; only 1.8% were female. The impact of the veterans' preference law upon the public employment opportunities of women has thus been severe. This impact lies at the heart of the appellee's federal constitutional claim.

[The] equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification. Most laws classify, and many affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law. When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern. The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.

In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification. *Railway Express Agency v. New York*. When some other independent right is not at stake, and when there is no "reason to infer antipathy," it is presumed that "even improvident decisions will eventually be rectified by the democratic process[.]"

Certain classifications, however, in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown v. Board of Education*; *McLaughlin v. Florida*. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo v. Hopkins*. [Much as with race, the Court's precedents with respect to sex] dictate that any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment.

[The] cases of *Washington* v. *Davis* [*supra*, p. V-60] and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* [*supra*, p. V-66] recognize that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may still be at work. But those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results.

[The] dispositive question [here] is whether [Feeney] has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation. [She] points to two basic factors which in her view distinguish [the statute] from the neutral rules at issue in the *Washington* v. *Davis* and *Arlington Heights* cases. The first is the nature of the preference, which is said to be demonstrably gender-biased in the sense that it favors a status reserved under federal military policy primarily to men. The second concerns the impact of the absolute lifetime preference upon the employment opportunities of women, an impact claimed to be too inevitable to have been unintended. [Feeney] contends that these factors, coupled with the fact that the preference itself has little if any relevance to actual job performance, more than suffice to prove the discriminatory intent required to establish a constitutional violation.

[The] contention that this veterans' preference is "inherently nonneutral" or "gender-biased" presumes that the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans. [But the] District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently nonneutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

[The] appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

> "Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature

> did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are *that* inevitable, can they meaningfully be described as unintended?"

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences.[24] It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[25] Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service. To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. [The] preference formula itself, which is the focal point of this challenge, was first adopted—so it appears from this record—out of a perceived need to help a small group of older Civil War veterans. It has since been reaffirmed and extended only to cover new veterans. When the totality of legislative actions establishing and extending the Massachusetts veterans' preference are considered, the law remains what it purports to be: a preference for veterans of either sex over nonveterans of either sex, not for men over women.

■ JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

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[24] Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation."

[25] This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the preference here], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When, as here, the impact is essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when, as here, the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof.

[In] my judgment, Massachusetts' choice of an absolute veterans' preference system evinces purposeful gender-based discrimination. And because the statutory scheme bears no substantial relationship to a legitimate governmental objective, it cannot withstand scrutiny under the Equal Protection Clause.

[That] a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to disadvantage another. Individuals in general and lawmakers in particular frequently act for a variety of reasons. [Thus,] the critical constitutional inquiry is not whether an illicit consideration was the primary or but-for cause of a decision, but rather whether it had an appreciable role in shaping a given legislative enactment.

[Moreover,] since reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable. To discern the purposes underlying facially neutral policies, this Court has therefore considered the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available.

[In] the instant case, the impact of the Massachusetts statute on women is undisputed. [In practice,] this preference supplants test results as the determinant of upper level civil service appointments. Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. [Where] the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme.

Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil service regulations exempted from operation of the preference any job requisitions "especially calling for women." [Particularly] when viewed against the range of less discriminatory alternatives available to assist veterans,[2] Massachusetts' choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral.[*]

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[2] Only four States afford a preference comparable in scope to that of Massachusetts. Other States and the Federal Government grant point or tie-breaking preferences that do not foreclose opportunities for women.

[*] [A short concurrence by JUSTICE STEVENS, suggesting that the total number of men disadvantaged by the hiring preference was large enough to refute the claim of discriminatory purpose, is omitted. —BE]

PURPOSE, INDIFFERENCE, AND SOCIAL MEANING

As you've seen, *Feeney*, *Davis*, and *Arlington Heights* all grapple with what, other than a race- or sex-based classification on the face of the law, should trigger scrutiny or invalidation under the Equal Protection Clause. They clearly reject a *Griggs*-like rule that would ground liability on unjustified disparate impact alone; they require that something also be proved about *why* the government acted as it did. Even with *Feeney* on the books, however, what exactly this extra ingredient amounts to is not entirely clear. And, of course, what *should* be required would remain contested in any event.

At one extreme, it could be that only "discriminatory purpose" in the sense of a specific intent to bring about some (adverse) result for members of a protected group suffices. *Feeney* arguably takes that position—sometimes described as a "malice" standard—when it says that "the decisionmaker [must have] selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."* But, on the other hand, that reading of *Feeney* could yield results that even the more conservative Justices might find absurd. Note, too, that cases such as *Cleburne v. Cleburne Living Center* [*supra*, p. V-10] and *Romer v. Evans* [*supra*, p. V-23]—which also seem to embody a conception of constitutionally forbidden purpose—came after *Feeney*.

What, short of malice or specific intent (but beyond unjustified disparate impact alone), might plausibly suffice to invalidate a law or trigger heightened scrutiny? Here it's helpful to return to the question of what, substantively, equal protection actually requires. If the answer is equal respect and concern, then even laws that lack a malicious purpose could certainly fail to afford equal protection. For one thing, such a law might still result from "selective sympathy and indifference"† toward the interests of different groups. That phenomenon is like intent or purpose in that it is a feature of *how* or *why* a decisionmaker decided as they did—the reasons to which they were and were not responsive—rather than of the *outcomes* that happen to result. But a rule that aimed to guard against selective indifference would have much more practical bite than a rule that aimed to guard only against malice. And such a rule would presumably make evidence of the distribution of effects far more probative as well. With respect to the facts of *Feeney*, for example, contrast these three possible descriptions of what happened:

1) The legislature adopted or preserved the veterans preference in order to exclude women from the top of the civil service.

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* See, e.g., Haney López, *supra*; BLBAS, p. 1098.

† See, e.g., Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 26–28 (1976).

2) The legislature adopted or preserved the veterans preference, knowing that it would thereby exclude women from the top of the civil service.

3) The legislature adopted or preserved the veterans preference, knowing that it would thereby exclude women from the top of the civil service; moreover, the legislature would not have found that foreseeable result an acceptable price to pay for the veterans preference but for the operation of gender stereotypes that made the absence of women from the top of the civil service seem normal and unproblematic to the legislators.

Under *Feeney*, it is clear that (2) does not state a constitutional violation. But does *Feeney* settle the constitutional status of (3)?

A further puzzle about "discriminatory purpose" doctrine concerns the difficulty—perhaps incoherence—of imputing genuine, human-like intentions to a state or its legislature in the first place. This concern is often raised as an argument for textualism in the statutory-interpretation context, but it is important here as well. Most of the actions challenged in equal protection cases are taken by multi-member bodies, where different members often have different intentions. Insofar as individual legislators have a genuine purpose, moreover, it may often be simply to please (or not upset) their constituents. In *Arlington Heights*, for instance, the members of the Village Board might have been entirely indifferent to *why* their constituents opposed the zoning petition. But it seems untenable that this fact alone should insulate the decision from any equal protection challenge, no matter how blatant the constituents' own racist motives might be.

If talk of lawmakers' "intent" or "purpose" can't be taken at face value, then, perhaps it is, at least sometimes, a roundabout way of talking about *social meaning*. The social meaning of a law is, roughly, the "significance that a competent, informed participant in a society would attach to a statute as an indicator of prevailing societal values."[*] This is essentially the same idea that Charles Black deployed in his famous argument that "the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority."[†] A law's social meaning might be *affected* by what particular legislators say about their reasons for supporting it, but perhaps it is ultimately the meaning rather than the actual mental states that matters (and that we sometimes describe, confusingly, as the law's "purpose").

One case discussed by some proponents of this approach is **City of Memphis v. Greene** (1981). Memphis had permanently blocked off part of a street that ran through a white community, but that had been used mostly

[*] Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 549 (2016).

[†] *Supra*, p. V-49. For an extended argument that equal protection law should be concerned with the demeaning social meaning of an action, see DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? (2008).

by residents of a predominantly Black community to the north to access a city park. The city defended its actions as intended to preserve the white neighborhood's residential character and ameliorate traffic concerns. The Court essentially accepted those justifications as race-neutral and upheld the city's decision.

In an article advocating a turn away from considerations of "purpose" and toward social meaning, Richard Fallon suggests *Greene* was wrongly decided. "[T]he combined effect of the street closure in disproportionately accommodating whites (who understandably disliked having heavy traffic in their neighborhood) and disadvantaging blacks (who had to traverse greater distances on their way to and from their homes) could reasonably have been understood as conveying an implicit message concerning favored and disfavored racial groups," and "evidence of specifically discriminatory subjective intentions on the part of some members of the decisionmaking body would have enhanced that message."[*] Likewise, in an important early article arguing that equal protection doctrine fails to reckon with "unconscious racism," Charles Lawrence wrote:

> Individual members of the city council might well have been unaware that their continuing need to maintain their superiority over blacks, or their failure to empathize with how construction of the wall would make blacks feel, influenced their decision. But if one were to ask even the most self-deluded among them what the residents of Memphis would take the existence of the wall to mean, the obvious answer would be difficult to avoid. If one told the story leading to the wall's construction while omitting one vital fact—the race of those whose vehicular traffic the barrier excluded—and then asked Memphis citizens to describe the residents of the community claiming injury, few, if any, would not guess that they were black.
>
> The current racial meanings of governmental actions are strong evidence that the process defects of group vilification and misapprehension of costs and benefits have occurred whether or not the decisionmakers were conscious that race played a part in their decisionmaking. Moreover, actions that have racial meaning within the culture are also those actions that carry a stigma for which we should have special concern.[†]

We'll return to the possible relevance of a law's social meaning to equal protection doctrine, because considerations of this sort seem to have played a role in at least two other significant lines of cases: the embrace of colorblindness as a limit on affirmative-action policies (*infra* section V.B.3); and

[*] Fallon, *supra*, at 586.

[†] Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987).

the invalidation of laws excluding same-sex couples from marriage (*infra* section V.D).

3. Colorblindness (44 PAGES)

Whereas *Brown* and its immediate progeny used the Equal Protection Clause to check or dismantle racial hierarchy—and cases like *Washington v. Davis* stand for the limits that the Court imposed on its own undertaking in that regard—a third set of cases involves the use of equal protection to curb affirmative efforts by state actors to bring about some form of integration or racial repair. The most prominent of these cases concern affirmative action policies adopted by state universities (or private universities that are required by statute to comply with equal protection principles). But closely related issues also arise in connection with efforts to integrate public schools by considering race in making school assignments and, at least at one time, affirmative action in government contracting as well. What unites the cases in these areas is their embrace of a constitutional presumption of "colorblindness"—a rule that state action is unconstitutional, or at least triggers strict scrutiny, whenever it treats people differently on the basis of race.

Before turning to the cases, you'll first read an excerpt from a chapter by Elizabeth Anderson that maps the terrain of plausible justifications for affirmative-action programs and unpacks their different logics. Over the course of this section, consider which of the different models that Anderson identifies seem to have been at issue in the different cases and where each stands by the time we reach the present.

Understanding Affirmative Action

Elizabeth Anderson*

Four Models of Affirmative Action

Since the demise of court-ordered busing for school integration, affirmative action has been the most controversial race-conscious policy in the United States. By "affirmative action," I refer to any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through "outreach" (targeting the group for publicity and invitations to participate) or "preference" (using group membership as criteria for selecting participants). In the United States, affirmative action is practiced in three domains: employment, education, and government contracting.

This chapter compares four models of race-based affirmative action in the United States: compensatory, diversity, discrimination-blocking, and integrative. The compensatory model represents racial preferences as a way to compensate for the effects of past discrimination. Since blacks have suffered discrimination, they are entitled to compensation in the form of

* Excerpt from ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION, ch. 7 (2010).

access to the opportunities that discrimination has unjustly denied them. Compensatory affirmative action is backward looking: it aims to restore justice by undoing wrongs of the past. Its principal legal foundation can be traced to Justice Blackmun's concurring opinion in *United Steelworkers of America v. Weber*, which upheld affirmative action in employment [as not prohibited by Title VII of the Civil Rights Act of 1964].

The diversity model represents racial preferences as a means to increase the cultural and epistemic diversity of the institution practicing it. In this view, blacks, by virtue of their historical and cultural differences from other groups, have diverse ideas and perspectives from other racial groups. This epistemic diversity enriches the educational mission of schools, the public discourse needed to advance democracy, and the ability of corporations to design and market products and services that appeal to diverse consumers. This is a present-oriented and forward-looking rationale: it views the participation of racially diverse individuals as advancing institutional objectives. The principal legal foundation of this rationale is Justice Powell's opinion in *Regents of the University of California v. Bakke*, supporting race-based affirmative action in college admissions.

The discrimination-blocking model represents affirmative action as a tool for counteracting continuing discrimination. It is founded on the fact that, without pressure on institutions to meet race-conscious goals, antidiscrimination laws fail to produce race-neutral hiring and promotion in the face of entrenched and often unconscious discriminatory habits. This is a present-oriented rationale: hiring goals and timetables are means to force institutions to stop discriminating. The principal legal foundations for this model [include] *Sheet Metal Workers v. EEOC* (1986), which affirmed the power of federal courts to order employers found guilty of discrimination to adopt remedial affirmative action programs.

The integrative model represents racial preferences as a means to racially integrate the main institutions of civil society. Segregation is the linchpin of unjust systematic race-based disadvantage because it blocks blacks' access to public and consumer goods, employment, and financial, human, social, and cultural capital and causes pervasive antiblack racial stigmatization and discrimination. Integration helps dismantle these underlying causes of race-based injustice. Integration is also needed to advance a democratic culture, by providing opportunities for citizens from all walks of life to communicate on matters of public interest, forge cooperative relationships, and construct an integrated collective identity, and to advance democratic governance, by creating an integrated and thereby more competent and accountable elite, better disposed and able to honor the rights and serve the interests of all members of society, regardless of their group identities. This is a forward-looking rationale: it views the integration of mainstream institutions as essential to advancing justice and democracy. The principal legal foundation of the integrative rationale for affirmative action can be traced to a line of cases from *Brown v. Board of Education* (prohibiting racial segregation of schools), including *Swann v.*

Charlotte-Mecklenburg Board of Education (upholding race-based assignment of students as a means to desegregate schools), and culminating in *Grutter v. Bollinger* (upholding race-based affirmative action admissions at the University of Michigan Law School).

Public discourse about affirmative action is dominated by the compensatory and diversity models. The discrimination-blocking and integrative models are not well understood. I shall argue that the latter models have several virtues not shared by the former[.]

1. The Compensatory Model

Every model of race-based affirmative action offers an account of its purpose, which determines (1) which agents may practice affirmative action, (2) who should be a targeted beneficiary, and why, (3) how much weight may be given to group preferences, (4) who should bear the costs of affirmative action, and (5) the meaning and relevance of race to the purpose of affirmative action. In addition, if the model is based on considerations of justice, it also presupposes (6) an account of the causes of race-based injustice.

The compensatory rationale typically draws on an individualized model of compensatory justice. In this model, if a person has suffered from wrongdoing, she is entitled to compensation from the wrongdoer[.] This implies that (1) the agents who should practice affirmative action are those who had previously engaged in racial discrimination; (2) the beneficiaries are targeted by virtue of being the victims of past racial discrimination by the agents; (3) they should be compensated to the extent of the harm they suffered, and (4) the agents who had engaged in discrimination should bear the costs. Membership in a disadvantaged racial group is a relevant basis for targeting beneficiaries for affirmative action, on the assumption that (5) membership serves as an accurate proxy for the morally relevant characteristic of having been victimized by racial discrimination. This model supposes that (6) past racial discrimination is the main cause of current race-based injustice.

Critics object that the practice of affirmative action does not fit the compensatory rationale very well. Schools, government bodies, and employers practice affirmative action even if they have not been found guilty of discrimination. They do not attempt to identify and compensate the victims of their own discrimination but target their benefits to others on the basis of their shared racial identity with those presumed to be victims[.] [Those] who bear the costs of the policy are not its practitioners, but innocent whites and Asians who are displaced by racial preferences. Finally, race is an imperfect proxy for victimization-by-discrimination. It is overinclusive[and] underinclusive[.]

Because affirmative action fails to meet the exacting standards of individualized remedies, the compensatory model is sometimes cast in terms of group compensation. In this view, society is fundamentally divided into racial groups who constitute the relevant units of moral agency and considerability. A discriminatory act by one white constitutes whites as a debtor class, creating a group obligation to compensate that could be discharged by any other white. A discriminatory injury to any black constitutes blacks as a creditor class, creating a group entitlement in which an injury to one black can be made up by a preference to any other. This group model does a better job fitting the practice of affirmative action to a rationale. But it is unacceptable. Individuals, not racial groups, are the relevant units of moral entitlement.

[The] compensatory model must therefore address the objections lodged against it within an individualist conception of justice. [Many] discriminatory policies inflict their damage probabilistically, like air pollution. In pollution cases, that the causal connection is statistical and not provable in any single instance does not undermine the case for compensation in a class action suit. Racial discrimination often works the same way[.]

The "innocent white" objection to who bears the costs of affirmative action also has little normative force. [Whenever] a corporation helps the victims of some wrongdoing, the costs are borne by innocent individuals who are or would like to be associated with it. Firms that offered jobs as compensation to the survivors of 9/11 victims denied these jobs to other innocent job applicants. We observe no protests about such compensatory acts, nor should we.

[As] long as discrimination or its effects persist, there will be innocent victims suffering unjust burdens. The only question is whether these burdens should be borne exclusively by disadvantaged racial groups or more widely shared. There is no injustice in sharing the costs of widespread injustice. [For example, the fact that] one has neither committed nor benefited from any crime constitutes no claim against paying the taxes used to help the victims of crime.

[Thus,] the compensatory model of affirmative action can be defended against common objections. Yet it suffers from an inadequate conception of the wrongs its beneficiaries suffer. In focusing on past discrimination, it suggests that discrimination is only in the past, and that current group disadvantage consists only of the inherited effects of past events. This inspires impatience about the continuation of the policy once antidiscrimination laws have been in place for decades[.] The compensatory model also does not offer a satisfactory explanation of why affirmative action, which is practiced only by selective colleges, large corporations, and governments, is an appropriate form of compensation. It benefits only a small proportion of the members of such groups, often the best-off among them[.] Rough compensatory justice would be better served if we distributed lump-sum cash reparations to every member of the disadvantaged group, or concentrated compensation on the least well-off within the group.

Finally, the compensatory model offers an inadequate conception of the role of beneficiaries in the institutions practicing affirmative action. They are represented as passive victims of injustice, rather than as active contributors whose participation contributes to the mission of these institutions. This representation feeds stigmatizing thoughts that affirmative action's beneficiaries are not pulling their own weight in these institutions, that they do not deserve to be there, and that they lack real merit[.]

2. The Diversity Model

The diversity model represents affirmative action as promoting a "robust exchange of ideas." In this model, (1) the institutions eligible to practice affirmative action are those whose mission would profit from a greater diversity of ideas brought by participants. (2) The targeted beneficiaries should be members of any group that would contribute to the epistemic diversity of the institution. (3) The weight given to preferences for including members from any group should be proportional to the diversity of ideas they bring, and inversely proportional to the degree to which they are already represented. (4) Those who should bear the costs of affirmative action are those whose perspectives and ideas are already well represented in the institution. (5) Race is presumed relevant to diversity because it is viewed as a proxy for possession of ideas distinct from well-represented groups. Finally, (6) individuals are targeted by affirmative action not to remedy injustice, but to advance the missions of the institutions that practice it.

The diversity model answers the surviving objections against the compensatory model. It is future-oriented, locating the point of affirmative action in continuing institutional needs for epistemic diversity rather than in receding events that, over time, lose their claim on how current institutions should be structured. It explains why affirmative action favors the more advantaged members of targeted groups. To effectively contribute to epistemic diversity, the beneficiaries must be otherwise qualified to perform up to the institution's standards. The more advantaged within the targeted groups possess those qualifications to a greater degree. The diversity model offers a nonstigmatizing account of why members of targeted racial groups are preferred: they bring valuable features to the institution—epistemic diversity—that advance the institution's mission. This is a meritocratic rationale, which represents the targets of affirmative action as contributing, deserving agents rather than as pitiful subjects of an institution's beneficence. It gives other participants positive reasons to value the presence of affirmative action's beneficiaries.

Yet the diversity model, when divorced from the aims of social justice, suffers from several flaws. First, its rationale does not fit the *scope* of the practice. It [does not seem to justify] affirmative action in employment for routinized blue- and pink-collar jobs that do not ask their occupants to contribute ideas[.] [It] even has a hard time explaining the scope of racial preferences by educational institutions. [It] is hard to see the cognitive relevance of racial diversity to investigations in mathematics, engineering, or the physical sciences. Yet schools extend racial preferences in admission to graduate programs in the latter fields.

Second, the diversity model, when separated from considerations of justice, cannot account for the special *weight* institutions give to race compared to other dimensions of diversity. In principle, race should figure no more than other background factors that affect a person's perspective, such as practicing an unusual religion, having lived abroad, or having grown up on a farm. In practice, schools give race enough weight to produce a "critical mass" of students from disadvantaged racial groups but are satisfied with mere token representation of people with other unusual backgrounds. [Blacks] in the United States [bring] less cultural diversity to American schools than blacks, Asians, and Latinos from abroad and are already more heavily represented than the latter in most schools. Yet schools still place greater weight on admitting American blacks than the latter groups.

Third, the diversity model, when separated from justice concerns, promotes racial myths that may be stigmatizing. In stressing how different African Americans are from other Americans, it potentially primes stereotypes of blacks as alien and blocks recognition of common perspectives and identities. ["R]ace" denotes an identity group, a social category that has been made the basis of social inequality by means of in-group closure and out-group stigmatization. This is not the same as a cultural group.

[Finally,] the diversity model, when divorced from social justice, raises worries about the justification of racial preferences in terms of institutional goals. If such goals are sufficient to justify racial preferences in favor of disadvantaged groups, why aren't they sufficient to justify discrimination *against* these groups? People in racially heterogeneous groups feel more stress and conflict than when they are in racially homogeneous groups. Yet diversity advocates do not allow that an institution's interest in promoting internal work group harmony by means of racial homogeneity may override its interest in epistemic diversity.

An adequate model of affirmative action would explain the full scope and weight given to race in the institutions that practice it [and avoid these other weaknesses of the diversity model].

3. The Discrimination-Blocking Model

The discrimination-blocking model of affirmative action focuses on the practical difficulties of stopping current discrimination in a world saturated with stigmatizing stereotypes of disadvantaged groups and structured by entrenched habits that favor advantaged groups. [In] this model (1) the agents eligible to practice affirmative action are any institutions that are still discriminating. (2) The targets of affirmative action are qualified members of disadvantaged groups who would not gain access to opportunities in the absence of affirmative action. (3) Discrimination-blocking programs generally allow only "tie-breaking" preferences for members of disadvantaged groups. (4) The costs to innocents are very small since racial preferences that override meritocratic criteria are generally not involved. (5) Race, in the discrimination-blocking model, helps identify those who, but for affirmative action, would be victims of ongoing discrimination. (6) The discrimination-blocking model represents *current* discrimination as the fundamental cause of unjust race-based disadvantage.

[Why] does discrimination persist, despite antidiscrimination laws? [Habits] and unconscious biases continue to operate to the extent that they are not checked by countervailing motives. Hiring goals and timetables help supply such motives. [Critics] of such plans complain that they amount to a racial spoils system, reflecting a divisive conception of society as sorted into racial groups, each entitled to its proportional share of opportunities. Yet these plans do not generally require hiring goals out of line with the background qualifications and employment preferences of individuals in each group, as a "proportional representation" system would. [Rather, they rest on a premise that] [s]ubstantial, persistent, unexplained group inequalities should be closed because their most likely cause is ongoing discrimination. Since there is no meritocratic justification for these inequalities, whatever business practices are generating them amount to arbitrary obstacles to equal opportunity. The purpose of hiring goals is thus to block current discrimination that unjustly deprives individuals of equal opportunity.

[The] discrimination-blocking model is indispensable to understanding how affirmative action operates in employment contexts. It introduces no novel or controversial moral principles. It simply requires recognition of the difficulty of avoiding discrimination in contexts organized around discriminatory habits and pervaded by group stigmatization. In the absence of concerted pressure to produce results, discrimination continues to undermine opportunities for stigmatized groups. Discrimination-blocking affirmative action is simply an application of Aristotle's point that to do the right thing in the face of a contrary inclination, we must drag ourselves in the opposite direction, as an archer must aim against the wind to hit the bull's-eye.

Although indispensable, the discrimination-blocking model offers [an] incomplete account of current obstacles to equal opportunity: it focuses only on current discrimination, not on segregation and the lingering effects of past discrimination. This defect is particularly significant for affirmative action in higher education. Human capital deficits are among the stubborn legacies of historic discrimination, perpetuated by continuing segregation. To correct for these deficits, selective educational institutions that practice affirmative action give a weight to race that exceeds what can be justified on a discrimination-blocking model. To justify this weight, we need to resort to compensatory or integrative models of affirmative action.

4. The Integrative Model

The integrative model of affirmative action begins with the observation that Americans live in a profoundly racially segregated society. *De facto* racial segregation unjustly impedes socioeconomic opportunities for disadvantaged racial groups, causes racial stigmatization and discrimination, and is inconsistent with a fully democratic society. To remedy these problems, we need to practice racial integration. In this model, (1) the agents eligible to practice affirmative action are any institutions capable of promoting racial integration. (2) The targets of affirmative action are those individuals best placed to act as agents of racial integration. (3) The weight given to preferences for admitting these targets depends on how much integration is needed for its positive effects to be realized. I shall argue below that this justifies seeking a critical mass of any segregated and stigmatized racial group. (4) Since all citizens have a duty to promote the justice of social arrangements, and integration is instrumental to justice, it is just to expect all citizens to bear their fair share of the costs of integration. (5) Race, in the integrative model, is not a proxy for some other relevant characteristics but directly relevant to the integrative mission of affirmative action. (6) The integrative model represents racial segregation and stigmatization as the fundamental causes of unjust race-based disadvantage, treating discrimination as but one consequence of stigmatization. Affirmative action is a tool for dismantling the continuing causes of unjust race-based disadvantage. It offers a comprehensive defense of affirmative action that fits the practice and meets or avoids the objections against the other three models.

The integrative model solves the scope problem by covering all institutions that practice affirmative action. Institutions may promote integration whether or not they have or are engaged in racial discrimination. The integrative model has wider scope than the diversity model because it affirms that integration plays multiple roles, in addition to epistemic ones, in a just and democratic society. Across all domains of interracial interaction, integrative affirmative action helps people learn to cooperate across racial lines, breaks down racial stigmatization, interracial discomfort, and habits of segregation, makes decision makers more aware of and accountable for the impact of their decisions on all racial groups, and invigorates democratic exchange in civil society[.]

Integration also has distinct roles to play in particular domains. For professional schools, affirmative action helps remedy the severe deficit residents of segregated neighborhoods suffer in access to professional services. [For example,] Black physicians are far more likely than white physicians to locate in underserved minority neighborhoods and serve far more black, Latino, and Medicaid patients, even after controlling for their location. [Discussion of other domains omitted. —BE]

[The] integrative model offers a nonstigmatizing representation of affirmative action's targets. It identifies the proper targets of affirmative action as those who can function as agents of integration and destigmatization. They are not passive recipients of compensation delivered to them as victims, but partners with the practitioners of affirmative action in breaking down the barriers that block segregated groups' access to mainstream opportunities. [Beneficiaries] therefore win their places on the merits, by virtue of their capacity to contribute to institutional goals[, including the goal of advancing justice,] through their performance in their role. The beneficiaries of affirmative action play this role in multiple ways, corresponding to the ways integration breaks down segregation and stigmatization and promotes democracy. The targets of affirmative action remain linked to social networks of family, neighborhood, and friendship that are largely black and typically poorer than they are. They serve as sources of social capital to less advantaged black relatives, acquaintances, and neighbors. They transmit human and cultural capital (including knowledge of how to operate successfully in integrated settings). Through demonstrably successful functioning in their roles, the targets of affirmative action help break down racial stereotypes that underlie stigmatization and discrimination. [On] a larger scale, affirmative action aims to break the public association of blacks with poverty and associated dysfunctional behaviors by moving blacks to secure middle-class positions, reproduced across generations. This reduces statistical discrimination against blacks and destigmatizes by reducing the usefulness of race as a basis for making inferences about an individual's position in society and conduct correlated with that position. Finally, the targets of affirmative action advance the democratic project of integrating civil society in central sites—schools and workplaces—making information about the asymmetric impacts of policies and other social phenomena on segregated communities more salient to others, and holding decision makers accountable for responding to this information.

The integrative model's representation of beneficiaries of affirmative action as agents of justice explains why affirmative action programs tend to select from within the disadvantaged racial groups those who are likely to be better skilled and more highly educated, who have suffered less from the racial caste system than their peers. These individuals are usually better able to perform their integrative roles since successful integration requires successful functioning in the position to which affirmative action opens access. The integrative model is based on a recognition of the fact that sometimes an effective way to help the disadvantaged is to give opportunities to their more privileged peers, who will then be better situated to help them.

[Race], in the integrative model, does not function fundamentally as a proxy for some other morally relevant property. It is the direct object of moral and instrumental concern. It refers not to a biological classification, but to an identity that has been constituted as a ground of categorical inequality through segregation and stigmatization. The causal power of a person's race to break down race-based barriers to opportunity through integration is directly linked to these features. If the problem is racial segregation, then the most direct way to remedy this problem is to practice racial integration. Integration directly opens up hoarded opportunities to the targets of affirmative action and their ingroup associates. As the contact hypothesis holds, institutionally supported cooperative interaction with members of stigmatized groups on terms of equality reduces stigmatization of and discrimination against them. As the accountability effect holds, the presence of members of stigmatized or excluded groups as equals in decision-making bodies reduces discrimination and increases responsible deliberation by decision makers.

The remainder of this section is organized around the two questions that we've seen recur across the individual-rights cases. First, what standard of review should apply? As you'll see, the Court has settled on a "symmetric" rule that subjects affirmative-action policies, just like Jim Crow laws, to strict scrutiny. Second, do the policies at issue withstand such review? On that question, the Court has shifted dramatically over time.

STRICT SCRUTINY AND THE COURT'S EMBRACE OF SYMMETRY

As a doctrinal matter, the natural first question about equal protection challenges to affirmative-action measures is whether "strict scrutiny" applies. The Court first addressed that issue in *Regents of the University of California v. Bakke* (1978), where it struck down a state medical school's admissions policy reserving 16 of 100 seats for "Blacks," "Chicanos," "Asians," and "American Indians." There was no majority opinion, but Justice Powell's opinion—which invalidated the policy on comparatively narrow grounds—was treated for many years as the controlling statement of the law. Justice Powell concluded, in short, that all racial classifications triggered strict scrutiny, but that certain affirmative-action policies—such as the one employed by Harvard College, which he attached to his opinion as an appendix—could withstand it.

For the moment, we will focus just on the threshold holding about the standard of review. As you read, consider how Justice Powell's argument for strict scrutiny and the joint dissenters' argument against it each build on or depart from the Court's prior thinking about equal protection, race, and its own role.

Regents of the University of California v. Bakke

438 U.S. 265 (1978)

▪ JUSTICE POWELL announced the judgment of the Court.

[The] guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley* v. *Kraemer* (1948). Accord, *Missouri ex rel. Gaines* v. *Canada* [*supra*, p. V-39]; *McCabe* v. *Atchison, T. & S. F. R. Co* [*supra*, p. V-38]. 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.

Nevertheless, [the state] argues [that] white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co.*, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. *See, e.g., Skinner v. Oklahoma* (1942). These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, *e.g., Massachusetts Board of Retirement v. Murgia* (1976) (age); *San Antonio Independent School Dist. v. Rodriguez* (1973) [*infra*, p. V-217] (wealth); *Graham* v. *Richardson* (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. [They] are inherently suspect and thus call for the most exacting judicial examination.

[The] difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable. The concepts of "majority" or "minority" necessarily reflect temporary arrangements and political judgments. [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability would then be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.

Moreover, there are serious problems of justice connected with the idea of preference itself. [Preferential] programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. [And] there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

[Disparate] constitutional tolerance of [racial] classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation.

[Political] judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.

▪ JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," summed up by the shorthand phrase "[o]ur Constitution is color-blind," *Plessy* v. *Ferguson* (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. [Our] cases have always implied that an "overriding statutory purpose," *McLaughlin* v. *Florida* (1964), could be found that would justify racial classifications. [Accordingly,] we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

[Unquestionably] we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny" and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. But no fundamental right is involved here. Nor do whites as a class have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School Dist. v. Rodriguez* [*infra*, p. V-217]; see *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 n. 4 (1938).

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant and therefore prohibited." Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more. See *Yick Wo v. Hopkins*; accord, *Strauder* v. *West Virginia*; *Brown v. Board of Education*; *McLaughlin* v. *Florida*; *Loving* v. *Virginia*.

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational-basis standard of review that is the very least that is always applied in equal protection cases. [Instead], a number of considerations [lead] us to conclude that racial classifications designed to further remedial purposes "must serve important governmental objectives and must be substantially related to achievement of those objectives."

[In] sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be strict—not "strict" in theory and fatal in fact, because it is stigma that causes fatality—but strict and searching nonetheless.

In the decades after *Bakke*, Justice Powell's conclusion about the standard of review—i.e., that even racial classifications benefiting members of subordinated racial groups should trigger strict scrutiny—became a square holding of the Court.

At first, a plurality of the Court applied a more lenient standard to *federal* affirmative action programs. In another splintered decision, **Fullilove v. Klutznick** (1980), the Court upheld the "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977. The law required that 10% of federal funds allocated for local public works projects be used to procure services or supplies from minority-owned businesses, with "minority" defined as "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Chief Justice Burger announced the judgment of the Court and delivered an opinion joined by Justices White and Powell, concluding:

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the [power] "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. [The] clear objective of the MBE provision is [to] ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity. [Congress,] after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives[.]

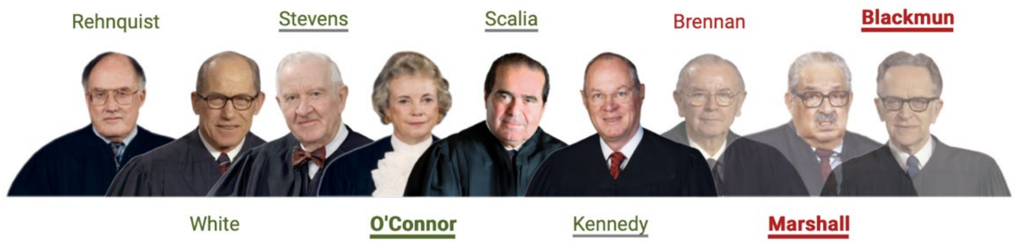
Justice Stewart dissented, joined by Justice Rehnquist. Upholding the statute was wrong, they said, "for the same reason that *Plessy v. Ferguson* was wrong[:] The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government."[*]

In two more contracting cases, however, the Court first solidified the strict-scrutiny standard for affirmative-action policies adopted at the state level, and then abandoned *Fullilove*'s distinction between the state and federal contexts.

[*] JUSTICE STEVENS dissented on the narrower ground that the statute lumped together "six racial subclasses"—without any reason to think that "each . . . is equally entitled to reparations from the United States Government"—and generally amounted to a "slapdash statute" that would effect "a random distribution of benefits on racial lines."

City of Richmond v. J.A. Croson Co.

488 U.S. 469 (1989)



[Richmond, Virginia, adopted a plan much like the federal MBE provision upheld in *Fullilove*. The City required contractors to whom it awarded construction contracts to subcontract at least 30% of the contract amount with MBEs, defined as businesses at least 51% owned and controlled by minority group members. J.A. Croson Company, a plumbing contractor, challenged the set-aside requirement.]

■ JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Part II, in which CHIEF JUSTICE REHNQUIST and JUSTICE WHITE joined, and an opinion with respect to Part III-A, in which CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, and JUSTICE KENNEDY joined.

II

[In *Fullilove*, we upheld a congressional program requiring that 10% of certain federal construction grants be awarded to minority contractors.] Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to "enforce" may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. [That] Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision[.]

III

A

[T]he "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer* (1948) [(citing *McCabe v. Atchison, Topeka & Santa Fe R. Co.* (1914); *Missouri ex rel. Gaines* v. *Canada* (1938))]. The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. *See Bakke* (opinion, of Powell, J). We thus reaffirm the view [that] the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. ["T]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Bakke* (opinion of Powell, J.).

[Even] were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States v. Carolene Products Co.*, n.4 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).

In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the City Council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.

■ SCALIA, J., concurring in the judgment.

I agree with much of the Court's opinion, and, in particular, with its conclusion that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is "remedial" or "benign." [Those] who believe that racial preferences can help to "even the score" display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.

■ JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE BLACKMUN join, dissenting.

[Today,] for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development. A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism. Racial classifications "drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism" warrant the strictest judicial scrutiny because of the very irrelevance of these rationales. *Bakke* (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.) By contrast, racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.

[In] concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges. In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation whom government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.

I am also troubled by the majority's assertion that, even if it did not believe generally in strict scrutiny of race-based remedial measures, "the circumstances of this case" require this Court to look upon the Richmond City Council's measure with the strictest scrutiny. The sole such circumstance which the majority cites, however, is the fact that blacks in Richmond are a "dominant racial grou[p]" in the city [constituting] "approximately 50% of the population["] and "[f]ive of the nine seats on the City Council[.]"

[It] cannot seriously be suggested that nonminorities in Richmond have any "history of purposeful unequal treatment." Nor is there any indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect. [If] the majority really believes that groups like Richmond's nonminorities, which comprise approximately half the population but which are outnumbered even marginally in political fora, are deserving of suspect class status for these reasons alone, this

Court's decisions denying suspect status to women and to persons with below-average incomes stand on extremely shaky ground.

■ JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

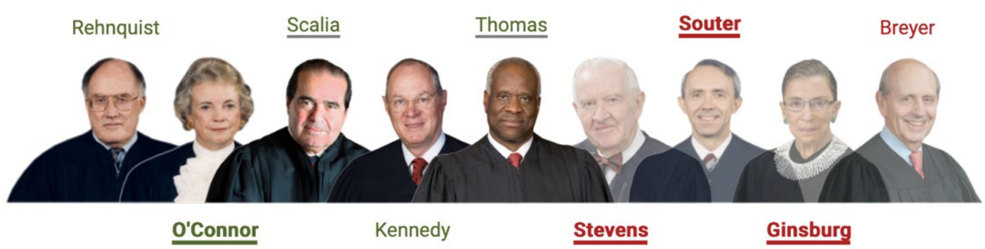
I join JUSTICE MARSHALL's perceptive and incisive opinion[.]

I never thought that I would live to see the day when the city of Richmond, Virginia, the cradle of the Old Confederacy, sought on its own, within a narrow confine, to lessen the stark impact of persistent discrimination. But Richmond, to its great credit, acted. Yet this Court, the supposed bastion of equality, strikes down Richmond's efforts as though discrimination had never existed or was not demonstrated in this particular litigation. JUSTICE MARSHALL convincingly discloses the fallacy and the shallowness of that approach. History is irrefutable, even though one might sympathize with those who — though possibly innocent in themselves — benefit from the wrongs of past decades.

So the Court today regresses. I am confident, however, that, given time, it one day again will do its best to fulfill the great promises of the Constitution's Preamble and of the guarantees embodied in the Bill of Rights[.]

Adarand Constructors v. Peña

515 U.S. 200 (1995)



[In 1989, the Department of Transportation awarded a highway contract to a construction company. The contract provided additional financial incentives if the company hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals," presumed by regulation to include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." Adarand Constructors, a rejected subcontractor that did not meet this criterion, challenged this regime under equal protection.]

■ JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts III–B, III–D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in JUSTICE SCALIA's concurrence, and an opinion with respect to Part III–C in which JUSTICE KENNEDY joins.

III

B

[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 judicial scrutiny. [This rule] derive[s] from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited," *Hirabayashi v. United States* (1943)—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding "benign" state and federal racial classifications to different standards does not square with them.

[Accordingly,] we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

[In] dissent, JUSTICE STEVENS criticizes us for "deliver[ing] a disconcerting lecture about the evils of governmental racial classifications." With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

JUSTICE STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. He also allows that "[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." What he fails to recognize is that strict scrutiny *does* take "relevant differences" into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. [Strict] scrutiny does not "trea[t] dissimilar race-based decisions as though they were equally objectionable"; to the contrary, it evaluates carefully all governmental race-based decisions in order to decide which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," *Fullilove* (Stevens, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

[According] to Justice Stevens, our view of consistency [ignores] the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat." It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.

■ JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court [except] insofar as it may be inconsistent with the following: 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.

■ JUSTICE THOMAS, concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. [I] believe that there is a "moral [and] constitutional equivalence," *post* (Stevens, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

[Purchased] at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society. [In] my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

■ JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. [The] consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

[As] a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.*

Croson and *Adarand* resolved that all racial classifications trigger strict scrutiny, and the Court has never wavered about that since. One more notable articulation of the rationale for this rule came in Chief Justice Roberts's plurality opinion in ***Parents Involved in Community Schools v. Seattle School District No. 1*** (2007). The case concerned efforts by two school districts (in Seattle and in Jefferson County, Kentucky) to create more integrated schools by considering race, among other things, when allocating seats in particular schools. A dissent by Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) argued against the application of strict scrutiny in this context, and Chief Justice Roberts responded:

> JUSTICE BREYER's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,'" but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends *and* as to means." *Adarand*. Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.
>
> [If] the need for the racial classifications embraced by the school districts is unclear, [the] costs are undeniable. "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*. Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," *Croson*, "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin," and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." As the Court [has explained], "[o]ne of the principal reasons race is treated as a forbidden classification

* [A dissent by JUSTICE SOUTER (joined by JUSTICES GINSBURG and BREYER), defending the statute under *Fullilove*, and a separate dissent by JUSTICE GINSBURG (joined by JUSTICE BREYER), contending that equal protection permits "carefully designed affirmative action program[s]," are omitted. —BE]

> is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."
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> All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education* (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. The next Term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of determining admission to the public schools on a *nonracial basis*."
>
> The parties and their *amici* debate which side is more faithful to the heritage of *Brown*, but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?
>
> [Before] *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis," *Brown II*, is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

As noted earlier, "strict scrutiny" itself is clearly an implementing rule of some sort—a court-made test for judging whether equal protection has been afforded, not a candidate for the underlying content of the Equal Protection Clause. *See supra* p. V-19. The opinions excerpted above articulate a number of different reasons for (and against) subjecting all racial classifications to "strict scrutiny." So it makes sense that they also seem to reflect different understandings of how that test actually implements the underlying constitutional requirement in the first place. As you think about the merits of the arguments voiced in these cases, therefore, there are actually two complementary ways of framing the problem. First, which of the arguments for a symmetric standard of review do you find more or less forceful? But also, second, which of the implicit conceptions of the job of "strict scrutiny" do you find most suitable, as a proposed implementing doctrine for equal protection, to begin with?

APPLYING STRICT SCRUTINY TO AFFIRMATIVE ACTION

Once it is settled that all racial classifications by government trigger strict scrutiny, the decisive question becomes a familiar one concerning ends and means: Is the program at hand "narrowly tailored" to further a "compelling interest"?

Outside the context of education, the Court has identified two interests that could theoretically suffice to justify a race-based action, neither of which has very much practical significance. The first, as the Court later described it, is "remediating specific, identified instances of past [unlawful] discrimination." The Court has never upheld any general affirmative-action measure under that rationale, however, because it has also held that "[a] generalized assertion of past discrimination in a particular industry or region is not adequate"—and, *a fortiori*, that "an effort to alleviate the effects of societal discrimination is not a compelling interest." *Shaw v. Hunt* (1996).* The second is avoiding an "emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates." *Johnson v. California* (2005) (quoting *Croson* (Scalia, J., concurring in judgment)).

With respect to state universities, by contrast, the Court held for many years that "obtaining the educational benefits that flow from a diverse student body" *was* a compelling interest. Justice Powell concluded as much in his controlling *Bakke* opinion, and the Court embraced that holding, in a 5–4 decision authored by Justice O'Connor, in *Grutter v. Bollinger* (2003).

* In a litigated case involving certain findings of discrimination by a particular defendant, hiring or promotion goals that take account of race might be permissible as part of a court-imposed remedy. See, e.g., *Fullilove* v. *Klutznick* (1980) (opinion of Burger, C.J.) ("Where federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor").

Grutter v. Bollinger
539 U.S. 306 (2003)

■ JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful. [Since] this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. [T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Adarand*. This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.

[The Law School] assert[s] only one justification for [its] use of race in the admissions process: obtaining "the educational benefits that flow from a diverse student body." [We] have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke* (opinion of Powell, J.). That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

The Law School's claim of a compelling interest is further bolstered by its *amici*[.] [Major] American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its [principal] mission to provide national security." The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." [We] agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

[This] Court has long recognized that "education . . . is the very foundation of good citizenship." *Brown v. Board of Education*. For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. [Effective] participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. [Individuals] with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. [In] order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

[The] Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. [We] adhere to *Adarand*'s teaching that the very purpose of strict scrutiny is to [take] "relevant differences into account."

To be narrowly tailored, a race-conscious admissions program [must] consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Bakke* (opinion of Powell, J.) In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight." *Ibid.*

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. [We] are satisfied that the Law School's admissions program [does] not operate as a quota. Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are "reserved exclusively for certain minority groups." *Croson*.

[The] Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. As the Harvard plan described by JUSTICE POWELL recognized, there is of course "some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." "[S]ome attention to numbers," without more, does not transform a flexible admissions system into a rigid quota. [T]he Law School's admissions officers testified without contradiction that they never gave race any more or less weight based on the information contained in [daily reports about class-wide demographics]. Moreover, [between] 1993 and 2000, the number of African-American, Latino, and Native-American students in each class at the Law School varied from 13.5 to 20.1 percent, a range inconsistent with a quota.

[When] using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount. See *Bakke* (opinion of Powell, J.) (identifying the "denial . . . of th[e] right to individualized consideration" as the "principal evil" of the medical school's admissions program).

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.

[Narrow] tailoring [also requires] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. [But r]ace-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores" [would] require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.

[We] acknowledge that "there are serious problems of justice connected with the idea of preference itself." *Bakke* (opinion of Powell, J.). Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group.

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants. As Justice Powell recognized in *Bakke,* so long as a race-conscious admissions program uses race as a "plus" factor in the context of individualized consideration, a rejected applicant

> "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.... His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."

We agree that, in the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants.

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti* (1984). Accordingly, race-conscious admissions policies must be limited in time. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle.

[In] the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. [We] take the Law School at its word that it would "like nothing better than to find a race-neutral admissions formula" and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since JUSTICE POWELL first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

■ JUSTICE THOMAS, with whom JUSTICE SCALIA joins [as to the excerpted portion], concurring in part and dissenting in part.

[Because] I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the [Law School]. The Constitution does not, however, tolerate institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination. Nor does the Constitution countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of "strict scrutiny."

No one would argue that a university could set up a lower general admission standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.

[The] Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society." *Adarand* (Thomas, J., concurring in part).

[The] proffered interest that the majority vindicates today [is] not simply "diversity." Instead the Court upholds the use of racial discrimination as a tool to advance the Law School's interest in offering a marginally superior education while maintaining an elite institution.[*]

Alongside its decision in *Grutter*, the Court invalidated the University of Michigan's *undergraduate* admissions program in **Gratz v. Bollinger** (2003). The college ranked applications on a 150-point scale, awarding points based on various factors. For instance, applicants received 10 points for being a Michigan resident, and 4 points for being a legacy. Members of underrepresented racial or ethnic groups, including African Americans,

[*] [A brief concurrence by JUSTICE GINSBURG and additional dissents by JUSTICE SCALIA, CHIEF JUSTICE REHNQUIST, and JUSTICE KENNEDY are omitted. —BE]

Hispanics, and Native Americans, were automatically awarded 20 points. A student earning 100 points was presumptively admitted.

Justice O'Connor, who authored *Grutter*, joined a majority opinion by Chief Justice Rehnquist (who dissented in *Grutter*) holding that this regime was not "narrowly tailored." Rehnquist highlighted the emphasis that Justice Powell's *Bakke* opinion had placed on "the importance of considering each particular applicant as an individual" and "assessing all of the qualities that individual possesses [and may] contribute to the unique setting of higher education." The college's policy, by contrast, "[did] not provide such individualized consideration." Moreover, the "automatic distribution of 20 points ha[d] the effect of making [race] decisive for virtually every minimally qualified underrepresented minority applicant."

After the split decision in *Grutter* and *Gratz*, therefore, the critical question about affirmative-action policies seemed to be which of the two fact patterns a policy resembled more. Many have observed that these distinctions in form can be quite artificial; for instance, a small enough quota would have less effect on a white student's chances of admission than a *Grutter*-style "plus." And likewise, whether the "plus" is reduced to a numerical value, as in *Gratz*, may not say much about its actual effect on the admissions process. Still, even after Justice O'Connor's retirement, the Court adhered to *Grutter*'s basic approach in **Fisher v. University of Texas** (2016)—where, in another closely divided decision (this time with Justice Kennedy joining and writing for the majority), the Court upheld UT Austin's *Grutter*-style college admissions policy.

The Court would change course in *Students for Fair Admissions v. Harvard College* (2023), but in the meantime, it decided another important case in the distinct context of elementary and secondary schools. As noted above (*supra*, p. V-98), **Parents Involved in Community Schools v. Seattle School District No. 1** (2007) involved challenges to two school districts' use of race as a factor in school assignments. The Court invalidated the policies by a vote of 5-4. Chief Justice Roberts wrote for a plurality that also included Justices Scalia, Thomas, and Alito; Justice Kennedy concurred in the judgment but pointedly declined to join large portions of Roberts' opinion. (Justices Stevens, Souter, Ginsburg, and Breyer all dissented.) Much of the interest of the case lies in the contrast between the Roberts opinion and Justice Kennedy's narrower, controlling concurrence, so we will just focus on those here.

One of the main passages that Justice Kennedy refused to join—and that therefore did not constitute a majority opinion—addressed the school districts' asserted interest in racial integration:

> Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests [i.e., other than *Grutter*'s conception of diversity] [in support of] their race-based assignments. Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially

concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. [This] working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional."

[Accepting] racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, (1995). Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." *Croson*.

[The] principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—

> they offer no definition of the interest that suggests it differs from racial balance.
>
> [However] closely related race-based assignments may be to achieving racial balance, that itself cannot be the goal, whether labeled "racial diversity" or anything else. To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

Justice Kennedy wrote that his "views [did] not allow [him] to join [this portion] of the opinion." He explained:

> [The] plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.
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> The statement by Justice Harlan that "[o]ur Constitution is colorblind" was most certainly justified in the context of his dissent in *Plessy v. Ferguson*. [And,] as an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.
>
> In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.
>
> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race

> conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.
>
> [I agree with the result here because] the small number of assignments affected [by race] suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.
>
> [There are special] dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means. When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process. On the other hand race conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.
>
> This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. [What] the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification.

Justice Kennedy's reasoning here bears an important family resemblance to the distinction that the Court drew in *Grutter* and *Gratz* (and that Justice Powell had prefigured in *Bakke*) between a "plus," on the one hand, and a "quota" (or a rigid point system), on the other. As noted earlier, that distinction has struck many as oddly artificial. Likewise here, achieving integrated schools via the careful drawing of attendance zones might be no different—at least in terms of its purposes and material effects—than achieving the same result via "retail" sorting based on a race checkbox. But in both contexts, the Court's center-right Justices have seen a difference anyway, and Justice Kennedy's separate opinion here offers one window into why. In fact, some read these cases, taken together, to suggest an ongoing effort on the part of a series of "swing" Justices to account for and manage the social meaning of state efforts at racial integration—that is, to license those efforts while also channeling them into *forms* that, at least in the view of those Justices, were less divisive, stigmatizing, or disrespectful of people's individuality.[*]

If that analysis is correct, one important question is whether the tendency it identifies will continue to operate now that Justice Kennedy, the last of the Justices who had seemed to reason in this way, has retired. As you read *SFFA*, ask yourself how thoroughly it repudiates the middle course charted by Justices O'Connor and Kennedy, in cases like *Grutter* and *Parents Involved*, on questions of both means and ends.

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

600 U.S. 181 (2023)

[At the time of this lawsuit, Harvard College used a four-step admissions process. First, an initial reader assigned scores to each application in six categories (academic, extracurricular, athletic, school support, personal, and overall). Readers could consider an applicant's race in the "overall" score. Second, regional subcommittees made recommendations to the full admissions committee. The subcommittees "[took] an applicant's race into account when making their recommendations." Third, the full admissions committee voted on those recommendations, considering the racial composition of the tentative class at the beginning and end of the meeting. Finally, during the "lop" stage, the admissions committee narrowed the tentatively admitted group to the final class. At this stage, potential cuts were

[*] See, e.g., Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 927–28 (1983); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 73–75 (2003); and Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1296–99 (2011).

placed on a "lop list" which "only contained four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race.[*]"]

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment.

III

A

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person ... the equal protection of the laws." Amdt. 14, § 1. To its proponents, the Equal Protection Clause represented a "foundation[al] principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws." Cong. Globe (1866) (statement of Rep. Bingham).

At first, this Court embraced the transcendent aims of the Equal Protection Clause. "What is this," we said of the Clause in 1880, "but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States?" *Strauder v. West Virginia*. "[T]he broad and benign provisions of the Fourteenth Amendment" apply "to all persons," we unanimously declared six years later; it is "hostility to ... race and nationality" "which in the eye of the law is not justified." *Yick Wo v. Hopkins* (1886).

Despite our early recognition of the broad sweep of the Equal Protection Clause, this Court—alongside the country—quickly failed to live up to the Clause's core commitments. [After *Plessy*], "American courts ... labored with the doctrine [of separate but equal] for over half a century." *Brown v. Board of Education* (1954). [But] the inherent folly of that approach—of trying to derive equality from inequality—soon became apparent. As the Court subsequently recognized, even racial distinctions that were argued to have no palpable effect worked to subordinate the afflicted students. See, *e.g.*, *McLaurin v. Oklahoma State Regents for Higher Ed.* (1950) ("It is said that the separations imposed by the State in this case are in form merely nominal. . . . But they signify that the State . . . sets [petitioner] apart from the other students."). By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the

[*] [SFFA sued both Harvard College and the University of North Carolina (UNC). Both challenges were resolved together in this opinion. UNC's admissions process differed in some particulars from Harvard's, but it was alike in using race as a "plus" at important stages of decision-making. —BE]

States and Federal Government. [The] mere act of separating "children ... because of their race," we explained, itself "generate[d] a feeling of inferiority."

The conclusion reached by the *Brown* Court was thus unmistakably clear: the right to a public education "must be made available to all on equal terms." As the plaintiffs had argued, "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown I*. The Court reiterated that rule just one year later, holding that "full compliance" with *Brown* required schools to admit students "on a racially nondiscriminatory basis." *Brown II* (1955). The time for making distinctions based on race had passed. *Brown*, the Court observed, "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional."

[In] the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone[.] As we recounted in striking down the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment "proscri[bes] ... all invidious racial discriminations." *Loving v. Virginia* (1967). Our cases had thus "consistently denied the constitutionality of measures which restrict the rights of citizens on account of race." *Ibid.*

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti* (1984). We have recognized that repeatedly. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving*; see also *Washington v. Davis* (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."); *McLaughlin v. Florida* (1964) ("[T]he historical fact [is] that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination.").

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." *Yick Wo*. For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. *Bakke* (opinion of Powell, J.). "If both are not accorded the same protection, then it is not equal."

[The Court's description of *Bakke* and *Grutter* is omitted. —BE]

IV

[We] have permitted race-based admissions only within the confines of narrow restrictions. [Harvard's and UNC's] admissions systems—however well intentioned and implemented in good faith—fail [these] criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.[4]

A

[First,] the interests [that the universities invoke] cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks." UNC points to similar benefits, namely, "(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny. At the outset, it is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve. [The] interests that respondents seek, though plainly worthy, are inescapably imponderable.

Second, respondents' admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue. To achieve the educational benefits of diversity, [both universities] work[] to avoid the underrepresentation of minority groups. [T]he universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue.

For starters, the categories are themselves imprecise in many ways. [Indeed,] the use of these opaque racial categories undermines, instead of

[4] The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. [We do] not address [that] issue, in light of the potentially distinct interests that military academies may present.

promotes, respondents' goals. By focusing on underrepresentation, respondents would apparently prefer a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students than the latter. [G]iven the mismatch between the means respondents employ and the goals they seek, it is especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use.

The universities' main response to these criticisms is, essentially, "trust us." [But] "deference does not imply abandonment or abdication of judicial review." Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. [The] programs at issue here do not satisfy that standard.

B

The race-based admissions systems that respondents employ also fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a "negative" and that it may not operate as a stereotype.

First, our cases have stressed that an individual's race may never be used against him in the admissions process. Here, however, the First Circuit found that Harvard's consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard. And the District Court observed that Harvard's "policy of considering applicants' race . . . overall results in fewer Asian American and white students being admitted."

Respondents nonetheless contend that an individual's race is never a negative factor in their admissions programs, but that assertion cannot withstand scrutiny. Harvard, for example, draws an analogy between race and other factors it considers in admission. "[W]hile admissions officers may give a preference to applicants likely to excel in the Harvard-Radcliffe Orchestra," Harvard explains, "that does not mean it is a 'negative' not to excel at a musical instrument." But on Harvard's logic, while it gives preferences to applicants with high grades and test scores, "that does not mean it is a 'negative'" to be a student with lower grades and lower test scores. This understanding of the admissions process is hard to take seriously. College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.

[Respondents'] admissions programs are infirm for a second reason as well. [B]y accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race *qua* race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something that a white person cannot offer." *Bakke* (opinion of Powell, J.). UNC is much the same. It argues that race in itself "says [something] about who you are." Tr. of Oral Arg.; see also *id.* (analogizing being of a certain race to being from a rural area).

We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those "who may have little in common with one another but the color of their skin." The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.

"[It] demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." But when a university admits students "on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike"—at the very least alike in the sense of being different from nonminority students. In doing so, the university furthers "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution."

C

If all this were not enough, respondents' admissions programs also lack a "logical end point." *Grutter*.

[Respondents] assert that universities will no longer need to engage in race-based admissions when, in their absence, students nevertheless receive the educational benefits of diversity. But as we have already explained, it is not clear how a court is supposed to determine when stereotypes have broken down or "productive citizens and leaders" have been created. [T]here is no reason to believe that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon.

VI

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. [At] the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. See, e.g., [citing descriptions of application essays included in the trial record]. But [universities] may not simply establish through application essays or other means the regime we hold unlawful today.["W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows," and the prohibition against racial discrimination is "levelled at the thing, not the name." *Cummings v. Missouri* (1867). A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

■ JUSTICE SOTOMAYOR with whom JUSTICE KAGAN and JUSTICE JACKSON join, dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. [Today,] this Court [holds] that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter.

[F]or more than four decades, it has been this Court's settled law that the Equal Protection Clause of the Fourteenth Amendment authorizes a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body. From *Brown* to *Fisher*, this Court's cases have sought to equalize educational opportunity in a society structured by racial segregation and to advance the Fourteenth Amendment's vision of an America where racially integrated schools guarantee students of all races the equal protection of the laws. [What] was true [in] 1954 is true today: Equality requires acknowledgment of inequality.

[The] Court claims [that the] supposed issues with respondents' programs render the programs insufficiently "narrow" under the strict scrutiny framework that the Court's precedents command. In reality, however, [the Court] overrules its [precedents] following *Bakke*.

[To] avoid public accountability for its choice, the Court seeks cover behind a unique measurability requirement of its own creation. None of this Court's precedents, however, requires that a compelling interest meet some threshold level of precision to be deemed sufficiently compelling. In fact, this Court has recognized as compelling plenty of interests that are equally or more amorphous, including the "intangible" interest in preserving "public confidence in judicial integrity[.]" *See also Ramirez* v. *Collier*, (2022) (ROBERTS, C. J., for the Court) ("[M]aintaining solemnity and decorum in the execution chamber" is a "compelling" interest); *United States v. Alvarez* (2012) (plurality opinion) ("[P]rotecting the integrity of the Medal of Honor" is a "compelling interes[t]"); *Sable Communications of Cal., Inc. v. FCC* (1989) ("[P]rotecting the physical and psychological well-being of minors" is a "compelling interest"). Thus, although the Members of this majority pay lip service to respondents' "commendable" and "worthy" racial diversity goals, they make a clear value judgment today: Racial integration in higher education is not sufficiently important to them.

[Discussion of the Court's other objections to the Harvard and UNC admissions policies omitted. —BE]

[In] a single paragraph at the end of its lengthy opinion, the Court suggests that "nothing" in today's opinion prohibits universities from considering a student's essay that explains "how race affected [that student's] life." This supposed recognition that universities can, in some situations, consider race in application essays is nothing but an attempt to put lipstick on a pig. The Court's opinion circumscribes universities' ability to consider race in any form by meticulously gutting respondents' asserted diversity interests. Yet, because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled.

[Today,] this Court overrules decades of precedent and imposes a superficial rule of race blindness on the Nation. The devastating impact of this decision cannot be overstated. The majority's vision of race neutrality will entrench racial segregation in higher education because racial inequality will persist so long as it is ignored.

■ JUSTICE JACKSON, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.*

[SFFA] has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented intergenerational transmission of inequality that still plagues our citizenry.

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

Imagine two college applicants from North Carolina, John and James. Both trace their family's North Carolina roots to the year of UNC's founding in 1789. Both love their State and want great things for its people. Both want to honor their family's legacy by attending the State's flagship educational institution. John, however, would be the seventh generation to graduate from UNC. He is White. James would be the first; he is Black. Does the race

* [JUSTICE JACKSON was recused in the Harvard case and participated only in the UNC case. —BE]

of these applicants properly play a role in UNC's holistic merits-based admissions process?

[It] is hardly John's fault that he is the seventh generation to graduate from UNC. UNC should permit him to honor that legacy. Neither, however, was it James's (or his family's) fault that he would be the first. And UNC ought to be able to consider why.

Most likely, seven generations ago, when John's family was building its knowledge base and wealth potential on the university's campus, James's family was enslaved and laboring in North Carolina's fields. Six generations ago, the North Carolina "Redeemers" aimed to nullify the results of the Civil War through terror and violence, marauding in hopes of excluding all who looked like James from equal citizenship. Five generations ago, the North Carolina Red Shirts finished the job. Four (and three) generations ago, Jim Crow was so entrenched in the State of North Carolina that UNC "enforced its own Jim Crow regulations." Two generations ago, North Carolina's Governor still railed against "'integration for integration's sake'"—and UNC Black enrollment was minuscule. So, at bare minimum, one generation ago, James's family was six generations behind because of their race, making John's six generations ahead.

[To] demand that colleges ignore race in today's admissions practices—and thus disregard the fact that racial disparities may have mattered for where some applicants find themselves today—is [an] affront to the dignity of those students for whom race matters [and] condemns our society to never escape the past that explains *how and why* race matters to the very concept of who "merits" admission. [Permitting] (not requiring) colleges like UNC to assess merit fully, without blinders on, plainly advances (not thwarts) the Fourteenth Amendment's core promise. UNC considers race as one of many factors in order to best assess the entire unique import of John's and James's individual lives and inheritances *on an equal basis*. Doing so involves acknowledging (not ignoring) the seven generations' worth of historical privileges and disadvantages that each of these applicants was born with when his own life's journey started a mere 18 years ago.

Recognizing all this, UNC has developed a holistic review process to evaluate applicants for admission. [R]ace is considered alongside any other factor that sheds light on what attributes applicants will bring to the campus and whether they are likely to excel once there. [UNC] does not do all this to provide handouts to either John or James. It does this to ascertain who among its tens of thousands of applicants has the capacity to take full advantage of the opportunity to attend, and contribute to, this prestigious institution, and thus merits admission. And UNC has concluded that ferreting this out requires understanding the *full* person, which means taking seriously not just SAT scores or whether the applicant plays the trumpet, but also any way in which the applicant's race-linked experience bears on his capacity and merit.

[The] majority seems to think that race blindness solves the problem of race-based disadvantage. But the irony is that requiring colleges to ignore the initial race-linked opportunity gap between applicants like John and James will inevitably widen that gap, not narrow it. [The] ultimate goal of recognizing James's full story and (potentially) admitting him to UNC is to give him the necessary tools to contribute to closing the equity gaps [detailed in an omitted portion of the opinion —BE] so that he, his progeny—and therefore all Americans—can compete without race mattering in the future. That intergenerational project is undeniably a worthy one.

[That] end is not fully achieved just because James is admitted. Schools properly care about preventing racial isolation on campus because research shows that it matters for students' ability to learn and succeed while in college if they live and work with at least some other people who look like them and are likely to have similar experiences related to that shared characteristic. Equally critical, UNC's program ensures that students who don't share the same stories (like John and James) will interact in classes and on campus, and will thereby come to understand each other's stories, which [improves] cognitive abilities and critical-thinking skills, reduces prejudice, and better prepares students for postgraduate life.

[The] overarching reason the majority gives for becoming an impediment to racial progress—that its own conception of the Fourteenth Amendment's Equal Protection Clause leaves it no other option—has a wholly self-referential, two-dimensional flatness. The majority and concurring opinions rehearse this Court's idealistic vision of racial equality, from *Brown* forward, with appropriate lament for past indiscretions. But the race-linked gaps that the law (aided by this Court) previously founded and fostered—which indisputably define our present reality—are strangely absent and do not seem to matter.

With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces "colorblindness for all" by legal fiat. But deeming race irrelevant in law does not make it so in life. And having so detached itself from this country's actual past and present experiences, the Court has now been lured into interfering with the crucial work that UNC and other institutions of higher learning are doing to solve America's real-world problems.

[Although] formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways, and today's ruling makes things worse, not better. [To] impose this result in that Clause's name when it requires no such thing, and to thereby obstruct our collective progress toward the full realization of the Clause's promise, is truly a tragedy for us all.[*]

[*] [Several separate opinions are omitted. JUSTICE THOMAS argued that the "colorblind" reading of the Equal Protection Clause was defensible on originalist grounds. JUSTICE GORSUCH argued that the majority's result followed from Title VI as well as from equal protection. JUSTICE KAVANAUGH emphasized the "temporal limit" issue in *Grutter*. —BE]

THE AFTERMATH AND IMPLICATIONS OF *SFFA*

1. What Even Is a Decision Based on Race? *SFFA* is widely understood to have pronounced "affirmative action" unconstitutional. But "affirmative action" is not a well-defined legal category. What exactly did *SFFA* rule out?

Note, in particular, the majority's closing assurance that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." To Justice Sotomayor, these "supposed" limits on the majority's holding were "nothing but an attempt to put lipstick on a pig"—and by proclaiming as much, she evidently sought to ensure that "[n]o one is fooled."* But it's also possible that some properties that relate to a person's race—but do not amount to "race *qua* race"—are perfectly valid considerations under the logic of *SFFA*. These might include many of the properties that proponents of affirmative action have traditionally cared about in the first place—such as 'being motivated to defy stereotypic expectations about one's socially salient identities,' 'being thoughtful about one's inherited advantages and disadvantages,' or perhaps even, in the spirit of *Grutter*, 'being such that one's attainment of societal leadership positions would be apt to increase the seeming openness of those positions to the qualified aspirants who are otherwise most likely to discount themselves.' Is it clear to you which of these are licit considerations under *SFFA* and which are not?†

2. What About Achieving Diversity by Facially Neutral Means? *SFFA* will also motivate universities to achieve racial diversity or integration by means that do not require considering any race-related properties of individual applicants at the point of assessment at all. Some selective public universities, for instance, guarantee admission to some number of the highest-achieving graduates of all public high schools. If these practices are adopted as indirect means of ensuring racial diversity, do they run afoul of *SFFA* (or perhaps *Arlington Heights* and *Feeney*)? Recall Justice Kennedy's

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* Here again, notice the recurring strategic choices that confront dissenters in major cases. *See, e.g.*, *supra* pp. III-138 (regarding *Trump v. United States*), *infra* p. V-177 (regarding *Lawrence v. Texas*).

† In a post-*SFFA* article considering these and other possibilities, Deborah Hellman and I have argued that

> [i]n many cases, one cannot engage in the kind of consideration of race-related properties that the Court blessed—indeed, that it said "nothing in [its] opinion should be construed as prohibiting"—without also considering, at some level, an applicant's race or racial self-identification. That means that, whether the Justices in the majority appreciated it or not, the conflicting impulses to which *SFFA* gave expression cannot be reconciled by simply forbidding all consideration of an applicant's race.

Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions After SFFA*, 4 AM. J. L. & EQUALITY 295 (2024), https://tinyurl.com/4kp3upvn.

suggestion, in his controlling opinion in *Parents Involved*, that some mechanisms that are "race conscious but do not lead to different treatment based on a [racial] classification . . . [are] unlikely [to] demand strict scrutiny to be found permissible." *Supra*, p. V-108. Can that proposition be squared with *SFFA*?[*]

[*] In 2024, the Court declined to hear a case posing a version of this issue, but Justices Alito and Thomas dissented from the denial of certiorari. Coalition for TJ v. Fairfax County School Bd. (No. 23-170), 601 U.S. ___ (2024). For an extended analysis of the question, see Sonja Starr, *The Magnet School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024).

B. Sex, Gender, and Gender Identity (40 PAGES)

For many years after the ratification of the Fourteenth Amendment, legislative classifications on the basis of sex were routinely upheld as reasonable. A good example is **Goesaert v. Cleary** (1948), where the Court upheld a state law prohibiting a woman from working as a bartender unless she was the "wife or daughter of the male owner." Justice Frankfurter wrote for the Court:

> We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England. The Fourteenth Amendment did not tear history up by the roots[.]
>
> [Michigan] could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women. [These changes] do not preclude the States from drawing a sharp line between the sexes[.] The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.
>
> [The] Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same." [B]artending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures[.] Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. [Since] the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling.

The thrust of this reasoning might remind you of *Plessy v. Ferguson* [*supra*, p. V-34], in at least two important respects. First, claims to equality in the domain of civil or political rights—exemplified in *Plessy* by *Strauder*'s holding regarding an all-white jury, and here by the Nineteenth Amendment's (1920) guarantee of voting rights—were not understood to bear on questions about the *ordinary regulation of social life*. Second, although equal protection did require that legislative distinctions be rational or reasonable, the state was "at liberty to act with reference to the established usages, customs, and traditions of the people," as *Plessy* had put it: These conventions and traditional understandings were seen, not as constitutionally suspect, but as a store of wisdom that made distinctions conforming to them presumptively reasonable.

The first major departure from this dismissive approach to sex-discrimination claims came in **Reed v. Reed** (1971). An Idaho statute provided that, when multiple people petitioned to administer an estate—as the decedent's divorced parents both did in *Reed*—"males must be preferred to females." The asserted justification of the law was a simple desire to avoid probate hearings on the merits of different proposed administrators; conclusively presuming that the male candidate was better qualified was more efficient. As one casebook explains:

> [Ruth Bader] Ginsburg's brief[, filed on behalf of the decedent's mother,] argued that under the Fourteenth Amendment
>
> > it is presumptively impermissible to distinguish on the basis of congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized. Such conditions include not only race, a matter clearly within the "suspect classification" doctrine, but include as well the sex of the individual.
>
> [The] brief repeatedly emphasized the injustice of discrimination based on traits that were "immutable" and "highly visible," arguing that "American women have been stigmatized historically as an inferior class" and "lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally." Because "legislators have found it easy to draw gross, stereotypical distinctions" on the basis of the sex characteristic, it was necessary for the Court to subject sex-based legislation to a particularly searching form of inquiry under the Fourteenth Amendment.[*]

Although the Court invalidated the statute at issue in *Reed*, it did not embrace Ginsburg's proposal for heightened scrutiny. In a very brief opinion for the unanimous Court, Chief Justice Burger rejected the statute's rationale without purporting to depart from rational-basis review:

> The question presented by this case [is] whether a difference in the sex of competing applicants [bears] a rational relationship to a state objective that is sought to be advanced. [Clearly] the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause.

[*] BLBAS, p. 1255.

> We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment[.]

Is this argument convincing? Might *Reed*—decided two years before *USDA v. Moreno* [*supra*, p. V-8]—actually have been an early invocation of what we now know as "rational basis with bite"?

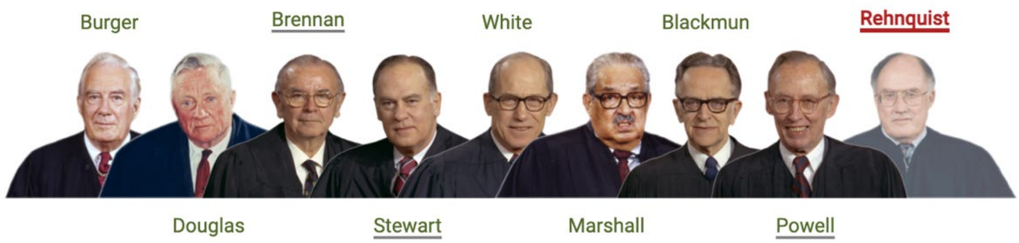
The question of the proper standard of scrutiny for sex classifications returned to the Court in two other 1970s cases—*Frontiero v. Richardson* and *Craig v. Boren*—which you'll read next. As you read those cases, try to reconstruct the Court's basic understanding of the wrong of discrimination in this context. How compelling is that understanding? As a foil for the Court's way of thinking, consider Catharine MacKinnon's later criticism of these and similar cases:

> To stereotype is to impose a trait or characterization that may be true of some members of a group upon all in the group. As an account of the injury of discrimination, this notion of misrepresentation by generalization is certainly partial, limited, can be trivializing and even perverse. What if the stereotype—such as women enjoy rape—is not really true of anyone? What if, to the extent a stereotype is accurate, it is a product of abuse, like passivity, or a survival strategy, like manipulativeness? What if, to the degree it is real, it signals an imposed reality, like a woman's place is in the home? What if the stereotype is ideologically injurious but materially helpful, like maternal preference in child custody cases? What if a stereotype is injurious as a basis for policy whether or not accurate, such as the view that women are not interested in jobs with higher salaries? Further, why is it an injury to be considered a member of a group of which one is, in fact, a member? Is the injury perhaps more how that group is actually treated? If sex-based generalizations are the problem of sex inequality under law, what can be done by law about those problems women generally *do* share? Will a law shaped to correct illusions rather than to confront the problems women have as women be able to face realities to the extent women have women's problems? If facial classifications are eliminated in the name of their exceptions, what becomes of those women the exceptions leave behind?[*]

[*] Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1293 (1991).

Frontiero v. Richardson

411 U.S. 677 (1973)



■ JUSTICE BRENNAN announced the Court's judgment and delivered an opinion in which DOUGLAS, WHITE, and MARSHALL, JJ., joined.

The question before us concerns the right of a female member of the uniformed services to claim her spouse as a "dependent" for the purposes of obtaining increased quarters allowances and medical and dental benefits [under federal law] on an equal footing with male members. Under these statutes, a serviceman may claim his wife as a "dependent" without regard to whether she is in fact dependent upon him for any part of her support. A service-woman, on the other hand, may not claim her husband as a "dependent" under these programs unless he is in fact dependent upon her for over one-half of his support. Thus, the question for decision is whether this difference in treatment constitutes an unconstitutional discrimination against servicewoman in violation of the Due Process Clause[.]

[At] the outset, appellants contend that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree[.]

[There] can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. [As] a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. And although blacks were guaranteed the right to vote in 1870, women were denied even that right [until the] adoption of the Nineteenth Amendment half a century later.

It is true, of course, that the position of women in America has improved markedly in recent decades. Nevertheless, it can hardly be doubted that, in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena.[17]

Moreover, since sex, like race and national origin, is an immutable characteristic, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility[.]" *Weber v. Aetna Casualty & Surety Co.* (1972).[*] And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.

[With] these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme before us is constitutionally invalid.

[The] Government concedes that the differential treatment accorded men and women under these statutes serves no purpose other than mere "administrative convenience." In essence, the Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives. Thus, the Government argues that Congress might reasonably have concluded that it would be both cheaper and easier simply conclusively to presume that wives of male members are financially dependent upon their husbands, while burdening female members with the task of establishing dependency in fact. The Government offers no concrete evidence, however, tending to support its view that such differential treatment in fact saves the Government any money.

[In] any case, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience,

[17] It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And [this] underrepresentation is present throughout all levels of our State and Federal Government.

[*] [*Weber* held unconstitutional a statute that discriminated against "illegitimate" children, relative to other dependent children, with respect to a father's death benefits. —BE]

necessarily commands "dissimilar treatment for men and women who are . . . similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution.]" *Reed v. Reed*.

■ JUSTICE POWELL, with whom CHIEF JUSTICE BURGER and JUSTICE BLACKMUN join, concurring in the judgment.

I agree that the challenged statutes constitute an unconstitutional discrimination against servicewomen in violation of the Due Process Clause, [but] I cannot [agree] that all classifications based upon sex, "like classifications based upon race, alienage, and national origin," are "inherently suspect and must therefore be subjected to close judicial scrutiny." It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. [In] my view, we can and should decide this case on the authority of *Reed* and reserve for the future any expansion of its rationale.

There is another [reason] for deferring a general categorizing of sex classifications as invoking the strictest test of judicial scrutiny. The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.[*] If this Amendment is duly adopted, it will represent the will of the people accomplished in the manner prescribed by the Constitution. [Reaching] out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.[†]

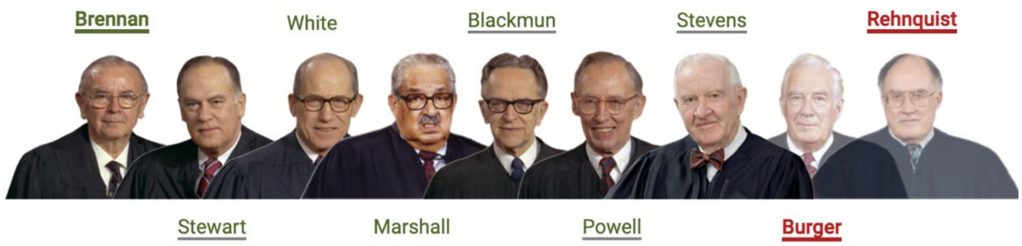
Although Justice Brennan's opinion in *Frontiero* embraced "strict scrutiny" for sex classifications, only three other Justices joined it, and *Frontiero* thus failed to settle the issue for future cases. A few years later, Justice Brennan did garner a majority for his opinion in *Craig v. Boren* (1976)—but as you'll see, *Craig* articulated a somewhat different standard.

[*] [The proposed Equal Rights Amendment (ERA) provided: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Its history is complicated, but it has not been adopted. —BE]

[†] [JUSTICE STEWART concurred in the judgment only, "agreeing that the statutes [work] an invidious discrimination in violation of the Constitution," citing *Reed*. JUSTICE REHNQUIST dissented. —BE]

Craig v. Boren

429 U.S. 190 (1976)



■ JUSTICE BRENNAN delivered the opinion of the Court.

[An] Oklahoma statute prohibits the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender-based differential constitutes a denial to males 18–20 years of age of equal protection of the laws in violation of the Fourteenth Amendment.

II

A

[Analysis] may appropriately begin with the reminder that *Reed* emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed,* the objectives of "reducing the workload on probate courts" and "avoiding intrafamily controversy" were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. *See, e.g.*, *Frontiero v. Richardson*. And only two Terms ago, *Stanton* v. *Stanton* (1975) [held] that *Reed* required invalidation of a Utah differential age-of-majority statute, notwithstanding the statute's coincidence with and furtherance of the State's purpose of fostering "old notions" of role typing and preparing boys for their expected performance in the economic and political worlds.

Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations concerning the financial position of servicewomen, *Frontiero*, [could] not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. *Stanton v. Stanton*. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.

In this case, too, "*Reed*, we feel, is controlling[.]" *Stanton*. We turn then to the question whether, under *Reed*, the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

C

We accept for purposes of discussion the District Court's identification of the objective underlying [the law] as the enhancement of traffic safety.[7] Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. [But this evidence] offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18–20-year-olds for alcohol-related driving offenses, exemplifies the [problem]. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a

[7] That this was the true purpose is not at all self-evident. [The] attorney for Oklahoma, while proposing traffic safety as a legitimate rationale[,] candidly acknowledged at oral argument that he is unable to assert that traffic safety is "indeed the reason" for the gender line[.] For this appeal we find adequate [Oklahoma's] representation of legislative purpose, leaving for another day consideration of whether the statement of the State's Assistant Attorney General should suffice to inform this Court of the legislature's objectives, or whether the Court must determine if the litigant simply is selecting a convenient, but false, *post hoc* rationalization.

decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.[13]

[There] is no reason to belabor this line of analysis. [Proving] broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18-20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to achievement of the statutory objective.

[In] sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. [We] conclude that the gender-based differential [in the Oklahoma statute] constitutes a denial of the equal protection of the laws to males aged 18–20].

▪ JUSTICE POWELL, concurring.

[With] respect to the equal protection standard, I agree that *Reed v. Reed* is the most relevant precedent. But I find it unnecessary, in deciding this case, to read that decision as broadly as some of the Court's language may imply. *Reed* and subsequent cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when "fundamental" constitutional rights and "suspect classes" are not present.

I view this as a relatively easy case. [It] turns on whether the state legislature, by the classification it has chosen, has adopted a means that bears a "fair and substantial relation" to [the asserted highway-safety] objective.

It seems to me that the statistics [do] tend generally to support the view that young men drive more, possibly are inclined to drink more, and—for various reasons—are involved in more accidents than young women. Even so, I am not persuaded that these facts and the inferences fairly drawn from them justify this classification based on a three-year age differential between the sexes, and especially one that is so easily circumvented as to be virtually meaningless. Putting it differently, this gender-based classification does not bear a fair and substantial relation to the object of the legislation.

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[13] For example, we can conjecture that in *Reed*, Idaho's apparent premise that women lacked experience in formal business matters (particularly compared to men) would have proved to be accurate in substantially more than 2% of all cases. And in [*Frontiero*], we expressly found [the government's] empirical defense of mandatory dependency tests for men but not women to be unsatisfactory, even though we recognized that husbands are still far less likely to be dependent on their wives than vice versa.

▪ JUSTICE REHNQUIST, dissenting.

The Court's disposition of this case is objectionable on two grounds. First is its conclusion that *men* challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court's enunciation of this standard, without citation to any source, as being that "classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives." [I] think the Oklahoma statute challenged here need pass only the "rational basis" equal protection analysis expounded in cases such as [*Lee Optical*], and I believe that it is constitutional under that analysis.*

The Court in *Craig* reasoned that "a correlation of 2% must be considered an unduly tenuous 'fit.'" But, for purposes of assessing this equal protection challenge, is that comparison—between the set of all young men, on the one hand, and the set of young men arrested for drinking and driving, on the other—even the relevant one to draw? Notwithstanding the Court's rhetorical focus on questions of "fit," perhaps the majority's hostility to the law can be recast in different and more substantial terms. After all, Footnote 13 seems to acknowledge that a lack of fit or predictiveness was not really the driving force behind *Reed* or *Frontiero* either. So then what was it?

However it is best understood, the formula articulated in *Craig* came to be known in the years that followed as "intermediate scrutiny." Justice O'Connor summarized that standard in her opinion for the Court in *Mississippi University for Women v. Hogan* (1982):

> Our decisions [establish] that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives."
>
> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because

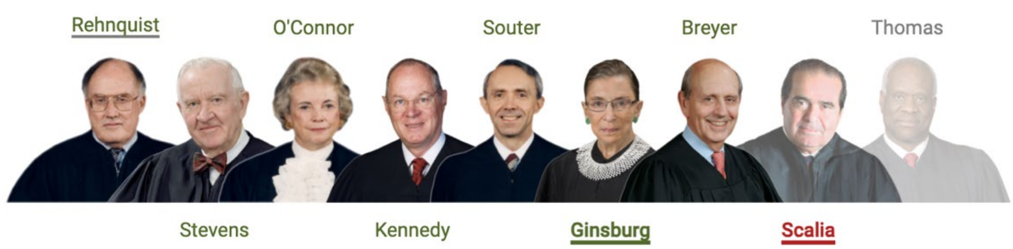
* [JUSTICE STEVENS concurred but expressed misgivings about the Court's "tiered" system of equal protection analysis. JUSTICE STEWART concurred in the judgment, writing that "[t]he disparity created by these Oklahoma statutes amounts to total irrationality," and "thus amount[ed] to invidious discrimination." CHIEF JUSTICE BURGER dissented, noting that he was "in general agreement with Justice Rehnquist's dissent."]

> they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. *See* Frontiero v. Richardson (plurality opinion).
>
> If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women. The need for the requirement is amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," *Craig v. Boren*, to establish a link between objective and classification.

The leading modern case applying intermediate scrutiny is *United States v. Virginia*, which you'll read next. Consider whether and how intermediate scrutiny, as articulated and deployed there, really differs from the "strict" scrutiny that applies in the context of race.

United States v. Virginia

518 U.S. 515 (1996)



▪ JUSTICE GINSBURG delivered the opinion of the Court.

Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute (VMI). The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree.

I

Founded in 1839, VMI is today the sole single-sex school among Virginia's 15 public institutions of higher learning. VMI's distinctive mission is to produce "citizen-soldiers," men prepared for leadership in civilian life and in military service. VMI pursues this mission through pervasive training of a kind not available anywhere else in Virginia, an "adversative method"

[once] characteristic of military instruction. VMI constantly endeavors to instill physical and mental discipline in its cadets and impart to them a strong moral code.

[Neither] the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women. And the school's impressive record in producing leaders has made admission desirable to some women. Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords.

II

[VMI] produces its "citizen-soldiers" through an "adversative, or doubting, model of education" which features "physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."

[VMI] cadets live in spartan barracks where surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the mess hall, and regularly participate in drills. Entering students are incessantly exposed to the rat line, "an extreme form of the adversative model," comparable in intensity to Marine Corps boot camp. Tormenting and punishing, the rat line bonds new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors.

[In] 1990, prompted by a complaint filed [by] a female high-school student seeking admission to VMI, the United States sued, [alleging] that VMI's exclusively male admission policy violated the Equal Protection Clause of the Fourteenth Amendment.

[When Virginia lost in the lower courts, it proposed as a remedy that it would establish the] Virginia Women's Institute for Leadership (VWIL). The 4-year, state-sponsored undergraduate program would be located at Mary Baldwin College, a private liberal arts school for women, and would be open, initially, to about 25 to 30 students. Although VWIL would share VMI's mission—to produce "citizen-soldiers"—the VWIL program would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of education, and financial resources. [Virginia] returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. [A] divided Court of Appeals affirmed[.]

III

The cross-petitions in this suit present two ultimate issues. First, does Virginia's exclusion of women from the educational opportunities provided by VMI—extraordinary opportunities for military training and civilian leadership development—deny [equal protection] to women "capable of all of the individual activities required of VMI cadets"[?] Second, if [so], what is the remedial requirement?

IV

[Parties] who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action. [*Hogan*].

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. [Through] a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination. See, *e.g., Goesaert* v. *Cleary* (1948)[.]

In 1971, for the first time in our Nation's history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. *Reed v. Reed*. Since *Reed*, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. See *Loving v. Virginia* (1967). Physical differences between men and women, however, are enduring: "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."

"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment activity," to advance full development of the talent and capacities of our Nation's people.[7] But such classifications may not be used, as they once were, *see Goesaert*, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no "exceedingly persuasive justification" for excluding all women from the citizen-soldier training afforded by VMI. [Moreover,] the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation[.]

V

[Virginia] asserts two justifications in defense of VMI's exclusion of women. First, "[single-sex] education provides important educational benefits," and the option of single-sex education contributes to "diversity in educational approaches." Second, [the] school's adversative approach[] would have to be modified were VMI to admit women. We consider these justifications in turn.

A

Single-sex education affords pedagogical benefits to at least some students, Virginia emphasizes, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State. In cases of this genre, our precedent instructs that "benign" justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

Mississippi Univ. for Women is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in "educational affirmative action" by "compensat[ing] for discrimination against women." Undertaking a "searching analysis," the Court found no close resemblance between "the alleged objective" and "the actual purpose underlying the discriminatory classification." Pursuing a similar inquiry here, we reach the same conclusion. [Historical discussion omitted. —BE]

[7] Several *amici* have urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity. Indeed, it is the mission of some single-sex schools "to dissipate, rather than perpetuate, traditional gender classifications." See Brief for Twenty-Six Private Women's Colleges[.] We do not question the State's prerogative evenhandedly to support diverse educational opportunities[.]

B

Virginia next argues that VMI's adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be "radical," so "drastic," Virginia asserts, as to transform, indeed "destroy," VMI's program. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would "eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia."

The District Court forecast from expert witness testimony [that] coeducation would materially affect "at least these three aspects of VMI's program—physical training, the absence of privacy, and the adversative approach." And it is uncontested that women's admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that "the VMI methodology could be used to educate women." The District Court even allowed that some women may prefer it to the methodology a women's college might pursue. [The] parties, furthermore, agree that "*some* women can meet the physical standards [VMI] now imposes on men." In sum, as the Court of Appeals stated, "neither the goal of producing citizen soldiers," VMI's *raison d'être,* "nor VMI's implementing methodology is inherently unsuitable to women."

[In] support of its initial judgment for Virginia, [the] District Court made "findings" on "gender-based developmental differences." These "findings" restate the opinions of Virginia's expert witnesses, opinions about typically male or typically female "tendencies." For example, "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere."

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and time again since this Court's turning point decision in *Reed v. Reed*, we have cautioned reviewing courts to take a "hard look" at generalizations or "tendencies" of the kind pressed by Virginia[.] State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on "fixed notions concerning the roles and abilities of males and females."

It may be assumed, for purposes of this decision, that most women would not choose VMI's adversative method. [But] it is also probable that "many men would not want to be educated in such an environment." (On that point, even our dissenting colleague might agree.) Education, to be sure, is not a "one size fits all" business. The issue, however, is not whether "women—or men—should be forced to attend VMI"; rather, the question is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other "self-fulfilling prophec[ies]," *Mississippi Univ. for Women*, once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed[.] [Medical] faculties similarly resisted men and women as partners in the study of medicine.

[Women's] successful entry into the federal military academies, and their participation in the Nation's military forces, indicate that Virginia's fears for the future of VMI may not be solidly grounded. The Commonwealth's justification for excluding all women from "citizen-soldier" training for which some are qualified, in any event, cannot rank as "exceedingly persuasive," as we have explained and applied that standard.

VMI's mission [is] to produce "citizen-soldiers[."] [That] goal is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit, from the State's premier "citizen-soldier" corps.

VI

In the second phase of the litigation, Virginia presented its remedial plan—maintain VMI as a male-only college and create VWIL as a separate program for women. [A] remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in "the position they would have occupied in the absence of [discrimination]."

[VWIL] affords women no opportunity to experience the rigorous military training for which VMI is famed. [Kept] away from the pressures, hazards, and psychological bonding characteristic of VMI's adversative training, VWIL students will not know the "feeling of tremendous accomplishment" commonly experienced by VMI's successful cadets.

Virginia maintains that these methodological differences are "justified pedagogically," based on "important differences between men and women in learning and developmental needs," "psychological and sociological differences" Virginia describes as "real" and "not stereotypes."

[But a]s earlier stated, generalizations about "the way women are," estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. [In] contrast to the generalizations about women on which Virginia rests, we note again these dispositive realities: VMI's "implementing methodology" is not "inherently unsuitable to women," "some women . . . do well under [the] adversative model," "some women, at least, would want to attend [VMI] if they had the opportunity," "some women are capable of all of the individual activities required of VMI cadets," and "can meet the physical standards [VMI] now impose[s] on men." It is on behalf of these women that the United States has instituted this suit, and it is for them that a remedy must be crafted,[19] a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit[.]

▪ JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. [The] tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat. The people may decide to change the one tradition, like the other, through democratic processes; but the assertion that either tradition has been unconstitutional through the centuries is not law, but politics-smuggled-into-law. And the same applies, more broadly, to single-sex education in general which [is] threatened by today's decision with the cutoff of all state and federal support. [Today,] however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court.

[The] United States urged us to hold in this case "that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex." [The Court] effectively accepts [this]. Although the Court in two places recites the test as stated in [*Mississippi Univ. for Women v. Hogan*], [the] Court proceeds to interpret "exceedingly persuasive justification" in a fashion that contradicts the reasoning of [that case] and our other precedents.

[Only] the amorphous "exceedingly persuasive justification" phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a "substantial relation" between the classification and the state interests that it serves. [There] is simply no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance.

[If] the question of the applicable standard of review for sex-based classifications were to be [reconsidered], the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. [Normal] rational-basis review of sex-based classifications would be much more in accord with the genesis of heightened standards of judicial review, the famous footnote four in *Carolene Products*[.] It is hard to consider women a "discrete and insular minorit[y]" unable to employ the

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[19] Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. Experience [in the U.S. military academies] shows such adjustments are manageable.

"political processes ordinarily to be relied upon," when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns. Moreover, a long list of [anti-discrimination] legislation proves the proposition false.

[Under] the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—asking whether the State has adduced an "exceedingly persuasive justification" for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education.

[But] the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. Indeed, the Court indicates that if any program restricted to one sex is "uniqu[e]," it must be opened to members of the opposite sex "who have the will and capacity" to participate in it. I suggest that the single-sex program that will not be capable of being characterized as "unique" is not only unique but nonexistent[.]*

INTERMEDIATE SCRUTINY AND PHYSICAL DIFFERENCES

As Justice Scalia observes, Justice Ginsburg's articulation of the "exceedingly persuasive justification" required by "intermediate scrutiny" resembles strict scrutiny in most respects.† Notice, though, that Justice Ginsburg herself underscores certain differences between the two standards that she intends to preserve (*supra*, p. V-134). One is the possibility of using sex distinctions for progressive ends in light of historical discrimination. The other is the notion that sex-related "physical differences" or "inherent differences" may sometimes justify differential treatment. After *Virginia*, in fact, it might be most descriptively accurate to think of "intermediate scrutiny" as "intermediate" only in that the Court's review is less than strict when one of these two situations is involved.

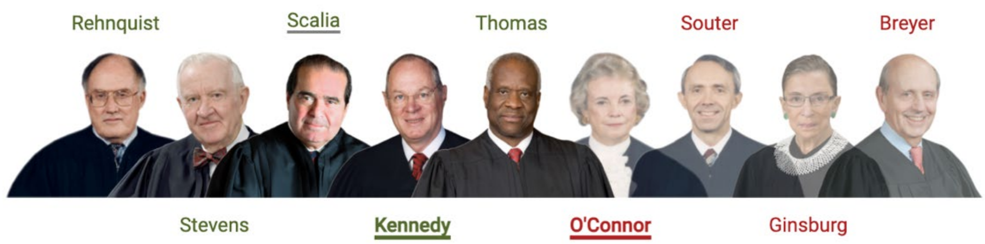
* [A concurrence in the judgment by CHIEF JUSTICE REHNQUIST, endorsing the result on somewhat narrower grounds, is omitted. JUSTICE THOMAS was recused. —BE]

† The genealogy of the "exceedingly persuasive justification" language itself is an interesting case study in how individual Justices can inadvertently or strategically shape the law when writing majority opinions. The language actually first appeared in, of all places, *Personnel Administrator of Massachusetts v. Feeney* (1979) [*supra*, p. V-69], where it figured in a context-specific description of what the *Craig* standard—which was not actually applied in *Feeney* at all—would require to justify sex discrimination in public employment. Justice Marshall then seems to have cleverly slipped it (with the authority of *Feeney*) into a routine, effectively unanimous opinion applying intermediate scrutiny to an obviously archaic state law. *See Kirchberg v. Feenstra* (1981). Justice O'Connor then repeated *Kirchberg*'s formulation in *Mississippi University for Women*, and by the time of *Virginia* it was available as a gloss on intermediate scrutiny that lent strong rhetorical support to nudging the standard toward strict scrutiny.

Sex classifications that are allegedly based on physical differences (or, as these cases are sometimes known, "real differences") pose distinctive and challenging issues. In the balance of this section, you'll first read *Nguyen v. INS* (2001), which has long been thought to capture the Court's modern approach to such "real differences" cases. You'll then read *United States v. Skrmetti* (2025), the Court's first attempt to apply its equal protection doctrine to the claims of transgender plaintiffs. As you read these cases, think about how each limits the Court's other precedents on equal protection and sex—like *Virginia*—and whether and how the distinctions that they draw are justified.

Nguyen v. INS

533 U.S. 53 (2001)



■ Justice Kennedy delivered the opinion of the Court.

Title 8 U.S.C. § 1409 governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born [abroad]. The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father. The question before us is whether the statutory distinction is consistent with the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment.

I

Petitioner Tuan Anh Nguyen was born in Saigon, Vietnam, to copetitioner Joseph Boulais and a Vietnamese citizen. Boulais and Nguyen's mother were not married. Boulais always has been a citizen of the United States, and he was in Vietnam under the employ of a corporation. [In] June 1975, Nguyen, then almost six years of age, came to the United States. He became a lawful permanent resident and was raised in Texas by Boulais.

[Nguyen was convicted of two criminal offenses that together made him deportable under the Immigration and Nationality Act. He defended on the ground that he was legally a citizen because of his father's U.S. citizenship.]

II

[The law] sets forth the following requirements [for derivative citizenship when a child is born abroad to unwed parents] where the father is the citizen parent and the mother is an alien:

> (1) a blood relationship between the person and the father is established by clear and convincing evidence,
>
> (2) the father had the nationality of the United States at the time of the person's birth, [and]
>
> (4) [the father fulfills one of three options for formally recognizing paternity before the child's 18th birthday].

When the citizen parent of the child born abroad and out of wedlock is the child's mother, the requirements for the transmittal of citizenship are [only that, at the time of birth, the mother was a citizen and had at some point spent at least one year in the United States].

[All] concede the requirements of [§ 1409(a)(4)], relating to a citizen father's acknowledgment of a child while he is under 18, were not satisfied in this case.

III

For a gender-based classification to withstand equal protection scrutiny, it must be established "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States* v. *Virginia* (1996). For reasons to follow, we conclude § 1409 satisfies this standard.

[Congress'] decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth. Specifically, the imposition of the requirement for a paternal relationship, but not a maternal one, is justified by two important governmental objectives. We discuss each in turn.

A

The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother's status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. [Section] 1409(a)(4)'s provision of three options for a father seeking to establish paternity—legitimation, paternity oath, and court order of paternity—is designed to ensure an acceptable documentation of paternity.

[Nguyen and Boulais] argue that the requirement of §1409(a)(1), that a father provide clear and convincing evidence of parentage, is sufficient to achieve the end of establishing paternity, given the sophistication of modern DNA tests. Section 1409(a)(1) does not actually mandate a DNA test, however. The Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method. With respect to DNA testing, the expense, reliability, and availability of such testing in various parts of the world may have been of particular concern to Congress. The requirement of §1409(a)(4) represents a reasonable conclusion by the legislature that the satisfaction of one of several alternatives will suffice to establish the blood link between father and child required as a predicate to the child's acquisition of citizenship.

[Finally], to require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality. [The] issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. [Here,] the use of gender specific terms takes into account a biological difference between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

B

The second important governmental interest furthered in a substantial manner by §1409(a)(4) is the determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States. In the case of a citizen mother and a child born overseas, the opportunity for a meaningful relationship between citizen parent and child inheres in the very event of birth[.] The mother knows that the child is in being and is hers and has an initial point of contact with him. There is at least an opportunity for mother and child to develop a real, meaningful relationship.

The same opportunity does not result from the event of birth, as a matter of biological inevitability, in the case of the unwed father. [It] is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity. This fact takes on particular significance in the case of a child born overseas and out of wedlock. One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.

When we turn to the conditions which prevail today, we find that the passage of time has produced additional and even more substantial grounds to justify the statutory distinction. The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that must be of real concern when we contemplate the prospect of [mandating], contrary to Congress' wishes, citizenship by male parentage subject to no condition save the father's previous length of residence in this country.

[Without] an initial point of contact with the child by a father who knows the child is his own, there is no opportunity for father and child to begin a relationship. Section 1409 takes the unremarkable step of ensuring that such an opportunity, inherent in the event of birth as to the mother-child relationship, exists between father and child before citizenship is conferred upon the latter.

[Petitioners argue] that, rather than fulfilling an important governmental interest, § 1409 merely embodies a gender-based stereotype. [But] the difference does not result from some stereotype, defined as a frame of mind resulting from irrational or uncritical analysis. There is nothing irrational or improper in the recognition that at the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype. See *Virginia* ("The heightened review standard our precedent establishes does not make sex a proscribed classification. . . . Physical differences between men and women . . . are enduring").

[A] statute meets the equal protection standard we here apply so long as it is "substantially related to the achievement of" the governmental objective in question. *Virginia*. It is almost axiomatic that a policy which seeks to foster the opportunity for meaningful parent-child bonds to develop has a close and substantial bearing on the governmental interest in the actual formation of that bond. None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance. In this difficult context of conferring citizenship on vast numbers of persons, the means adopted by Congress are in substantial furtherance of important governmental objectives. The fit between the means and the important end is "exceedingly persuasive." See *Virginia*. We have explained that an "exceedingly persuasive justification" is established "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Hogan.* Section 1409 meets this standard.

V

[To] fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial[.] [The] distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

■ JUSTICE O'CONNOR, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents. Because the [government] has not shown an exceedingly persuasive justification for the sex-classification embodied in 8 U.S.C. § 1409(a)(4)—*i.e.*, because it has failed to establish at least that the classification substantially relates to the achievement of important governmental objectives—I would [hold the statute unconstitutional].

[The] Court recites the governing substantive standard for heightened scrutiny of sex-based classifications, but departs from the guidance of our precedents concerning such classifications in several ways. In the first sentence of its equal protection analysis, the majority glosses over the crucial matter of the burden of justification. *Ante* ("For a gender-based classification to withstand equal protection scrutiny, it must be established . . ."). In other circumstances, the Court's use of an impersonal construction might represent a mere elision of what we have stated expressly in our prior cases. Here, however, the elision presages some of the larger failings of the opinion.

For example, the majority hypothesizes about the interests served by the statute and fails adequately to inquire into the actual purposes of § 1409(a)(4). The Court also does not always explain adequately the importance of the interests that it claims to be served by the provision. The majority also fails carefully to consider whether the sex-based classification is being used impermissibly "as a proxy for other, more germane bases of classification," *Mississippi Univ. for Women*, and instead casually dismisses the relevance of available sex-neutral alternatives. And, contrary to the majority's conclusion, the fit between the means and ends of § 1409(a)(4) is far too attenuated for the provision to survive heightened scrutiny. In all, the majority opinion represents far less than the rigorous application of heightened scrutiny that our precedents require.

According to the Court, "[t]he first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists." The majority does not elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship. Nor does the majority demonstrate that this is one of the actual purposes of

§1409(a)(4). [The] INS does not appear to rely on this interest in its effort to sustain §1409(a)(4)'s sex-based classification. Cf. Brief for Respondent. In light of the reviewing court's duty to "determine whether the proffered justification is 'exceedingly persuasive,'" *Virginia*, this disparity between the majority's defense of the statute and the INS' proffered justifications is striking, to say the least.

The majority concedes that Congress could achieve the goal of assuring a biological parent-child relationship in a sex-neutral fashion, but then, in a surprising turn, dismisses the availability of sex-neutral alternatives as irrelevant. As the Court suggests, "Congress could have required both mothers and fathers to prove parenthood within 30 days or, for that matter, 18 years, of the child's birth." Indeed, whether one conceives the majority's asserted interest as assuring the existence of a biological parent-child relationship, or as ensuring acceptable documentation of that relationship, a number of sex-neutral arrangements—including the one that the majority offers— would better serve that end. As the majority seems implicitly to acknowledge at one point, a mother will not always have formal legal documentation of birth because a birth certificate may not issue or may subsequently be lost. Conversely, a father's name may well appear on a birth certificate. While it is doubtless true that a mother's blood relation to a child is uniquely "verifiable from the birth itself" to those present at birth, the majority has not shown that a mother's birth relation is uniquely verifiable *by the INS*, much less that any greater verifiability warrants a sex-based, rather than a sex-neutral, statute. [The Court's discussion] demonstrates that, at most, differential *impact* will result from the fact that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." In other words, it will likely be easier for mothers to satisfy a sex-neutral proof of parentage requirement[, but that is irrelevant.]

[As for the second interest:] Assuming, as the majority does, that Congress was actually concerned about ensuring a "demonstrated opportunity" for a relationship, it is questionable whether such an opportunity qualifies as an "important" governmental interest apart from the existence of an actual relationship. By focusing on "opportunity" rather than reality, the majority presumably improves the chances of a sufficient means-end fit. But in doing so, it dilutes significantly the weight of the interest. It is difficult to see how, in this citizenship-conferral context, anyone profits from a "demonstrated opportunity" for a relationship in the absence of the fruition of an actual tie.

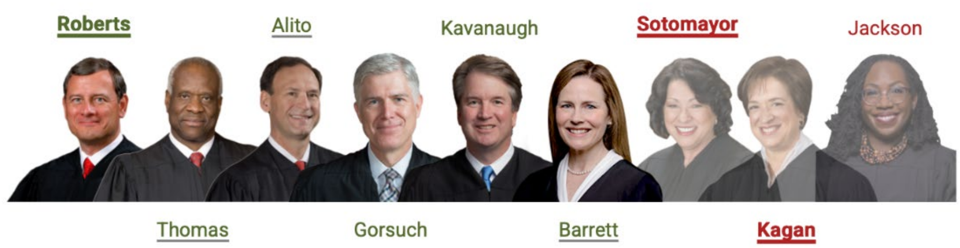
[Moreover], available sex-neutral alternatives would at least replicate, and could easily exceed, whatever fit there is between §1409(a)(4)'s discriminatory means and the majority's asserted end. [Congress] could simply substitute for §1409(a)(4) a requirement that the parent be present at birth or have knowledge of birth. Congress could at least allow proof of such presence or knowledge to be one way of demonstrating an opportunity for a relationship.

[Indeed], the idea that a mother’s presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father’s presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. The “[p]hysical differences between men and women,” *Virginia*, therefore do not justify §1409(a)(4)’s discrimination.

[The asserted justification] finds support not in biological differences but instead in a stereotype—i.e., “the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.” Such a claim relies on “the very stereotype the law condemns, “lends credibility” to the generalization, and helps to convert that “assumption” into “a self-fulfilling prophecy.”[*]

United States v. Skrmetti

145 S. Ct. 1816 (2025)



■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

In this case, we consider whether a Tennessee law banning certain medical care for transgender minors violates the Equal Protection Clause of the Fourteenth Amendment.

I

An estimated 1.6 million Americans over the age of 13 identify as transgender, meaning that their gender identity does not align with their biological sex. Some transgender individuals suffer from gender dysphoria, a medical condition characterized by persistent, clinically significant distress resulting from an incongruence between gender identity and biological sex.

[*] [JUSTICE SCALIA wrote a concurring opinion, joined by JUSTICE THOMAS, denying relief on the ground that the Court lacked the power to grant a remedy conferring citizenship without congressional authorization in any event. —BE]

Left untreated, gender dysphoria may result in severe physical and psychological harms.

[In 2023], Tennessee joined the growing number of States restricting sex transition treatments for minors by enacting the [statute challenged here, known as "SB1"]. While the State's legislature acknowledged that discordance between a minor's gender identity and biological sex can cause "discomfort or distress," §68-33-101(c), it identified concerns regarding the use of puberty blockers and hormones to treat gender dysphoria in minors. In particular, the legislature found that such treatments "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences," and that minors "lack the maturity to fully understand and appreciate" these consequences and may later regret undergoing the treatments. The legislature further found that sex transition treatments were "being performed on and administered to minors in th[e] state with rapidly increasing frequency," notwithstanding the fact that the full range of harmful effects associated with the treatments were likely not yet known. The legislature also noted that guidelines regarding sex transition treatments for minors had "changed substantially in recent years," and that health authorities in Sweden, Finland, and the United Kingdom had "placed severe restrictions" on such treatments after determining that there was "no evidence" that their benefits outweigh their risks. Finally, the legislature determined that there is evidence that gender dysphoria "can be resolved by less invasive approaches that are likely to result in better outcomes."

SB1 responds to these concerns by banning the use of certain medical procedures for treating transgender minors. In particular, the law prohibits a healthcare provider from "[s]urgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being," or "[p]rescribing, administering, or dispensing any puberty blocker or hormone," for the purpose of (1) "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex," or (2) "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity." Among other things, these prohibitions are intended to "protec[t] minors from physical and emotional harm" by "encouraging minors to appreciate," rather than "become disdainful of," their sex.

SB1 is limited in two relevant ways. First, SB1 does not restrict the administration of puberty blockers or hormones to individuals 18 and over. Second, SB1 does not ban fully the administration of such drugs to minors. A healthcare provider may administer puberty blockers or hormones to treat a minor's congenital defect, precocious (or early) puberty, disease, or physical injury. The law defines the term "[c]ongenital defect" to include an "abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex," but excludes from the definitions of "[c]ongenital defect" and "disease" "gender dysphoria, gender identity disorder, [and] gender incongruence."

[Several physicians and transgender minors challenged the statute on equal protection groups, and the United States intervened as a plaintiff as well. The plaintiffs prevailed in the district court, but the Sixth Circuit reversed. —BE] We granted certiorari to decide whether SB1 violates the Equal Protection Clause of the Fourteenth Amendment.

II

The Fourteenth Amendment's command that no State shall "deny to any person within its jurisdiction the equal protection of the laws," U. S. Const., Amdt. 14, §1, "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons," *Romer v. Evans* (1996). We have reconciled the principle of equal protection with the reality of legislative classification by holding that, "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." We generally afford such laws "wide latitude" under this rational basis review, acknowledging that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne v. Cleburne Living Center, Inc.* (1985).

Certain legislative classifications, however, prompt heightened review. For example, laws that classify on the basis of race, alienage, or national origin trigger strict scrutiny and will pass constitutional muster "only if they are suitably tailored to serve a compelling state interest." We have similarly held that sex-based classifications warrant heightened scrutiny. See *United States v. Virginia* (1996). While our precedent does not make sex a "proscribed classification," we have explained that sex "generally provides no sensible ground for differential treatment," *Cleburne*, and that sex-based lines too often reflect stereotypes or overbroad generalizations about the differences between men and women, see *Sessions v. Morales-Santana* (2017). We accordingly subject laws containing sex-based classifications to intermediate scrutiny, under which the State must show that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*.

A

1

[The] plaintiffs argue that SB1 warrants heightened scrutiny because it relies on sex-based classifications. We disagree. [SB1] prohibits healthcare providers from administering puberty blockers and hormones to *minors* for certain *medical uses,* regardless of a minor's sex.

The plaintiffs resist this conclusion, arguing that SB1 creates facial sex-based classifications by defining the prohibited medical care based on the patient's sex. This argument takes two forms. At times, the plaintiffs suggest that SB1 classifies on the basis of sex because its prohibitions reference sex. Alternatively, the plaintiffs contend that SB1 works a sex-based classification because application of the law turns on sex. Neither argument is persuasive.

This Court has never suggested that mere reference to sex is sufficient to trigger heightened scrutiny. See, *e.g., Nguyen v. INS* (2001) [*supra*, p. V-142] ("The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."). Such an approach, moreover, would be especially inappropriate in the medical context. Some medical treatments and procedures are uniquely bound up in sex. The Food and Drug Administration itself recognizes [the relevance of sex to the safety and efficacy of medical treatments]. Indeed, the agency frequently approves drugs for use by only one sex. In the medical context, the mere use of sex-based language does not sweep a statute within the reach of heightened scrutiny.

We also reject the argument that the application of SB1 turns on sex. The plaintiffs and the dissent contend that an adolescent whose biological sex is female cannot receive puberty blockers or testosterone to live and present as a male, but an adolescent whose biological sex is male can, while an adolescent whose biological sex is male cannot receive puberty blockers or estrogen to live and present as a female, but an adolescent whose biological sex is female can. So conceived, they argue, SB1 prohibits certain treatments for minors of one sex while allowing those same treatments for minors of the opposite sex.

The plaintiffs and the dissent, however, contort the meaning of the term "medical treatment." Notably absent from their framing is a key aspect of any medical treatment: the underlying medical concern the treatment is intended to address. The Food and Drug Administration approves drugs and requires that they be labeled for particular indications—the diseases or conditions that they treat, prevent, mitigate, diagnose, or cure. Different drugs can be used to treat the same thing (would you like Advil or Tylenol for your headache?), and the same drug can treat different things (take DayQuil to ease your cough, fever, sore throat, and/or minor aches and pains). For the term "medical treatment" to make sense of these various combinations, it must necessarily encompass both a given drug and the specific indication for which it is being administered.

When properly understood from the perspective of the indications that puberty blockers and hormones treat, SB1 clearly does not classify on the basis of sex. Both puberty blockers and hormones can be used to treat certain overlapping indications (such as gender dysphoria), and each can be used to treat a range of other conditions. These combinations of drugs and indications give rise to various medical treatments. When, for example, a transgender boy (whose biological sex is female) takes puberty blockers to treat his gender incongruence, he receives a different medical treatment than a boy whose biological sex is male who takes puberty blockers to treat his precocious puberty. SB1, in turn, restricts which of these medical treatments are available to minors: Under SB1, a healthcare provider may administer puberty blockers or hormones to any minor to treat a congenital defect, precocious puberty, disease, or physical injury; a healthcare provider may not administer puberty blockers or hormones to any minor to treat gender dysphoria, gender identity disorder, or gender incongruence. The application of that prohibition does not turn on sex.

Of course, a State may not circumvent the Equal Protection Clause by writing in abstract terms. See *Personnel Administrator of Mass. v. Feeney* (1979) (explaining that both overt and covert sex-based classifications are subject to heightened review). The antimiscegenation law that this Court struck down in *Loving v. Virginia* (1967) would not have shed its race-based classification had it, for example, prohibited "*any* person from marrying an individual of a different race." Such a law would still have turned on a race-based classification: It would have prohibited Mildred Jeter (a black woman) from marrying Richard Loving (a white man), while permitting a white woman to do so. The law, in other words, would still "proscribe generally accepted conduct if engaged in by members of different races."

Here, however, SB1 does not mask sex-based classifications. For reasons we have explained, the law does not prohibit conduct for one sex that it permits for the other. Under SB1, *no* minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder, or gender incongruence; minors of *any* sex may be administered puberty blockers or hormones for other purposes.

Nor are we persuaded that SB1's prohibition on the prescription of puberty blockers and hormones to "[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to "[t]rea[t] purported discomfort or distress from a discordance between the minor's sex and asserted identity," reflects a sex-based classification. In the dissent's view, this language "plainly classifies on the basis of sex" because it "turns on inconsistency with a protected characteristic." The dissent analogizes to a hypothetical law that "prohibit[s] minors from attending any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity inconsistent with the minor's religion." Such a law, the dissent argues, would plainly classify on the basis of religion. "Whether the law prohibits a minor from attending any particular religious service turns on the minor's religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue."

But a prohibition on the prescription of puberty blockers and hormones to "[e]nabl[e] a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" is simply a prohibition on the prescription of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, or gender incongruence. A law prohibiting attendance at a religious service "inconsistent with" the attendee's religion may trigger heightened scrutiny. A law prohibiting the administration of specific drugs for particular medical uses does not.

Finally, we reject the plaintiffs' argument that, "by design, SB1 enforces a government preference that people conform to expectations about their sex." The plaintiffs note that SB1's statutory findings state that Tennessee has a compelling interest in "encouraging minors to appreciate their sex" and in prohibiting medical care "that might encourage minors to become disdainful of their sex." They argue that these findings reveal that the law operates to force conformity with sex.

To start, the plaintiffs' allegations of sex stereotyping are misplaced. True, a law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. But where a law's classifications are neither covertly nor overtly based on sex, we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose, see *Feeney*; *Arlington Heights v. Metropolitan Housing Development Corp.* (1977). No such argument has been raised here.

Regardless, the statutory findings to which the plaintiffs point do not themselves evince sex-based stereotyping. [Tennessee's] stated interests in "encouraging minors to appreciate their sex" and in prohibiting medical care "that might encourage minors to become disdainful of their sex" simply reflect the State's concerns regarding the use of puberty blockers and hormones to treat gender dysphoria, gender identity disorder, and gender incongruence.

2

The plaintiffs separately argue that SB1 warrants heightened scrutiny because it discriminates against transgender individuals, who the plaintiffs assert constitute a quasi-suspect class. This Court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because SB1 does not classify on the basis of transgender status.

[We] have explained that a State does not trigger heightened constitutional scrutiny by regulating a medical procedure that only one sex can undergo unless the regulation is a mere pretext for invidious sex discrimination. In *Geduldig v. Aiello* (1974), for example, we held that a California insurance program that excluded from coverage certain disabilities resulting from pregnancy did not discriminate on the basis of sex. In reaching that holding, we explained that the program did not exclude any individual from benefit eligibility because of the individual's sex but rather "remove[d] one physical condition—pregnancy—from the list of compensable disabilities." We observed that the "lack of identity" between sex and the excluded pregnancy-related disabilities became "clear upon the most cursory analysis."

[By] the same token, SB1 does not exclude any individual from medical treatments on the basis of transgender status but rather removes one set of diagnoses [from] the range of treatable conditions. SB1 divides minors into two groups: those who might seek puberty blockers or hormones to treat the excluded diagnoses, and those who might seek puberty blockers or hormones to treat other conditions. Because only transgender individuals seek puberty blockers and hormones for the excluded diagnoses, the first group includes only transgender individuals; the second group, in contrast, encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence—just as only biological women can become pregnant—there is a "lack of identity" between transgender status and the excluded medical diagnoses. The plaintiffs, moreover, have not argued that SB1's prohibitions are mere pretexts designed to effect an invidious discrimination against transgender individuals. Under these circumstances, we decline to find that SB1's prohibitions on the use of puberty blockers and hormones exclude any individuals on the basis of transgender status.[3]

3

Finally, *Bostock v. Clayton County* (2020) does not alter our analysis. In *Bostock,* we held that an employer who fires an employee for being gay or transgender violates Title VII's prohibition on discharging an individual "because of" their sex. [In] such a case, the employer has penalized a member of one sex for a trait or action that it tolerates in members of the other.

The plaintiffs urge us to apply *Bostock*'s reasoning to this case. In their view, SB1 violates the Equal Protection Clause because it prohibits a minor whose biological sex is female from receiving testosterone to live as a male but allows a minor whose biological sex is male to receive testosterone for the same purposes (and vice versa). Applying *Bostock*'s reasoning, they argue that SB1 discriminates on the basis of sex because it intentionally penalizes members of one sex for traits and actions that it tolerates in another.

We have not yet considered whether *Bostock*'s reasoning reaches beyond the Title VII context, and we need not do so here. [Whereas changing an employee's sex would have yielded a different employment decision in *Bostock*, changing] a minor's sex or transgender status does not alter the application of SB1. Consider [a] girl with unwanted facial hair inconsistent

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[3] The dissent argues that our analysis "may well suggest that a law depriving all individuals who 'have ever, or may someday, menstruate' of access to health insurance would be sex neutral merely because not all women menstruate." But such a law is different from both SB1 and the law at issue in *Geduldig.* As we have explained, SB1 regulates certain medical treatments; *Geduldig* involved a state disability insurance system that excluded certain pregnancy-related disabilities from coverage. The dissent's hypothetical law, in contrast, does not regulate a class of treatments or conditions. Rather, it regulates a class of *persons* identified on the basis of a specified characteristic. Neither our analysis nor *Geduldig* speaks to a law that classifies on such a basis.

with her sex. If she has a diagnosis of hirsutism (male-pattern hair growth), a healthcare provider may, consistent with SB1, prescribe her puberty blockers or hormones. But changing the minor's sex to male does not automatically change the operation of SB1. If hirsutism is replaced with gender dysphoria, the now-male minor may not receive puberty blockers or hormones; but if hirsutism is replaced with precocious puberty, SB1 does not bar either treatment. Unlike the homosexual male employee whose sexuality automatically switches to straight when his sex is changed from male to female, there is no reason why a female minor's diagnosis of hirsutism automatically changes to gender dysphoria when her sex is changed from female to male. Under the logic of *Bostock,* then, sex is simply not a but-for cause of SB1's operation.

B

[SB1 readily satisfies rational basis review.] This case carries with it the weight of fierce scientific and policy debates about the safety, efficacy, and propriety of medical treatments in an evolving field. The voices in these debates raise sincere concerns; the implications for all are profound. The Equal Protection Clause does not resolve these disagreements. Nor does it afford us license to decide them as we see best. Our role is not "to judge the wisdom, fairness, or logic" of the law before us, but only to ensure that it does not violate the equal protection guarantee of the Fourteenth Amendment. Having concluded it does not, we leave questions regarding its policy to the people, their elected representatives, and the democratic process.

▪ JUSTICE SOTOMAYOR, with whom JUSTICE JACKSON joins, and with whom JUSTICE KAGAN joins as to all but Part V, dissenting.

[Tennessee's] law expressly classifies on the basis of sex and transgender status, so the Constitution and settled precedent require the Court to subject it to intermediate scrutiny. The majority contorts logic and precedent to say otherwise [and] subjects a law that plainly discriminates on the basis of sex to mere rational-basis review. By retreating from meaningful judicial review exactly where it matters most, the Court abandons transgender children and their families to political whims. In sadness, I dissent.

I

Begin with the medical context in which Tennessee's law operates. Doctors in the United States prescribe hormones and puberty inhibitors to treat a range of medical conditions. Often, they are administered to help minors conform to the typical appearance associated with their sex identified at birth. Children who start experiencing puberty at a premature age (precocious puberty), for example, have long received puberty-delaying medications to stave off puberty until adolescence. [After] puberty begins, doctors may prescribe these same medicines to adolescents whose physical appearance does not align with what one might expect from their sex identified at birth.

[Physicians] prescribe these same medications to transgender adolescents, whose gender identity is inconsistent with their sex identified at birth. Hormones and puberty blockers help align transgender adolescents' physical appearance with their gender identity, as they do when prescribed to adolescents who want to align their appearances with their sex identified at birth. The same puberty suppressants prescribed to pause the onset of precocious puberty can pause puberty for transgender adolescents, giving them "time to further understand their gender identity."

Hormone therapy later allows transgender teens to initiate puberty consistent with their gender identity. [As] is true for most medical treatment for minors, puberty blockers and hormones should be administered only after a comprehensive and individualized risk-benefit assessment, and with parental consent.[2]

Transgender adolescents' access to hormones and puberty blockers (known as gender-affirming care) is not a matter of mere cosmetic preference. To the contrary, access to care can be a question of life or death. Some transgender adolescents suffer from gender dysphoria, a medical condition characterized by clinically significant and persistent distress resulting from incongruence between a person's gender identity and sex identified at birth. If left untreated, gender dysphoria can lead to severe anxiety, depression, eating disorders, substance abuse, self-harm, and suicidality. [Tragically,] studies suggest that as many as one-third of transgender high school students attempt suicide in any given year.

[The] American Academy of Pediatrics, American Medical Association, American Psychiatric Association, American Psychological Association, and American Academy of Child Adolescent Psychiatry all agree that hormones and puberty blockers are "appropriate and medically necessary" to treat gender dysphoria when clinically indicated.

Tennessee has taken a different tack. The State enacted SB1 to categorically prohibit physicians from prescribing puberty blockers and hormone therapy for the purpose of treating gender dysphoria in minors. [SB1] leaves untouched the use of the same drugs to treat any other medical condition, including delayed (or early) puberty and any other "physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex."

II

A

The level of constitutional scrutiny courts apply in reviewing state action is enormously consequential. [The rational basis] standard, which the majority erroneously applies today, demands hardly more than a cursory glance at the State's reasons for legislating.

[2] The use of surgery to treat gender dysphoria [is] not at issue in this case.

This Court has long recognized, however, that a more "searching" judicial review is warranted when the rights of "discrete and insular minorities" are at stake. *United States v. Carolene Products Co.*, n. 4 (1938). Because such minorities often face systemic barriers to vindicating their interests through the political process, courts have a comparative advantage over the elected branches in safeguarding their rights. Such judicial scrutiny is at its apex in reviewing laws that classify on the basis of race and national origin. [For] nearly half a century, the Court has applied a different standard, known as intermediate scrutiny, to all "statutory classifications that distinguish between males and females." States can differentiate on the basis of sex only to "'serv[e] important governmental objectives'" and only if the sex classification is "'substantially related to the achievement of those objectives.'" The standard is an intermediate one because it strikes an important balance. On the one hand, there are some genuine "[p]hysical differences between men and women," so not all sex-based legislation is discriminatory or constitutionally proscribed. *Virginia*. On the other hand, sex-based legislation always presents a serious risk of invidious discrimination that relies on "overbroad generalizations about the different talents, capacities, or preferences of males or females." Intermediate scrutiny is the core judicial tool to differentiate innocuous sex-based laws from discriminatory ones.

B

SB1 plainly classifies on the basis of sex, so the Constitution demands intermediate scrutiny. Recall that SB1 prohibits the prescription of hormone therapy and puberty blockers only if done to "enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to alleviate "discomfort or distress from a discordance between the minor's sex and asserted identity." Use of the same drugs to treat any other "'disease'" is unaffected. Physicians may continue, for example, to prescribe hormones and puberty blockers to treat any "physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex."

What does that mean in practice? Simply that sex determines access to the covered medication. Physicians in Tennessee can prescribe hormones and puberty blockers to help a male child, but not a female child, look more like a boy; and to help a female child, but not a male child, look more like a girl. [All] this, the State openly admits, in service of "encouraging minors to appreciate their sex."

Like any other statute that turns on inconsistency with a protected characteristic, SB1 plainly classifies on the basis of sex. A simple analogy illustrates the point. Suppose Tennessee prohibited minors from attending "any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity *inconsistent* with the minor's religion." No one would seriously dispute that such a rule classifies on the basis of religion. Whether the law prohibits a minor from attending any particular religious service turns on the minor's religion: A Jewish child can visit a synagogue but not a church, while a Christian child can attend church but not the synagogue.

SB1 operates in the same way. Consider the mother who contacts a Tennessee doctor, concerned that her adolescent child has begun growing unwanted facial hair. This hair growth, the mother reports, has spurred significant distress because it makes her child look unduly masculine. The doctor's next step depends on the adolescent's sex. If the patient was identified as female at birth, SB1 allows the physician to alleviate her distress with testosterone suppressants. What if the adolescent was identified male at birth, however? SB1 precludes the patient from receiving the same medicine.

Now consider the parents who tell a Tennessee pediatrician that their teenage child has been experiencing an unwanted (but medically benign) buildup of breast gland tissue. Again, the pediatrician's next move depends on the patient's sex.

[Tennessee] essentially concedes the point. It admits that a prohibition on wearing clothing "'inconsistent with'" the wearer's sex would trigger intermediate scrutiny, as would a law prohibiting professionals from working in jobs "'inconsistent with'" their sex. That is because for some jobs and some outfits, "a male can have the job" or wear the outfit, "and a female cannot." SB1 draws exactly the same kind of sex-based line: For some treatments that help adolescents look and feel more masculine, a male minor can have the treatment, and a female minor cannot.[8]

That SB1 conditions a patient's access to treatment even in part on her sex is enough to trigger intermediate scrutiny. This Court's equal protection precedents ask only whether a law "differentiates on the basis of gender." If so, the law "attract[s] heightened review under the Constitution's equal protection guarantee." A long line of this Court's equal protection precedents confirms that much. That is why an Alabama statute that "authoriz[es] the imposition of alimony obligations on husbands, but not on wives," "'establishes a classification subject to scrutiny under the Equal Protection Clause'": The plaintiff, "Mr. Orr[,] bears a burden he would not bear were he female." *Orr v. Orr* (1979).

[8] The majority dismisses out of hand the United States' assertion that SB1 is designed to "force boys and girls to *look* and *live* like boys and girls," urging that any suggestion of sex stereotyping is relevant only to whether a law that classifies on the basis of sex fails intermediate scrutiny. *Ante*. That argument ignores that a law policing a sex stereotype, like the hypothetical requirement that all children wear "sex-consistent clothing," can itself qualify as sex-based government action that triggers intermediate scrutiny. See *United States v. Virginia*; *Bostock v. Clayton County,* 590 U.S. 644, 660 (2020). The clothing law would tolerate from a female minor at least some behavior (wearing a skirt, for example) that it proscribes for male minors and thereby treat minors differently on the basis of sex. In any event, the United States need not rest on a theory of sex stereotyping here because SB1 classifies by sex on its face.

This Court's decision in *Bostock v. Clayton County* (2020) confirms the classification on SB1's face. [In] deciding that discrimination based on incongruence between sex and gender identity was discrimination "because of sex," *Bostock* asked the very same question our equal protection precedents do: whether "changing the employee's sex would have yielded a different choice by the employer."[9] The answer was clearly yes, for the simple reason that discrimination against transgender employees necessarily "penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Bostock*. Nor was it a defense to liability that the discrimination might apply equally to both sexes: "[A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine" in both cases "fires an individual in part because of sex." The same is true of SB1. By depriving adolescents of hormones and puberty blockers only when such treatment is "inconsistent with" a minor's sex, the law necessarily deprives minors identified as male at birth of the same treatment it tolerates for an adolescent identified as female at birth (and vice versa).

III

Notwithstanding that SB1 distinguishes between males and females in the medical treatments it authorizes, [the majority holds] that SB1's prohibition on treatments "inconsistent with [a] minor's sex" contains no sex classification at all. As the statute's text itself makes clear, that conclusion is indefensible.

A

How does the majority wriggle [itself] free of any obligation to take a closer look? It abstracts away the sex classification on SB1's face, asserting that the law classifies based only on "age" and "medical purpose." [The] problem with the majority's argument is that the very "medical purpose" SB1 prohibits is defined by reference to the patient's sex. Key to whether a minor may receive puberty blockers or hormones is whether the treatment facilitates the "medical purpose" of helping the minor live or appear "inconsistent with" the minor's sex.

[The] majority emphasizes that, in Tennessee, "*no* minor may be administered puberty blockers or hormones to treat gender dysphoria," while "minors of *any* sex may be administered puberty blockers or hormones for

[9] JUSTICE THOMAS and JUSTICE ALITO observe, correctly, that the Equal Protection Clause and Title VII use different words. Yet that difference in wording does not change that this Court's equal protection precedents have always required courts to ask the same question this Court considered in *Bostock*: that is, whether a law "differentiate[s] on the basis of gender." *Sessions v. Morales-Santana* (2017).

To be sure, the constitutional analysis diverges from Title VII once a court identifies a law or policy that differentiates on the basis of sex. That is because the Constitution tolerates governmental differentiation on that basis if it survives intermediate scrutiny. *Virginia*. Title VII offers employers no similar opportunity to justify sex discrimination[.]

other purposes." But nearly every discriminatory law is susceptible to a similarly race-or sex-neutral characterization. A prohibition on interracial marriage, for example, allows *no* person to marry someone outside of her race, while allowing persons of *any* race to marry within their races. See *Loving v. Virginia* (1967).[11] The same is true of a hypothetical law prohibiting attendance at services "inconsistent with" a child's religion, while allowing all children to attend religion-consistent services. Indeed, the majority itself seems to recognize that laws prohibiting professions "inconsistent" with a person's sex, marriages "inconsistent" with a person's race, or religious services "inconsistent" with a person's faith must be subject to heightened review, even if rewritten as ostensibly neutral prohibitions on sex-, race-, and faith-inconsistent behavior. And although the majority insists that its logic would not apply to the hypothetical religion-consistent services law, it offers no principled reason to differentiate that law from SB1's prohibition on promoting "inconsisten[cy] with" the patient's sex.

C

In a final bid to avoid applying our equal protection precedents, the majority asserts that "mere reference to sex" is insufficient to trigger intermediate scrutiny, especially in the "medical context." [Yet] SB1 does not just mention sex. It defines an entire category of prohibited conduct based on inconsistency with sex.

[Nor] does the fact that SB1 concerns the "medical context" change the relevant analysis. No one disputes that "[s]ome medical treatments and procedures are uniquely bound up in sex" or that there are "biological differences between men and women." That there are such physical differences is, after all, one of the reasons why sex is not altogether a proscribed classification. See *Virginia*. A law that allowed only women to receive certain breast cancer treatments, for example, might well be consistent with the Constitution's equal protection mandate if the State establishes that the relevant treatments are suited to women's (and not men's) bodies. Cf. *ante* (noting "'many' breast cancer treatments [are] approved for women only"). Laws that differentiate based on biological distinctions between men and women are precisely the sort that States might successfully defend under intermediate scrutiny. Biological differences between the sexes, however, are no reason to skirt such scrutiny altogether.

Fashioning a medical-context-only exception also runs counter to decades of equal protection precedents. This Court has clarified that, although

[11] JUSTICE ALITO takes the position that this Court scrutinized and invalidated Virginia's antimiscegenation law because of its impermissible purpose "'to maintain White Supremacy'" and not simply because it classified on the basis of race. Of course, that is not what *Loving* said. In any event, the notion that some category of laws employing sex classifications should be scrutinized only if the purpose is "invidious sex discrimination" flips the equal protection inquiry on its head. The whole purpose, after all, of intermediate scrutiny is to separate invidious sex classifications from permissible ones.

not every sex-based distinction is "marked by misconception and prejudice," *Tuan Anh Nguyen v. INS* (2001), every sex-based distinction does warrant intermediate scrutiny.

Take, for example, *Tuan Anh Nguyen*[.] The Court ultimately decided that the "different set of rules" for fathers and mothers was "neither surprising nor troublesome from a constitutional perspective" because "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." We reached that conclusion, however, only after demanding of the Government an explanation for why that sex classification "'serve[d] "important governmental objectives"'" and how "'"the discriminatory means employed" [were] "substantially related to [those objectives."'"]

IV

Having blithely dispensed with the notion that SB1 classifies on the basis of sex, the majority next asserts that "SB1 does not classify on the basis of transgender status." That too is contrary to the statute's text and plainly wrong.

SB1 prohibits Tennessee physicians from offering hormones and puberty blockers to allow a minor to "identify with" a gender identity inconsistent with her sex. Desiring to "identify with" a gender identity inconsistent with sex is, of course, exactly what it means to be transgender. The two are wholly coextensive. That is why it would defy common sense to suggest an employer's policy of firing all persons identifying with or living as an identity inconsistent with their sex does not discriminate on the basis of transgender status.

Left with nowhere else to turn, the Court hinges its conclusion to the contrary on the by-now infamous footnote 20 of *Geduldig v. Aiello,* 417 U.S. 484 (1974), which declared that discrimination on the basis of pregnancy is not discrimination on the basis of sex. [*Geduldig*] was "egregiously wrong" when it was decided, both "[b]ecause pregnancy discrimination is inevitably sex discrimination" and because discrimination against women is so "tightly interwoven with society's beliefs about pregnancy and motherhood." *Coleman v. Court of Appeals of Md.* (2012) (Ginsburg, J., dissenting). [Divorced] from its fact-specific context, *Geduldig*'s reasoning may well suggest that a law depriving all individuals who "have ever, or may someday, menstruate" of access to health insurance would be sex neutral merely because not all women menstruate.

In any event, even *Geduldig*'s faulty reasoning cannot save the majority's conclusion that SB1 is innocent of transgender discrimination. Unlike pregnancy, a desire to "identify with, or live as, a purported identity inconsistent with [one's] sex," is not some "objectively identifiable physical condition" that legislatures can target without reference to sex or transgender status. And while not all women are pregnant, all transgender people, by definition, "identify with, or live as, a purported identity inconsistent with [their] sex."

That SB1 discriminates on the basis of transgender status is yet another reason it must be subject to heightened scrutiny. For one, this Court already decided in *Bostock* that "it is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex," and sex discrimination is of course subject to heightened scrutiny. Nor should there be serious dispute that transgender persons bear the hallmarks of a quasi-suspect class. See *Cleburne v. Cleburne Living Center, Inc.* (1985) (describing the standard). [Discussion omitted. —BE]

V

SB1's classifications by sex and transgender status clearly require the application of intermediate scrutiny. [And the] present record offers reason to question (as the District Court did) whether Tennessee's categorical ban on treating gender dysphoria bears the "requisite direct, substantial relationship" to its interest in protecting minors' health. *Mississippi Univ. for Women v. Hogan* (1982). Tennessee has offered little evidence, for example, that it is more dangerous to receive puberty blockers to "identify with, or live as, a purported identity inconsistent with the minor's sex" than to treat other conditions like precocious puberty. Why, then, does SB1 proscribe the regulated medications to treat gender dysphoria, while leaving them available for myriad other purposes? So too is it difficult to ignore that Tennessee professes concern with protecting the health of minors while categorically banning gender-affirming care for even those minors exhibiting the most severe mental-health conditions, including suicidality.

[On] remand, the courts could have taken due account of the "[r]ecent developments" that (according to the majority) "underscore the need for legislative flexibility in this area," including a recent report from England's National Health Service on the use of puberty blockers and hormones to treat transgender minors. Yet the majority inexplicably refuses to take even the modest step of requiring Tennessee to show its work before the lower courts.

* * *

[The] majority refuses to call a spade a spade. Instead, it obfuscates a sex classification that is plain on the face of this statute, all to avoid the mere possibility that a different court could strike down SB1, or categorical healthcare bans like it. The Court's willingness to do so here does irrevocable damage to the Equal Protection Clause and invites legislatures to engage in discrimination by hiding blatant sex classifications in plain sight. It also authorizes, without second thought, untold harm to transgender children and the parents and families who love them. Because there is no constitutional justification for that result, I dissent.

▪ JUSTICE KAGAN, dissenting.

For all the reasons JUSTICE SOTOMAYOR gives, Tennessee's SB1 warrants heightened judicial scrutiny. [Because] the Court is wrong in not subjecting

SB1 to that kind of examination, I join Parts I through IV of JUSTICE SOTOMAYOR's dissent.

I take no view on how SB1 would fare under heightened scrutiny, and therefore do not join Part V. The record evidence here is extensive, complex, and disputed, and the Court of Appeals (because it applied only rational-basis review) never addressed the relevant issues. Still more, both the plaintiffs and the Government asked this Court not to itself apply heightened scrutiny, but only to remand that inquiry to the lower courts. So I would both start and stop at the question of what test SB1 must satisfy. I respectfully dissent.*

* [Concurrences by JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE BARRETT (joined by JUSTICE THOMAS) are omitted. —BE]

C. Sexual Orientation (39 PAGES)

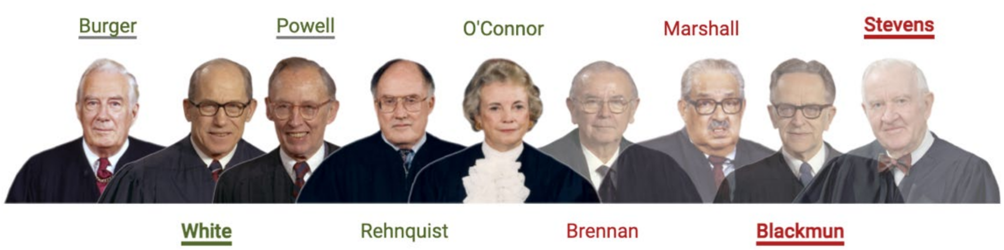
The legal treatment of gay, lesbian, and bisexual people is easily the area where constitutional law has moved most sharply in a progressive direction in recent decades. As you'll see, in the 1980s, the Court dismissed the idea of constitutional protection for same-sex sexual activity as "facetious"; within three decades, it had held that states could not constitutionally adhere to an opposite-sex definition of marriage. We'll trace that evolution in this section.

As you read the following cases, try to keep two issues in mind. First, this line of cases provides lots of fodder for thinking about the relationship between liberty and equality claims. Both kinds of arguments figure in these cases—and with both substantive due process and equal protection doctrine now in your repertoire, you can read the cases in sequence rather than sorting them into silos that might be artificial. What distinctive role does each kind of claim seem to be playing, and what advantages or disadvantages does each carry?

Second, these cases repeatedly pose a challenge that we first noted in connection with *Romer v. Evans* (1996) [*supra*, p. V-23]: how to distinguish a legitimate moral judgment rendered by a political community from impermissible "animus." Can the Court's interventions in this area be justified as a matter of constitutional principle, or are they, as the dissenters allege throughout, *ad hoc* usurpations of democratic authority (even if those usurpations made the society more just and humane)?

Bowers v. Hardwick

478 U.S. 186 (1986)



■ JUSTICE WHITE delivered the opinion of the Court.

In August 1982, [Michael Hardwick] was charged with violating the Georgia statute criminalizing sodomy[1] by committing that act with another adult male in the bedroom of [his] home. After a preliminary hearing, the

[1] Georgia Code Ann. §16-6-2 (1984) provides, in pertinent part, as follows: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . [.]"

District Attorney decided not to present the matter to the grand jury unless further evidence developed.

[Hardwick] then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. He asserted that he was a practicing homosexual, that the Georgia sodomy statute [placed] him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. [Relying] on our decisions in *Griswold* v. *Connecticut* (1965); *Eisenstadt* v. *Baird* (1972); [and] *Roe* v. *Wade* (1973), the court went on to hold that the Georgia statute violated [Hardwick's] fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment.

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. [The] issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement [with the lower courts and Hardwick] that the Court's prior cases [for] all intents and purposes have decided this case. [*Pierce*] *v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923) [dealt] with child rearing and education, *Skinner v. Oklahoma* (1942) with procreation, *Loving v. Virginia* (1967) with marriage, *Griswold* and *Eisenstadt* with contraception, and *Roe* with abortion. The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child.

Accepting the decisions in these cases[,] we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated[.] Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.

[Striving] to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko* v. *Connecticut* (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore* v. *East Cleveland* (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." See also *Griswold* v. *Connecticut.*

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. [In] fact, until 1961, all States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

[Even] if the conduct at issue here is not a fundamental right, [Hardwick] asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed[.][8]

[8] Respondent does not [rely upon] the Ninth Amendment, the Equal Protection Clause, or the Eighth Amendment.

■ CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion, but I write separately to underscore my view that there is no such thing as a fundamental right to commit homosexual sodomy. As the Court notes, the proscriptions against sodomy have very "ancient roots." [To] hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching. [This case presents] not a question of personal "preferences" but rather of the legislative authority of the State.

■ JUSTICE POWELL, concurring.

[I] agree with the Court that there is no fundamental right—*i.e.*, no substantive right under the Due Process Clause—such as that claimed by respondent Hardwick[.] [But i]n my view, a prison sentence for such conduct—certainly a sentence of long duration—would create a serious Eighth Amendment issue. In this case, however, [Hardwick] has not been tried, much less convicted and sentenced. Moreover, respondent has not raised the Eighth Amendment issue below.[2] For these reasons this constitutional argument is not before us.[*]

■ JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

This case is no more about "a fundamental right to engage in homosexual sodomy" [than] *Stanley v. Georgia* (1969) was about a fundamental right to watch obscene movies, or *Katz v. United States* (1967) was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone."

The statute at issue denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that [it] is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." [But like] Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down

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[2] It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades. Moreover, the State has declined to present the criminal charge against Hardwick to a grand jury[.] The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct. Some 26 States have repealed similar statutes. But the constitutional validity of the Georgia statute was put in issue by [Hardwick], and for the reasons stated by the Court, I cannot say that conduct condemned for hundreds of years has now become a fundamental right.

[*] [There is a remarkable story about Justice Powell's pivotal vote in this case. *See, e.g.*, KENJI YOSHINO, COVERING (2006). In short: Powell was, "at the eleventh hour, on the fence." He consulted his most liberal clerk and noted that he "did not think he had ever known a homosexual." The clerk, unbeknownst to Powell, was gay. "The astonished [clerk] agonized over whether to come out to his justice, but decided against it." Years later, Powell told an audience that he "probably made a mistake in the *Hardwick* case." —BE]

have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "'abominable crime not fit to be named among Christians.'" *Herring* v. *State,* 119 Ga. 709, 721 (1904).

[The] Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

■ JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. *Griswold* v. *Connecticut* (1965). Moreover, this protection extends to intimate choices by unmarried as well as married persons. *Carey* v. *Population Services International* (1977); *Eisenstadt* v. *Baird* (1972).

[When] individual married couples are isolated from observation by others, the way in which they voluntarily choose to conduct their intimate relations is a matter for them—not the State—to decide.[10] [And if] the Georgia statute cannot be enforced as it is written[,] the State must assume the burden of justifying a selective application of its law. [A] policy of selective application must be supported by a neutral and legitimate interest—something more substantial than a habitual dislike for, or ignorance about, the disfavored group. Neither the State nor the Court has identified any such interest in this case.

When the constitutionality of sodomy laws returned to the Court in *Lawrence v. Texas* (2003), the Court overruled *Bowers*.

[10] Indeed, the Georgia Attorney General concedes that Georgia's statute would be unconstitutional if applied to a married couple.

Lawrence v. Texas

539 U.S. 558 (2003)

▪ JUSTICE KENNEDY delivered the opinion of the Court.

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. [It] presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.

I

The question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.

In Houston, Texas, [police] officers [lawfully entered] an apartment where one of the petitioners, John Geddes Lawrence, resided. [The] officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were [charged with] "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)." [They were convicted under] Tex. Penal Code Ann. § 21.06(a). It provides: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." The statute defines "[d]eviate sexual intercourse" as follows:

> "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." § 21.01(1).

[The] petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual.

II

We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution. For this inquiry we deem it necessary to reconsider the Court's holding in *Bowers*.

[The] most pertinent beginning point is our decision in *Griswold v. Connecticut* (1965) [*supra*, p. IV-66]. [There t]he Court described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom.

After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship. [*Roe v. Wade*] then recognized the right of a woman to make certain fundamental decisions affecting her destiny and confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person. [This] was the state of the law with respect to some of the most relevant cases when the Court considered *Bowers v. Hardwick*.

[The] Court began its substantive discussion in *Bowers* as follows: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Having misapprehended the claim of liberty there presented to it, and thus stating the claim to be whether there is a fundamental right to engage in consensual sodomy, the *Bowers* Court said: "Proscriptions against that conduct have ancient roots." In academic writings [and *amicus* briefs], [there] are fundamental criticisms of the historical premises [asserted in] *Bowers*. We need not enter this debate in an attempt to reach a definitive historical judgment, but the following considerations counsel against adopting the definitive conclusions upon which *Bowers* placed such reliance.

At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. Beginning in colonial times there were prohibitions of sodomy derived from the English criminal laws passed in the first instance [in] 1533. The English prohibition was understood to include relations between men and women as well as relations between men and men. Nineteenth-century commentators [read] American [statutes in the same way]. The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. See, *e. g.,* J. Katz, The Invention of Heterosexuality 10 (1995); J. D'Emilio & E. Freedman, Intimate Matters: A History of Sexuality in America 121 (2d ed. 1997) ("The modern terms *homosexuality* and *heterosexuality* do not apply to an era that had not yet articulated these distinctions"). Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.

Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private. A substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent, as in the case of a minor or the victim of an assault. As to these, one purpose for the prohibitions was to ensure there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law. [The] infrequency of prosecutions [for conduct between consenting adults] makes it difficult to say that society approved of a rigorous and systematic punishment of [such acts]. The longstanding criminal prohibition of homosexual sodomy upon which the *Bowers* decision placed such reliance is as consistent with a general condemnation of nonprocreative sex as it is with an established tradition of prosecuting acts because of their homosexual character.

[Despite] the absence of prosecutions, there may have been periods in which there was public criticism of homosexuals as such and an insistence that the criminal laws be enforced to discourage their practices. But far from possessing "ancient roots," American laws targeting same-sex couples did not develop until the last third of the 20th century. [Even then] a significant number [of prosecutions] involved conduct in a public place.

It was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so.* [More recently,

* [These were Arkansas, Kansas, Kentucky, Missouri, Montana, Nevada, Oklahoma, Tennessee, and Texas. —BE]

even some] States with same-sex prohibitions have moved toward abolishing them.

In summary, [*Bowers*'] historical premises are not without doubt and, at the very least, overstated.

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Planned Parenthood of Southeastern Pa. v. Casey* (1992).

[Chief Justice Burger's *Bowers* concurrence pointed to the Georgia prohibition's] "firm[] root[s] in Judeo-Christian moral and ethical standards." As with Justice White's assumptions about history, scholarship cast some doubt on [that] sweeping [statement]. In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.

[This] emerging recognition should have been apparent when *Bowers* was decided. In 1955 the American Law Institute promulgated the Model Penal Code and made clear that it did not [support] "criminal penalties for consensual sexual relations conducted in private." It justified its decision on three grounds: (1) The prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail. In 1961 Illinois changed its laws to conform to the Model Penal Code. Other States soon followed.

[Where sodomy laws were in place, moreover, they] often were being ignored. *Bowers* (Powell, J., concurring) ("The history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct").

The sweeping references by Chief Justice Burger to the history of Western civilization [did] not take account of other authorities pointing in an opposite direction. [The British Parliament repealed] laws punishing homosexual conduct [in 1967]. [And almost] five years before *Bowers* was decided the European Court of Human Rights [held] that the laws proscribing [consensual homosexual conduct] were invalid under the European Convention on Human Rights. *Dudgeon* v. *United Kingdom,* 45 Eur. Ct. H. R. (1981). Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting [sodomy] are reduced now to 13, of which 4 enforce their laws only against homosexual conduct[.]

Two principal cases decided after *Bowers* cast its holding into even more doubt. In *Casey* [*supra*, p. IV-92], [we] explain[ed] the respect the Constitution demands for the autonomy of the person [as] follows:

> "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.

The second post-*Bowers* case of principal relevance is *Romer v. Evans* (1996) [*supra*, p. V-23]. There the Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause. *Romer* invalidated an amendment to Colorado's constitution which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by "orientation, conduct, practices or relationships." We concluded that the provision was "born of animosity toward the class of persons affected" and further that it had no rational relation to a legitimate governmental purpose.

As an alternative argument in this case, counsel for [Lawrence] and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.

[The] doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. In *Casey* we noted that when a Court is asked to overrule a precedent recognizing a constitutional liberty interest, individual or societal reliance on the existence of that liberty cautions with particular strength against reversing course. [However,] there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.

The rationale of *Bowers* does not withstand careful analysis. In his dissenting opinion in *Bowers* JUSTICE STEVENS came to these conclusions:

> "Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons."

JUSTICE STEVENS' analysis, in our view, should have been controlling in *Bowers* and should control here.

Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey*. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

■ JUSTICE O'CONNOR, concurring in the judgment.

The Court today overrules *Bowers v. Hardwick*. I joined *Bowers*, and do not join the Court in overruling it. Nevertheless, I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional. Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.

[Laws] such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne* v. *Cleburne Living Center* (1985) [*supra*, p. V-10]; see also *Williamson* v. *Lee Optical* (1955). We have consistently held, however, that some objectives, such as "a bare . . . desire to harm a politically unpopular group," are not legitimate state interests. *Department of Agriculture* v. *Moreno* (1973). See also *Cleburne*; *Romer*. When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.

We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships. In *Department of Agriculture* v. *Moreno,* for example, we held that a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection because the purpose of the law was to "'discriminate against hippies.'" The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. In *Eisenstadt* v. *Baird* (1972), we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in *Cleburne,* we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in *Romer,* we disallowed a state statute that "impos[ed] a broad and undifferentiated disability on a single named group"—specifically, homosexuals.

The statute at issue here makes sodomy a crime only if a person "engages in deviate sexual intercourse with another individual of the same sex." Sodomy between opposite-sex partners, however, is not a crime in Texas. That is, Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same-sex sexual orientation and thus are more likely to engage in behavior prohibited by [it].

The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction. [The law] brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has [stipulated] that the law "legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law," including in the areas of "employment, family issues, and housing."

Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality. [In *Bowers*], we rejected the argument that no rational basis existed to justify the law, pointing to the government's interest in promoting morality. [But this] case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. *See, e.g.*, *Moreno*; *Romer*. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.

[Texas] argues, however, that [the] law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class. [Indeed, i]n Texas, calling a person a homosexual is slander *per se* because the word "homosexual" "impute[s] the commission of a crime."

[Whether] a sodomy law that is neutral both in effect and application, see *Yick Wo v. Hopkins* [*supra*, p. V-55] would violate the substantive component of the Due Process Clause is an issue that need not be decided today. I am confident, however, that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society. In the words of Justice Jackson:

> "The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency v. New York* (1949) concurring opinion) [*supra*, p. V-3].

[This result] does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. [Unlike] the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.

■ JUSTICE SCALIA, with whom CHIEF JUSTICE REHNQUIST and JUSTICE THOMAS join, dissenting.

Most [of] today's opinion has no relevance to its actual holding—that the Texas statute "furthers no legitimate state interest which can justify" its application to petitioners under rational-basis review. Though there is discussion of "fundamental proposition[s]" and "fundamental decisions," nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers,* the Court leaves strangely untouched its central legal conclusion: "[R]espondent would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." Instead the Court simply describes [Lawrence's] conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.

I

I begin with the Court's surprising readiness to reconsider a decision rendered a mere 17 years ago[.] I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine.

[To] distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrulable *Bowers,* [the Court points to an absence of] "individual or societal reliance on *Bowers*[.]" [But c]ountless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is "immoral and unacceptable" constitutes a rational basis for regulation. [State] laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are [sustainable] only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision[.] What a massive disruption of the current social order, therefore, the overruling of *Bowers* entails.

II

[The Texas statute] undoubtedly imposes constraints on liberty. So do laws prohibiting prostitution, recreational use of heroin, and, for that matter, working more than 60 hours per week in a bakery. But there is no right to "liberty" under the Due Process Clause, though today's opinion repeatedly makes that claim. The Fourteenth Amendment *expressly allows* States to deprive their citizens of "liberty," *so long as "due process of law" is provided*[.]

Our opinions applying the doctrine known as "substantive due process" hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg* (1997). We have held repeatedly, in cases the Court today does not overrule, that *only* fundamental rights qualify for this so-called "heightened scrutiny" protection—that is, rights which are "'deeply rooted in this Nation's history and tradition.'" *Glucksberg*. See also *Michael H. v. Gerald D.* (1989) [*supra*, p. IV-85]; *Moore v. East Cleveland* (1977) (plurality opinion) [*supra*, p. IV-81]. All other liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.

III

[The Court's historical discussion] in no way casts into doubt the "definitive [historical] conclusio[n]," on which *Bowers* relied: that our Nation has a longstanding history of laws prohibiting *sodomy in general*—regardless of whether it was performed by same-sex or opposite-sex couples[.] Whether homosexual sodomy was prohibited by a law targeted at same-sex sexual relations or by a more general law prohibiting both homosexual and heterosexual sodomy, the only relevant point is that it *was* criminalized—which suffices to establish that homosexual sodomy is not a right "deeply rooted in our Nation's history and tradition."

IV

I turn now to the ground on which the Court squarely rests its holding: the contention that there is no rational basis for the law here under attack. This proposition is so out of accord with our jurisprudence—indeed, with the jurisprudence of *any* society we know—that it requires little discussion.

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable," *Bowers*—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, "furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual," *ante* (emphasis added). [This] effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.

V

[With respect to equal protection, JUSTICE O'CONNOR argues that the law discriminates against gay people because it targets] "conduct that is closely correlated with being homosexual." Of course the same could be said of any law. A law against public nudity targets "the conduct that is closely correlated with being a nudist," and hence "is targeted at more than conduct"; it is "directed toward nudists as a class." But be that as it may. Even if the Texas law *does* deny equal protection to "homosexuals as a class," that denial *still* does not need to be justified by anything more than a rational basis, which our cases show is satisfied by the enforcement of traditional notions of sexual morality.

[JUSTICE O'CONNOR's version of rational-basis review] leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. JUSTICE O'CONNOR seeks to preserve them by the conclusory statement that "preserving the traditional institution of marriage" is a legitimate state interest. But "preserving the traditional institution of marriage" is just a kinder way of describing the State's *moral disapproval* of same-sex couples. Texas's interest [here] could be recast in similarly euphemistic terms: "preserving the traditional sexual mores of our society."

[* * *]

Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. [The] Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.

[Let] me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means. Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best. [But] persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. I would no more *require* a State to criminalize homosexual acts—or, for that matter, display *any* moral disapprobation of them—than I would *forbid* it to do so. [It] is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.

[At] the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it. [Today's] opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring"; what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution"?

[This] case "does not involve" the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.*

SOME INTERPRETIVE CHALLENGES POSED BY *LAWRENCE*

1. Rational Basis or Heightened Scrutiny? Justice Scalia offers a much more confident and specific assessment of how the majority's holding should be understood than the majority itself ever does. Is he right that *Lawrence* declines to recognize any liberty interest triggering heightened scrutiny and therefore applies rational basis review? In an influential article shortly after the Court's decision, Laurence Tribe wrote:

> One aspect of *Lawrence* that was bound to draw criticism [is] the absence of any explicit statement in the majority opinion about the standard of review the Court employed to assess the constitutionality of the law at issue. The practice of announcing such a standard—naming a point somewhere on the spectrum from minimum rationality to per se prohibition[]—is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism, and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis. In any event, the strictness of the Court's

* [A brief separate dissent by JUSTICE THOMAS, criticizing Texas's law on policy grounds but disclaiming any authority to invalidate it, is omitted. —BE]

standard in *Lawrence*, however articulated, could hardly have been more obvious.*

If *Lawrence* were to be recast in more conventional doctrinal terms, what would it say? In particular, if it recognizes a "fundamental right"—or, in any event, some facet of "liberty" with which the state may not interfere without a good reason—what is it?

2. Due Process or Equal Protection? The Court, unlike Justice O'Connor, purported to resolve *Lawrence* under the Due Process Clause. But Justice Kennedy also underscored that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects." How so?

As we saw earlier, there is a striking inconsistency between the approaches to "history and tradition" that are reflected in cases like *Washington v. Glucksberg* or *Michael H. v. Gerald D.*—neither of which *Lawrence* even cites—and cases like *Casey* or, now, *Lawrence*. Do equality concerns play a role in *Lawrence*'s approach to that issue?

3. "The End of All Morals Legislation"? Resuming the critique he mounted in *Romer* (see *supra* p. V-30), Justice Scalia accused the *Lawrence* majority of effectively dooming laws that proscribe "bigamy, adultery, adult incest, bestiality, and obscenity" (as well as, eventually, same-sex marriage). Does *Lawrence* improve on or clarify *Romer*'s answer to that challenge? Meanwhile, consider Justice Scalia's choice to read *Lawrence* this way as another instance of the strategic trade-off facing dissenters, noted in connection with *Trump v. United States* and *SFAA* above (*supra*, pp. III-139 and V-120).

Just months after the Supreme Court decided *Lawrence*, Massachusetts became the first state to recognize same-sex marriage. In *Goodridge v. Department of Public Health* (Mass. 2003), the Massachusetts Supreme Judicial Court held that denying marriage licenses to same-sex couples violated due process and equal protection under the state constitution. Citing *Lawrence* and *Casey*, the court declared, "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family [are] among the most basic of every individual's liberty and due process rights." Over the next ten years, eleven other states and Washington, D.C., legalized same-sex marriage. Twenty-nine states, meanwhile, had passed state constitutional amendments banning same-sex marriage.

* Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004).

United States v. Windsor

570 U.S. 744 (2013)

▪ JUSTICE KENNEDY delivered the opinion of the Court.

I

[In] 1996, as some States were beginning to consider the concept of same-sex marriage, and before any State had acted to permit it, Congress enacted the Defense of Marriage Act (DOMA). [Section] 3 of DOMA provides as follows: "In determining the meaning of any Act of Congress, or of any [agency rule], the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." The definitional provision does not by its terms forbid States from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status. The enactment's comprehensive definition of marriage[,] however, does control over 1,000 federal laws in which [marital status is relevant].

Edith Windsor and Thea Spyer met in New York City in 1963 and began a long-term relationship. Windsor and Spyer registered as domestic partners when New York City gave that right to same-sex couples in 1993. Concerned about Spyer's health, the couple made the 2007 trip to Canada for their marriage, but they continued to reside in New York City. The State of New York deems their Ontario marriage to be a valid one. Spyer died in February 2009, and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax[.] [She sued,] contend[ing] that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

III

[Until] recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. [The] limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.

Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples who wanted to affirm their commitment to one another before their children, their family, their friends, and their community. [New] York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.

Against this background of lawful same-sex marriage in some States, the design, purpose, and effect of DOMA should be considered as the beginning point in deciding whether it is [constitutional]. By history and tradition the definition and regulation of marriage [has] been treated as being within the authority and realm of the separate States. Yet it is further established that Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges. [When] the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt. See *McCulloch v. Maryland* (1819). [Thus, for example, Congress has specified that a marriage entered into for the purpose of obtaining immigration benefits does not suffice under immigration law, or that common-law marriages are sufficient for purposes of Social Security benefits regardless of their recognition under state law.]

Though these discrete examples establish the constitutionality of limited federal laws that regulate the meaning of marriage in order to further federal policy, DOMA has a far greater reach; for it enacts a directive applicable to over 1,000 federal statutes and the whole realm of federal regulations. And its operation is directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect. See[, e.g.,] *Goodridge v. Dep't of Public Health* (Mass. 2003)[.]

In order to assess the validity of that intervention it is necessary to discuss the extent of the state power and authority over marriage as a matter of history and tradition. [The] definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the "protection of offspring, property interests, and the enforcement of marital responsibilities." "[T]he Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." [The] Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.

Against this background DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are [resolved at the state level]. Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism. Here the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage. "'[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" *Romer*.

The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect.

[The] States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits. Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form "but one element in a personal bond that is more enduring." *Lawrence*. By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.

IV

DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. *Department of Agriculture v. Moreno* [*supra*, p. V-8]. In determining whether a law is motived by an improper animus or purpose, "'discriminations of an unusual character'" especially require careful consideration. *Romer*. DOMA cannot survive under these principles. The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State's classifications have in the daily lives and customs of its people. DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

The history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence. The House Report announced its conclusion that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage. [The] effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage." The House concluded that DOMA expresses "both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." The stated purpose of the law was to promote an "interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." Were there any doubt of this far-reaching purpose, the title of the Act confirms it: The Defense of Marriage.

[The] Act's demonstrated purpose is to ensure that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriages for purposes of federal law. [Its] operation in practice confirms this purpose. [DOMA] writes inequality into the entire United States Code.

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. [DOMA] undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. It prohibits them from being buried together in veterans' cemeteries. For certain married couples, DOMA's unequal effects are even more serious. The federal penal code makes it a crime to [attack a family member of a federal official in retaliation against that official]. DOMA makes this protection inapplicable to same-sex spouses.

DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.

[* * *]

[What] has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. [While] the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

[DOMA] instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment. This opinion and its holding are confined to those lawful marriages.

▪ CHIEF JUSTICE ROBERTS, dissenting.

I [agree] with JUSTICE SCALIA that [DOMA is constitutional]. Interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world. The majority sees a more sinister motive, pointing out that the Federal Government has generally (though not uniformly) deferred to state definitions of marriage in the past. That is true, of course, but none of those prior state-by-state variations had involved differences over something—as the majority puts it—"thought of by most people as essential to the very definition of [marriage] and to its role and function throughout the history of civilization." That the Federal Government treated this fundamental question differently than it treated variations over consanguinity or minimum age is hardly surprising—and hardly enough to support a conclusion that the "principal purpose" of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was a bare desire to harm[.]

But while I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further. The Court does not have before it, and the logic of its opinion does not decide, the distinct question whether the States, in the exercise of their "historic and essential authority to define the marital relation" may continue to utilize the traditional definition of marriage. [The] dominant theme of the majority opinion is that the Federal Government's intrusion into an area "central to state domestic relations law applicable to its residents and citizens" is sufficiently "unusual" to set off alarm bells. I think the majority goes off course, as I have said, but it is undeniable that its judgment is based on federalism.

▪ JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

[There] are many remarkable things about the majority's [holding]. The first is how rootless and shifting its justifications are. For example, the opinion starts with [discussion of] the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. But we are eventually told that "it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution," and that "the State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism" because "the State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."

[Equally] perplexing are the opinion's references to "the Constitution's guarantee of equality." [If] this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.* [The] majority never

* [In the lower courts, the plaintiffs challenging DOMA had generally prevailed by convincing a court to treat classifications based on sexual orientation as triggering heightened scrutiny. The Obama Administration had also relied on that standard when it announced that it believed DOMA was unconstitutional and would not defend it in court. See *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act* (Feb. 23, 2011), https://tinyurl.com/4buzwfww. —BE]

utters the dread words "substantive due process," perhaps sensing the disrepute into which that doctrine has fallen. [The] opinion does not argue that same-sex marriage is "deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg* [*supra*, p. IV-94] a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of "'ordered liberty.'"

[As] I have observed before, the Constitution does not forbid the government to enforce traditional moral and sexual norms. [The] Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol. However, even setting aside traditional moral disapproval of same-sex marriage (or indeed same-sex sex), there are many perfectly valid—indeed, downright boring—justifying rationales for this legislation. Their existence ought to be the end of this case. For they give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act. And more importantly, they serve to make the contents of the legislators' hearts quite irrelevant.

[To] choose just one of these defenders' arguments, DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. [DOMA] avoided [uncertainty] by specifying which marriages would be recognized for federal purposes. That is a classic purpose for a definitional provision. Further, DOMA preserves the intended effects of prior legislation against then-unforeseen changes in circumstance. [That] is not animus—just stabilizing prudence.

[The] penultimate sentence of the majority's opinion is a naked declaration that "[this] opinion and its holding are confined" to those couples "joined in same-sex marriages made lawful by the State." [In] my opinion, however, the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today's opinion. [By] formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition. [That] is why the language is there. The result will be a judicial distortion of our society's debate over marriage—a debate that can seem in need of our clumsy "help" only to a member of this institution.

■ JUSTICE ALITO, with whom JUSTICE THOMAS joins [as to the excerpted portions], dissenting.

What Windsor and the United States seek [is] not the protection of a deeply rooted right but the recognition of a very new right, and they seek this innovation not from a legislative body elected by the people, but from unelected judges. Faced with such a request, judges have cause for both caution and humility.

The family is an ancient and universal human institution. Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects. Past changes in the understanding of marriage—for example, the gradual ascendance of the idea that romantic love is a prerequisite to marriage—have had far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.

We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come. There are those who think that allowing same-sex marriage will seriously undermine the institution of marriage. See, *e.g.,* S. Girgis, R. Anderson, & R. George, What is Marriage? Man and Woman: A Defense 53-58 (2012); Finnis, Marriage: A Basic and Exigent Good, 91 The Monist 388, 398 (2008). Others think that recognition of same-sex marriage will fortify a now-shaky institution. See, *e.g.,* A. Sullivan, Virtually Normal: An Argument About Homosexuality 202-203 (1996); J. Rauch, Gay Marriage: Why It Is Good for Gays, Good for Straights, and Good for America 94 (2004).

At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. [The] Constitution simply does not speak to the issue of same-sex marriage. [Any] change on a question so fundamental should be made by the people through their elected officials.

[Perhaps] because they cannot show that same-sex marriage is a fundamental right under our Constitution, Windsor and the United States couch their arguments in equal protection terms. [But b]y asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage.

The first and older view, which I will call the "traditional" or "conjugal" view, sees marriage as an intrinsically opposite-sex institution. [DOMA's defenders note] that virtually every culture, including many not influenced by the Abrahamic religions, has limited marriage to people of the opposite sex. [And they] attempt[] to explain this phenomenon by arguing that the institution of marriage was created for the purpose of channeling heterosexual intercourse into a structure that supports child rearing. Others explain the basis for the institution in more philosophical terms. They argue that marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so. See, *e.g.,* Girgis, Anderson, & George, What is Marriage? Man and Woman: A Defense, at 23-28. While modern cultural changes have weakened the link between marriage and procreation in the popular mind, there is no doubt that, throughout human history and across many cultures, marriage has been viewed as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship.

The other, newer view is what I will call the "consent-based" vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons. At least as it applies to heterosexual couples, this view of marriage now plays a very prominent role in the popular understanding of the institution. Indeed, our popular culture is infused with this understanding of marriage. Proponents of same-sex marriage argue that because gender differentiation is not relevant to this vision, the exclusion of same-sex couples from the institution of marriage is rank discrimination.

The Constitution does not codify either of these views of marriage (although I suspect it would have been hard at the time of the adoption of the Constitution or the Fifth Amendment to find Americans who did not take the traditional view for granted). The silence of the Constitution on this question should be enough to end the matter as far as the judiciary is concerned. Yet, Windsor and the United States implicitly ask us to endorse the consent-based view of marriage and to reject the traditional view, thereby arrogating to ourselves the power to decide a question that philosophers, historians, social scientists, and theologians are better qualified to explore. Because our constitutional order assigns the resolution of questions of this nature to the people, I would not presume to enshrine either vision of marriage in our constitutional jurisprudence.

QUESTIONS ABOUT *WINDSOR*

1. Federalism as a Way Station. Even by the standards of Justice Kennedy's often "free-form" jurisprudence, *Windsor* is a very unusual opinion. At different points, it gives the impression of resting on federalism, substantive due process, and equal protection. As a practical matter, why might Justice Kennedy have crafted the ruling in this way? And to the extent that its reasoning *can* be reconstructed in more formal legal categories, how does the argument run? If it isn't actually beyond the Federal Government's power to define "marriage" for purposes of federal benefits, what's the legal relevance of the fact that DOMA interferes with how "[New York] used its historic and essential authority to define the marital relation"?[*]

2. Animus and Dignity. At bottom, *Windsor* does seem to rest on equal protection. And it stands out among the Court's modern equal protection precedents in its insistent focus on how the challenged law "demeans," "degrades," and "humiliates" people (even as it also speaks in the more

[*] Cf. Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87 (2014).

conventional terms of "purpose" and "practical effects"). This aspect of *Windsor* evokes the appeals to social meaning that we touched upon in sections V.B.1 and V.B.2. Recall, for instance, Charles Black's defense of *Brown* as resting on "a plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority—[and the] equally plain fact that such treatment is hurtful to human beings." *Supra*, p. V-49. When Justice Kennedy describes DOMA as "motived by an improper animus or purpose," is that best understood as a claim about the intentions of individuals—or perhaps as a judgment about the "significance that a competent, informed participant in a society would attach to a statute as an indicator of prevailing societal values" (*supra*, p. V-75)?

Obergefell v. Hodges

576 U.S. 644 (2015)

▪ JUSTICE KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

II

A

[From] their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. [There] are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. [Far] from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment[.]

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid-20th century, same-sex intimacy long had been condemned as immoral [and criminalized]. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.

[For] much of the 20th century, moreover, homosexuality was treated as an illness. [Only] in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.

[In] the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts[.]

[After] years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage[.]

III

Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan* v. *Louisiana* (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g., Eisenstadt* v. *Baird* (1972); *Griswold* v. *Connecticut* (1965).

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe* v. *Ullman* (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*. That method respects our history and learns from it without allowing the past alone to rule the present.

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia* [*supra*, p. V-52], [a] unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." [Over] time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. *See, e.g.*, *Griswold*; *Skinner* v. *Oklahoma* (1942); *Meyer* v. *Nebraska* (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. [But the] Court's cases have expressed constitutional principles of broader reach. [And] in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt*; *Poe* (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence*.

[A] second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold* v. *Connecticut*[, which recognized] marriage [as] a right "older than the Bill of Rights [and] intimate to the degree of being sacred.["] [Marriage] responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

[*Lawrence*] acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*; *Meyer*. [Marriage's] protections for children and families are [profound]. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. [Excluding] same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.

[Fourth] and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. [For] that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, [States] have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights[;] hospital access; medical decisionmaking authority; adoption rights[;] health insurance; and [more].

[As] the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington* v. *Glucksberg* (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner v. Safley* (1987) did not ask about a "right of inmates to marry"; and *Zablocki v. Redhail* (1978) did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.

[The] right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way[.] Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.

[*Lawrence*, for example,] drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." [This] dynamic also applies to same-sex marriage. [Especially] against a long history of disapproval of their relationships, [denying] same-sex couples [the] right to marry [serves] to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. *See, e.g.*, *Skinner*.

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.

IV

[The] respondents warn there has been insufficient democratic discourse before deciding an issue so basic as the definition of marriage. [But the] dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter.

[The] respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regarding marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. [The] respondents have not shown a foundation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe[.]

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths[.] The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

▪ CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Petitioners make strong arguments rooted in social policy and considerations of fairness. They contend that same-sex couples should be allowed to affirm their love and commitment through marriage, just like opposite-sex couples. That position has undeniable appeal. [But] this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be.

[Supporters] of same-sex marriage have achieved considerable success persuading their fellow citizens—through the democratic process—to adopt their view. That ends today. Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage, making a dramatic social change that much more difficult to accept.

The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent. [The] Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?

[As] the majority notes, some aspects of marriage have changed over time. [These changes] did not, however, work any transformation in the core structure of marriage as the union between a man and a woman. If you had asked a person on the street how marriage was defined, no one would ever have said, "Marriage is the union of a man and a woman, where the woman is subject to coverture." The majority may be right that the "history of marriage is one of both continuity and change," but the core meaning of marriage has endured.

[To] avoid repeating *Lochner*'s error of converting personal preferences into constitutional mandates, our modern substantive due process cases have stressed the need for judicial self-restraint. Our precedents have required that implied fundamental rights be "objectively, deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*.

[Proper] reliance on history and tradition of course requires looking beyond the individual law being challenged, so that every restriction on liberty does not supply its own constitutional justification. The Court is right about that. But given the few "guideposts for responsible decisionmaking in this unchartered area," "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula," *Moore v. East Cleveland* (plurality opinion). [Even] a sincere profession of "discipline" in identifying fundamental rights does not provide a meaningful constraint on a judge, for "what he is really likely to be 'discovering,' whether or not he is fully aware of it, are his own values," J. Ely, Democracy and Distrust 44 (1980). The only way to ensure restraint in this delicate enterprise is "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and separation of powers." *Griswold* v. *Connecticut* (1965) (Harlan, J., concurring in judgment).

[Neither] *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here. Unlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here involve no government intrusion. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one. At the same time, the laws in no way interfere with the "right to be let alone."

[One] immediate question invited by the majority's position is whether States may retain the definition of marriage as a union of two people. Although the majority randomly inserts the adjective "two" in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not. Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world.

[In] addition to their due process argument, petitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. [The Court does not employ] anything resembling our usual framework for deciding equal protection cases. [In] any event, the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States' legitimate state interest in preserving the traditional institution of marriage. [The] equal protection analysis might be different, in my view, if we were confronted with a more focused challenge to the denial of certain tangible benefits.

[If] you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.

■ JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

[The] substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes. [It] is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

[What] really astounds is the hubris reflected in today's judicial Putsch. The five Justices who compose today's majority are entirely comfortable concluding that every State violated the Constitution for all of the 135 years between the Fourteenth Amendment's ratification and Massachusetts' permitting of same-sex marriages in 2003. They have discovered in the Fourteenth Amendment a "fundamental right" overlooked by every person alive at the time of ratification, and almost everyone else in the time since. They see what lesser legal minds—minds like Thomas Cooley, John Marshall Harlan, Oliver Wendell Holmes, Jr., Learned Hand, Louis Brandeis, William Howard Taft, Benjamin Cardozo, Hugo Black, Felix Frankfurter, Robert Jackson, and Henry Friendly—could not. They are certain that the People ratified the Fourteenth Amendment to bestow on them the power to remove questions from the democratic process when that is called for by their "reasoned judgment." These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry. And they are willing to say that any citizen who does not agree with that, who adheres to what was, until 15 years ago, the unanimous judgment of all generations and all societies, stands against the Constitution.

The opinion is couched in a style that is as pretentious as its content is egotistic. [The] opinion's showy profundities are often profoundly incoherent. [The] world does not expect logic and precision in poetry or inspirational pop-philosophy; it demands them in the law.

[With] each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—we move one step closer to being reminded of our impotence.

▪ JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Even if the doctrine of substantive due process were somehow defensible—it is not—petitioners still would not have a claim. [The] majority claims these state laws deprive petitioners of "liberty," but the concept of "liberty" it conjures up bears no resemblance to any plausible meaning of that word as it is used in the Due Process Clauses.

[To] the extent that the Framers would have recognized a natural right to marriage that fell within the broader definition of liberty, it would not have included a right to governmental recognition and benefits. Instead, it would have included a right to engage in the very same activities that petitioners have been left free to engage in—making vows, holding religious ceremonies celebrating those vows, raising children, and otherwise enjoying the society of one's spouse—without governmental interference.

[Perhaps] recognizing that these cases do not actually involve liberty as it has been understood, the majority goes to great lengths to assert that its decision will advance the "dignity" of same-sex couples. The flaw in that reasoning, of course, is that the Constitution contains no "dignity" Clause, and even if it did, the government would be incapable of bestowing dignity.

Human dignity has long been understood in this country to be innate. [Slaves] did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away. [Our] Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State. Today's decision casts that truth aside.

▪ JUSTICE ALITO, with whom JUSTICES SCALIA and THOMAS join, dissenting.

Today's decision usurps the constitutional right of the people to decide whether to keep or alter the traditional understanding of marriage. The decision will also have other important consequences.

It will be used to vilify Americans who are unwilling to assent to the new orthodoxy. In the course of its opinion, the majority compares traditional marriage laws to laws that denied equal treatment for African-Americans and women. The implications of this analogy will be exploited by those who are determined to stamp out every vestige of dissent. [I] assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.

The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation. [By] imposing its own views on the entire country [instead], the majority facilitates the marginalization of the many Americans who have traditional ideas. Recalling the harsh treatment of gays and lesbians in the past, some may think that turnabout is fair play. But if that sentiment prevails, the Nation will experience bitter and lasting wounds.

Today's decision will also have a fundamental effect on this Court and its ability to uphold the rule of law. If a bare majority of Justices can invent a new right and impose that right on the rest of the country, the only real limit on what future majorities will be able to do is their own sense of what those with political power and cultural influence are willing to tolerate. Even enthusiastic supporters of same-sex marriage should worry about the scope of the power that today's majority claims.

[I] do not doubt that my colleagues in the majority sincerely see in the Constitution a vision of liberty that happens to coincide with their own. But this sincerity is cause for concern, not comfort. What it evidences is the deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation.

D. "Fundamental Interests" Under the Equal Protection Clause (38 PAGES)

In this section, we'll consider a final branch of the Court's equal protection doctrine, sometimes described as involving "fundamental interests." The central idea is that there are some interests or goods that a state might not be required to protect or provide at all, but which the state may not deny *selectively* unless this differential treatment withstands heightened scrutiny. We first saw this line of thought in *Skinner v. Oklahoma* (1942) [*supra*, p. IV-65]. There, the Court did not hold that sterilization triggers heightened scrutiny as a matter of substantive due process, but it still closely scrutinized Oklahoma's choice of *which* crimes would result in sterilization, even though no "suspect classification" was at issue.

The "fundamental interests" line of cases had its heyday in the late 1950s and 1960s under the Warren Court—a progressive Court that wanted to protect people with respect to certain interests that could not naturally be cast as constitutional rights. Perhaps the most important of these interests—and certainly the one where the protective case-law has had the most staying power—is voting in state elections. One thread through this section, therefore, is the constitutional law of voting rights—from *Reynolds v. Sims* (1964), where the Court adopted the "one person, one vote" rule as a constitutional requirement, to *Rucho v. Common Cause* (2019), where the Court rejected equal protection challenges to partisan gerrymandering.

A second thread through this section is the question of what, if anything, equal protection law has to say about issues of class, welfare, and poverty. The "fundamental interests" line of cases is arguably the main answer to that question: It emerged to protect interests that the states did not and probably would not deny outright, but which were unaffordable for some. Some of the cases that follow thus also grappled with the question of whether wealth might be a suspect classification in itself—or, failing that, at least a suspect ground on which to deny people access to something especially important.

Finally, although none of the Warren Court cases that you'll read here have been overruled, you'll see later in the section how the Court's orientation toward "fundamental interests" claims shifted under the Burger Court in the 1970s. After *Dandridge v. Williams* (1970) and *San Antonio Independent School District v. Rodriguez* (1973), the "fundamental interests" line of equal protection cases arguably matters only insofar as it is furnishes the official rationale for certain constitutional protections now embedded in the case law. On the other hand, perhaps the modern Court's resistance to recognizing "fundamental rights" under substantive due process will put more pressure on equal protection doctrine in the years ahead.

EQUAL PROTECTION AND CRIMINAL APPEALS

After *Skinner* and before any of the cases that you'll read below, the Court laid a foundation for the "fundamental interests" equal protection doctrine in two cases concerning poverty and criminal appeals. First, in *Griffin v. Illinois* (1956), the Court held that Illinois could not require appellants in criminal cases to furnish a transcript of the trial at their own expense, as it did, without exempting indigent defendants from that requirement. Justice Black's plurality opinion explained:

> [There] is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. [Destitute] defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.

Then, in *Douglas v. California* (1963), the Court extended *Griffin*'s logic to the appointment of appellate counsel. Writing for the Court, Justice Douglas argued that "[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf," while poor defendants, who cannot afford to hire appellate counsel, must fend for themselves. Under such a system, "[t]he indigent [often] has only the right to a meaningless ritual, while the rich man has a meaningful appeal."

The Court would begin to extend this logic beyond the criminal context in *Harper v. Virginia Board of Elections* (1966) [*infra*, p. V-207]. But *Harper* also built on the Court's fledgling voting-rights jurisprudence, including *Reynolds v. Sims*, which you'll read next.

EQUAL PROTECTION AND VOTING RIGHTS

The protections for voting rights in the written Constitution are remarkably thin. Article I, § 2, provides that, in elections for the House of Representatives, "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." But that provision does not impose any limits on the state's authority to set those qualifications in the first place. In fact, nothing in the Constitution's text confers a general right to vote in state elections at all.* As amended, the Constitution does rule out certain grounds for excluding people from the state or federal electorate: race (under the 15th Amendment); sex (under the 19th); and age, for people who are 18 or older (under the 26th). The 24th Amendment, ratified in 1964, also prohibits poll taxes in federal elections. But apart from these targeted carveouts, the text leaves states free to organize themselves in more or less democratic ways, and those decisions indirectly determine the federal electorate as well.†

Nonetheless, the Court developed in the 20th century a body of law protecting voting rights at the state level as a matter of equal protection. You'll read three such cases below—the first involving a claim of "vote dilution," and the next two involving claims of outright "vote denial."

Reynolds v. Sims

377 U.S. 533 (1964)

[When this suit was brought in 1961, the last redistricting for Alabama's legislature had been based on the 1900 census. The plaintiffs were voters who lived in legislative districts that had experienced far more population growth than others over the intervening decades. They alleged that Alabama's continuing use of the 1900 census as a benchmark effectively "diluted" their electoral power, and that this violated the Equal Protection Clause.]

■ CHIEF JUSTICE WARREN delivered the opinion of the Court.

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* Moreover, Article I, § 4—known as the Elections Clause—leaves it up to the state legislatures to prescribe "[t]he Times, Places and Manner" of holding *federal* elections, although Congress "may at any time by Law make or alter such Regulations."

† The "Guarantee Clause" (Article IV, § 4) provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." This is one possible foothold for a federal *power* to impose some measure of democracy on the states, but the Court has not read it to confer judicially enforceable individual rights, and it is not clear that the guarantee of a "Republican" form of government would be very constraining in any event. *See, e.g.*, Federalist No. 43 (Madison) ("As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution.").

III

[Like] *Skinner* v. *Oklahoma,* [this] case "touches a sensitive and important area of human rights," and "involves one of the basic civil rights of man[.]" Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in *Yick Wo* v. *Hopkins,* the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights."

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. [The] right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. [If] a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. [Of] course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. [Weighting] the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable.

[Logically,] in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. [And] the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown v. Board of Education* (1954), or economic status, *Griffin* v. *Illinois* (1956); *Douglas v. California* (1963).

[We] are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the

States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us. [To] the extent that a citizen's right to vote is debased, he is that much less a citizen.

[Population] is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. [The] Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

IV

[We] hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

V

[We] find [Alabama's analogy to the apportionment of the U.S. Senate] inapposite and irrelevant to state legislative districting schemes. [The] system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. [A]t the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. [Political] subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State[.] [The] relationship of the States to the Federal Government could hardly be less analogous. [Since] we find the so-called federal analogy inapposite[,] we necessarily hold that [both] houses of a state legislature [must] be apportioned on a population basis.

VI

By holding [as we do in this case], we mean that [a] State [must] make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.

For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements [in this area]. Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

[So] long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible[.] [But] neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. [Modern] developments and improvements in transportation make rather hollow [most] claims that deviations from population-based representation can validly be based solely on geographic considerations[.]

A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. [In] many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. [But] if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration, [the] right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

▪ JUSTICE HARLAN, dissenting.

[Stripped] of aphorisms, the Court's argument boils down to the assertion that petitioners' right to vote has been invidiously "debased" or "diluted" by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that "equal" means "equal."

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choosing any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole,[*] by the understanding of those

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[*] [JUSTICE HARLAN's argument about "the Fourteenth Amendment taken as a whole" relied on § 2 of the Amendment, which provides that a state's representation in Congress shall be reduced "when the right to vote at any [state or federal] election [is] denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States." *Supra*, p. xiii. —BE]

who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by [the Fifteenth and Nineteenth Amendments] and decisions of this Court[.]

The failure of the Court to consider any of these matters cannot be excused or explained by any concept of "developing" constitutionalism. [Since] it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, [the] Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

[The] Court's elaboration of its new "constitutional" doctrine indicates how far—and how unwisely—it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the [federal courts] are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

[Generalities] cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. [I] know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes [any] of the[] exclusions [from the set of permissible districting considerations that the Court identifies].*

As you saw, the *Reynolds* Court opted to leave any "precise test" to be worked out in the future "on a case-by-case basis." Over the next several years, the Court confronted a series of cases about whether particular deviations from population equality were unconstitutional under *Reynolds*. In **Brown v. Thomson** (1983), the Court reviewed its precedents up to that point and distilled them into a presumption that population imbalances of less than 10% were permissible; absent special circumstances, only deviations larger than that would need to be justified.

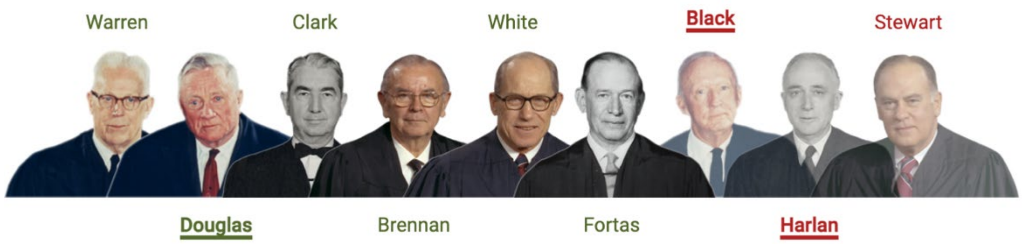
In the meantime, shortly after *Reynolds*, the Court confronted the constitutionality of poll taxes in *Harper v. Virginia Board of Elections*. In 1964, the country had ratified the 24th Amendment—banning states from conditioning the right to vote in *federal* elections on payment of any tax. But the

* [Separate concurrences by JUSTICE CLARK and JUSTICE STEWART are omitted. —BE]

amendment did not apply to elections for state offices, and a handful of southern states still imposed a poll tax on voters in their own elections.

Harper v. Virginia State Board of Elections

383 U.S. 663 (1966)



▪ JUSTICE DOUGLAS delivered the opinion of the Court.

These are suits by Virginia residents to have declared unconstitutional Virginia's poll tax.

[While] the right to vote in federal elections is conferred by Art. I, § 2, of the Constitution, the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment[.] [But] it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.

[We] conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. [We have] said that neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray* v. *Sanders* (1963). We think the same must be true of requirements of wealth or affluence or payment of a fee.

[Long] ago in *Yick Wo v. Hopkins* [*supra*, p. V-55], the Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Recently in *Reynolds* v. *Sims* (1964), we said, "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." [We] say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it. The principle that denies the State the right to dilute a citizen's vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. But [wealth], like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. See *Griffin v. Illinois* [*supra*, p. V-201]; *Douglas v. California* [*supra*, p. V-201]. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant.

[We] agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. New York* [*supra*, p. IV-44]). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change. [The shift from *Plessy* to *Brown* illustrates as much.]

In a recent searching re-examination of the Equal Protection Clause, we held [that] "the opportunity for equal participation by all voters in the election of state legislators" is required. *Reynolds* v. *Sims*. We decline to qualify that principle by sustaining this poll tax. Our conclusion, like that in *Reynolds* v. *Sims,* is founded not on what we think governmental policy should be, but on what the Equal Protection Clause requires.

We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. *See, e.g.*, *Skinner v. Oklahoma* (1942) [*supra*, p. IV-65].

Those principles apply here. For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.

▪ JUSTICE HARLAN, whom JUSTICE STEWART joins, dissenting.

In substance the Court's analysis of the equal protection issue goes no further than to say that the electoral franchise is "precious" and "fundamental," and to conclude that "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." These are of course captivating phrases, but they are wholly inadequate to satisfy the standard governing adjudication of the equal protection issue: Is there a rational basis for Virginia's poll tax as a voting qualification? I think the answer to that question is undoubtedly "yes."

Property qualifications and poll taxes have been a traditional part of our political structure. [It] is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise. It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.

[Property] and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized. [But] it is all wrong [for] the Court to adopt the political doctrines popularly accepted at a particular moment of our history and to declare all others to be irrational and invidious, barring them from the range of choice by reasonably minded people acting through the political process. It was not too long ago that Mr. Justice Holmes felt impelled to remind the Court that the Due Process Clause of the Fourteenth Amendment does not enact the *laissez-faire* theory of society, *Lochner* [*supra*, p. IV-44]. The times have changed, and perhaps it is appropriate to observe that neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism.[*]

Kramer v. Union Free School Dist. No. 15

395 U.S. 621 (1969)

▪ CHIEF JUSTICE WARREN delivered the opinion of the Court.

[A New York statute] provides that [otherwise-eligible voters] may vote in [certain] school district election[s] only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in the local public schools.

[Kramer] is a 31-year-old college-educated stockbroker who lives in his parents' home in the Union Free School District[.] He is a citizen of the United States and has voted in federal and state elections since 1959. However, since he has no children and neither owns nor leases taxable real

[*] [A separate dissent by JUSTICE BLACK is omitted. —BE]

property, appellant's attempts to register for and vote in the local school district elections have been unsuccessful.

[We] must give the statute a close and exacting examination. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims* (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

Thus, state apportionment statutes, which may *dilute* the effectiveness of some citizens' votes, receive close scrutiny from this Court. *Reynolds* v. *Sims*. No less rigid an examination is applicable to statutes *denying* the franchise to citizens who are otherwise qualified by residence and age. Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.

And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. [When] we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable. See *Harper v. Virginia Bd. of Elections* (1966). The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.

[And] the assumption is no less under attack because the legislature which decides who may participate at the various levels of political choice is fairly elected. Legislation which delegates decision making to bodies elected by only a portion of those eligible to vote for the legislature can cause unfair representation. Such legislation can exclude a minority of voters from any voice in the decisions just as effectively as if the decisions were made by legislators the minority had no voice in selecting.

[We] turn therefore to [the] question whether the exclusion [at issue here] is necessary to promote a compelling state interest. First, appellees argue that the State has a legitimate interest in limiting the franchise in school district elections to "members of the community of interest"—those "primarily interested in such elections." Second, appellees urge that the State may reasonably and permissibly conclude that "property taxpayers" (including [renters] who share the tax burdens through rent payments) and parents of the children enrolled in the district's schools are those "primarily interested" in school affairs.

[We] need express no opinion as to whether the State in some circumstances might limit the exercise of the franchise to those "primarily interested" or "primarily affected." [For], assuming, *arguendo*, that New York legitimately might limit the franchise in these school district elections to those "primarily interested in school affairs," [this statute] does not meet the exacting standard of precision we require of statutes which selectively distribute the franchise. [The] classifications in [the statute] permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions.[15]

■ JUSTICE STEWART, with whom JUSTICE BLACK and JUSTICE HARLAN join, dissenting.

[Clearly] a State may reasonably assume that its residents have a greater stake in the outcome of elections held within its boundaries than do other persons. Likewise, it is entirely rational for a state legislature to suppose that residents, being generally better informed regarding state affairs than are nonresidents, will be more likely than nonresidents to vote responsibly. And the same may be said of legislative assumptions regarding the electoral competence of adults and literate persons on the one hand, and of minors and illiterates on the other. It is clear, of course, that lines thus drawn cannot infallibly perform their intended legislative function. [Nonresidents] or minors might also in some instances be interested, informed, and intelligent participants in the electoral process. Persons who commute across a state line to work may well have a great stake in the affairs of the State in which they are employed; some college students under 21 may be both better informed and more passionately interested in political affairs than many adults. But such discrepancies are the inevitable concomitant of the line drawing that is essential to law making. So long as the classification is rationally related to a permissible legislative end, therefore—as are residence, literacy, and age requirements imposed with respect to voting—there is no denial of equal protection.

[15] For example, [Kramer] resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election.

[The Court] strikes down New York's statute by asserting that the traditional equal protection standard is inapt in this case[, but] the asserted justification for applying such a standard cannot withstand analysis. [The] voting qualifications at issue have been promulgated, not by [the school district], but by the New York State Legislature, and [Kramer] is of course fully able to participate in the election of representatives in that body.

[In] any event, it seems to me that under *any* equal protection standard, short of a doctrinaire insistence that universal suffrage is somehow mandated by the Constitution, the appellant's claim must be rejected. [A]s I have suggested, there is no persuasive reason for distinguishing constitutionally between the voter qualifications New York has required for its Union Free School District elections and qualifications based on factors such as age, residence, or literacy.

We'll now turn from the Court's seminal voting rights cases to two other landmark cases for the "fundamental interests" branch of equal protection doctrine—*Dandridge v. Williams* (1970), involving welfare benefits, and *San Antonio Independent School District v. Rodriguez* (1973), involving public education. As you'll see, whereas the voting rights cases (and *Griffin* and *Douglas*) had progressively expanded constitutional rights in the name of equal protection—and showed a mounting concern for the interests of the poor in particular—*Dandridge* and *Rodriguez* declined to move the law any further in the same direction.

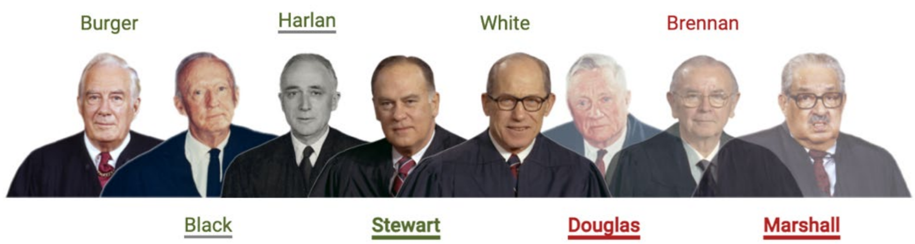
In thinking about what to make of that development, it helps to appreciate that *Kramer* was one of the final rulings of the Warren Court—the Court that had also decided *Brown*, *Reynolds*, *Heart of Atlanta Motel*, *Griswold*, and *Loving*, as well as foundational criminal-procedure and First Amendment cases that we haven't covered.[*] President Nixon, who had campaigned against the Court's "judicial activism," appointed Warren Burger to replace Earl Warren as Chief Justice in 1969. And by the time of *Rodriguez* a few years later, four of the five Justices who formed the majority were Nixon appointees.[†]

[*] These include *Gideon v. Wainwright* (1963), which recognized a right to government-funded counsel for indigent criminal defendants, and *New York Times v. Sullivan* (1964), which limited states' ability to impose tort liability for criticism of government officials.

[†] The Burger Court certainly handed down some liberal decisions (such as *Roe v. Wade*, which was decided in the same year as *Rodriguez*), as have the Rehnquist and Roberts Courts that have come since. In terms of personnel, though, most would agree that the Court has not had a liberal majority since the end of the Warren Court in 1969.

Dandridge v. Williams

397 U.S. 471 (1970)



▪ JUSTICE STEWART delivered the opinion of the Court.

[Maryland] participates in the [federal welfare program, known as Aid to Families with Dependent Children (AFDC)]. It computes the standard of need for each eligible family based on the number of children in the family and the circumstances under which the family lives. In general, the standard of need increases with each additional person in the household, but the [maximum] that any single family may receive [is] $250 per month. The appellees all have large families, so that their standards of need as computed by the State substantially exceed the maximum grants that they actually receive under the regulation. The appellees [argue] that the maximum grant limitation operates to discriminate against them merely because of the size of their families, in violation of the Equal Protection Clause[.]

[The] regulation can be clearly justified, Maryland argues, in terms of legitimate state interests in encouraging gainful employment, in maintaining an equitable balance in economic status as between welfare families and those supported by a wage-earner, in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families. The District Court, while apparently recognizing the validity of at least some of these state concerns, nonetheless held that the regulation "is invalid on its face for overreaching["]—that it violates the Equal Protection Clause "[b]ecause it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply[.]"

[But] the concept of "overreaching" has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Lee Optical* [*supra*, p. IV-56]. That era long ago passed into history. In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.

[To] be sure, [the cases] enunciating this fundamental standard under the Equal Protection Clause have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally valid. [A] solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor. [By] keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner.

[The] Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.

We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. [But] the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. [The] Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. Cf. *Helvering v. Davis* [*supra*, p. II-121].

■ JUSTICE MARSHALL, whom JUSTICE BRENNAN joins, dissenting.

[The Maryland regulation] produces a basic denial of equal treatment. Persons who are concededly similarly situated (dependent children and their families), are not afforded equal, or even approximately equal, treatment[.]

[In] the instant case, the only distinction between those children with respect to whom assistance is granted and those children who are denied such assistance is the size of the family into which the child permits himself to be born. The class of individuals with respect to whom payments are actually made (the first four or five eligible dependent children in a family), is grossly underinclusive in terms of the class that the AFDC program was designed to assist, namely, *all* needy dependent children. Such underinclusiveness manifests "a prima facie violation of the equal protection requirement of reasonable classification," compelling the State to come forward with a persuasive justification for the classification.

The Court never undertakes to inquire for such a justification; rather, it avoids the task by focusing upon the abstract dichotomy between two different approaches to equal protection problems that have been utilized by this court.

Under the so-called "traditional test," a classification is said to be permissible under the Equal Protection Clause unless it "without any reasonable basis." On the other hand, if the classification affects a "fundamental right," then the state interest in perpetuating the classification must be "compelling" in order to be sustained. *See, e.g., Harper v. Virginia Bd. of Elections* [*supra*, p. V-207]; *McLaughlin v. Florida* [*supra*, p. V-51].

This case simply defies easy characterization in terms of one or the other of these "tests." The cases relied on by the Court, in which a "mere rationality" test was actually used, are most accurately described as involving the application of equal protection reasoning to the regulation of business interests. The extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls. This case, involving the literally vital interests of a powerless minority—poor families without breadwinners—is far removed from the area of business regulation, as the Court concedes. Why then is the standard used in those cases imposed here? We are told no more than that this case falls in "the area of economics and social welfare," with the implication that from there the answer is obvious.

In my view, equal protection analysis of this case is not appreciably advanced by the *a priori* definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification. As we said only recently, "In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Kramer* v. *Union School District* (1969).

It is the individual interests here at stake that, as the Court concedes, most clearly distinguish this case from the "business regulation" equal protection cases. AFDC support to needy dependent children provides the stuff that sustains those children's lives: food, clothing, shelter. And this Court has already recognized several times that when a benefit, even a "gratuitous" benefit, is necessary to sustain life, stricter constitutional standards, both procedural and substantive,[18] are applied to the deprivation of that benefit.

[In] the final analysis, Maryland has set up an AFDC program structured to calculate and pay the minimum standard of need to dependent children. Having set up that program, however, the State denies some of those needy children the minimum subsistence standard of living, and it does so on the wholly arbitrary basis that they happen to be members of large families. One need not speculate too far on the actual reason for the regulation, for in the early stages of this litigation the State virtually conceded that it set out to limit the total cost of the program along the path of least resistance. Now, however, we are told that other rationales can be manufactured to support the regulation and to sustain it against a fundamental constitutional challenge.

However, these asserted state interests, which are not insignificant in themselves, are advanced either not at all or by complete accident by the maximum grant regulation. Clearly they could be served by measures far less destructive of the individual interests at stake.

[It] cannot suffice merely to invoke the spectre of the past and to recite from *Lindsley* v. *Natural Carbonic Gas Co.* and *Williamson* v. *Lee Optical Co.* to decide the case. Appellees are not a gas company or an optical dispenser; they are needy dependent children and families who are discriminated against by the State. The basis of that discrimination—the classification of individuals into large and small families—is too arbitrary and too unconnected to the asserted rationale, the impact on those discriminated against—the denial of even a subsistence existence—too great, and the supposed interests served too contrived and attenuated to meet the requirements of the Constitution. In my view Maryland's maximum grant regulation is invalid under the Equal Protection Clause of the Fourteenth Amendment.

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[18] Compare *Shapiro* v. *Thompson* (1969), striking down one-year residency requirement for welfare eligibility as violation of equal protection, and noting that the benefits in question are "the very means to subsist—food, shelter, and other necessities of life," with *Kirk* v. *Board of Regents* (1970), upholding one-year residency requirement for tuition-free graduate education at state university, and distinguishing *Shapiro* on the ground that it "involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children."

San Antonio Independent School Dist. v. Rodriguez

411 U.S. 1 (1973)

▪ JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend [schools] in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base.

I

[Substantial] interdistrict disparities in school expenditures [prevail] in San Antonio and in varying degrees throughout the State[.] And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' [system of financing public schools substantially with local property tax revenues] violated the Equal Protection Clause. [Finding] that wealth is a "suspect" classification and that education is a "fundamental" interest, the District Court held that the Texas system could be sustained only if the State could show it was premised upon some compelling state interests. On this issue the court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications."

II

[We] find neither the suspect-classification nor the fundamental-interest analysis persuasive.

A

[This] case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. [But the individuals] who constituted the class discriminated against in our prior [wealth-discrimination] cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. [That was true of the indigent defendants who could obtain no transcript whatsoever in *Griffin v. Illinois* (1956), or who could not afford any lawyer in *Douglas v. California* (1963).]

[Even] a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, [the plaintiffs] have made no effort to demonstrate that [the Texas system] operates to the peculiar disadvantage of any class fairly definable as indigent[.] Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts[, because the poor are often] clustered around commercial and industrial areas—those same areas that provide the most attractive sources of property tax income for school districts.

[Second], lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to [the plaintiffs'] argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the infinite variables affecting the educational process, can any system assure equal quality of education except in the most relative sense. [The] State [asserts that it assures] "every child in every school district an adequate education[,]" [and the plaintiffs have not] refut[ed] the State's assertion.

[For] these two reasons—the absence of any evidence that the financing system discriminates against any definable category of "poor" people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.[60]

[There is another] way in which the classification scheme might be defined—*district* wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. [The] disadvantaged class might [then] be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education. Alternatively, as suggested in MR. JUSTICE MARSHALL's dissenting

[60] An educational system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today. [But Texas] has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding [the] disparities in local tax resources.

opinion, the class might be defined more restrictively to include children in districts with assessable property which falls below the statewide average, or median, or below some other artificially defined level.

However described, it is clear that [the plaintiffs'] suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. [And we therefore turn to] th[e] question whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.

B

In *Brown v. Board of Education* [*supra*, p. V-41], a unanimous Court recognized that "education is perhaps the most important function of state and local governments." What was said there [has] lost none of its vitality with the passage of time:

> "[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

[Nothing] this Court holds today in any way detracts from our historic dedication to public education. [But] the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.

[For example], in *Dandridge* v. *Williams* (1970), the Court's explicit recognition of the fact that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings," provided no basis for departing from the settled mode of constitutional analysis of legislative classifications involving questions of economic and social policy. [The] central importance of welfare benefits to the poor was not an adequate foundation for requiring the State to justify its law by showing some compelling state interest.

The lesson of [this and similar] cases in addressing the question now before the Court is plain. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. [Rather,] the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. *Eisenstadt v. Baird*; *Skinner v. Oklahoma*.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. [The plaintiffs contend that education] bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. [A] similar line of reasoning is pursued with respect to the right to vote. Exercise of the franchise, it is contended, cannot be divorced from the educational foundation of the voter. [We] need not dispute any of these propositions. [Yet] we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. [But] they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

[The plaintiffs'] argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and a full participation in the political process. Furthermore, the logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of *Dandridge v. Williams* [*supra*, p. V-213] and *Lindsey v. Normet* (1972) [(similar as to housing)].

[Another] critical distinction between [prior cases applying strict scrutiny] and the one now before us lies in what Texas is endeavoring to do with respect to education. [Every] step leading to the establishment of the system

Texas utilizes today [was] implemented in an effort to *extend* public education and to improve its quality. [We] think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.

[This case represents] nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. [The plaintiffs] would have the Court intrude in an area in which it has traditionally deferred to state legislatures. [We] stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. [No] scheme of taxation [has] yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *Dandridge* v. *Williams.* [In] such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation[.]

III

[Under rational-basis review,] [t]he people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies. [Therefore], to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory.

IV

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor, a cautionary postscript seems appropriate. [The] constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. [The] complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefitted by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question—these groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, *i.e.,* in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts.

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. [We] hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. [But] the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

■ JUSTICE MARSHALL, with whom JUSTICE DOUGLAS concurs, dissenting.

[The] majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these [plaintiffs] to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown.*

I

[This] Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action.

Even if the Equal Protection Clause encompassed some theory of constitutional adequacy, discrimination in the provision of educational opportunity would certainly seem to be a poor candidate for its application. Neither the majority nor appellants inform us how judicially manageable standards are to be derived for determining how much education is "enough[.]" One would think that the majority would heed its own fervent affirmation of judicial self-restraint before undertaking the complex task of determining at large what level of education is constitutionally sufficient.

[In] my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle.

[As for] the precise character of the disadvantaged class in this case[, I] believe it is sufficient that the overarching form of discrimination [here] is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. [In] their complaint [the plaintiffs] asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity. [Under] such a principle, the children of a district are [unconstitutionally] disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an "artificially defined level" of district wealth. But such is clearly not the case, for this is the definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation.

II

[The] Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards[, depending] on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

[I] therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. [I] would like to know where the Constitution guarantees the right to procreate, *Skinner* v. *Oklahoma* (1942), or the right to vote in state elections, *e g., Reynolds* v. *Sims* (1964), or the right to an appeal from a criminal conviction, *e.g., Griffin* v. *Illinois* (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. [The] task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. [This] is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

[Here,] the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values. [Of] particular importance is the relationship between education and the political process[, especially in light of] the demonstrated effect of education on the exercise of the franchise by the electorate[.][74] [This] compel[s] us [to] scrutinize with appropriate care the bases for state discrimination affecting [education]—a conclusion which is only strengthened when we consider the character of the classification in this case.

[This] Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. [The] Court's distinctions [of this case] are not in fact consistent with *Harper v. Virginia Bd. of Elections*, *Griffin v. Illinois*, and *Douglas v. California*. [For example, under the majority's theory,] the disadvantaged class in *Harper,* in terms of a wealth analysis, should have consisted only of those too poor to afford the $1.50 necessary to vote. But

[74] I believe that the close nexus between education and our established constitutional values with respect to freedom of speech and participation in the political process makes this a different case than our prior decisions concerning discrimination affecting public welfare, *see, e.g., Dandridge v. Williams*, or housing, *see, e.g., Lindsey v. Normet.* [Whatever] the severity of the impact of insufficient food or inadequate housing on a person's life, they have never been considered to bear the same direct and immediate relationship to constitutional concerns for free speech and for our political processes as education has long been recognized to bear[.]

the *Harper* Court did not see it that way. In its view, the Equal Protection Clause "bars a system which excludes [from the franchise] those unable to pay a fee to vote or who *fail to pay." Ibid.* (Emphasis added.) So far as the Court was concerned, the "degree of the discrimination [was] irrelevant." *Ibid.* Thus, the Court struck down the poll tax *in toto;* it did not order merely that those too poor to pay the tax be exempted; complete impecunity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

[This] is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. [Here,] the children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial [scrutiny] that has previously been afforded wealth classifications is warranted here.

As the Court points out, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous judicial scrutiny of allegedly discriminatory state action. [In part, that reflects a recognition that] personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. [Thus,] we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See *Harper*. [When] evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny.

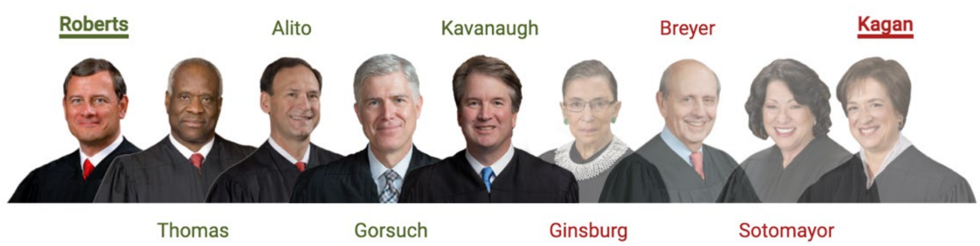
[True] state dedication to local control would present, I think, a substantial justification to weigh against simply interdistrict variations in the treatment of a State's schoolchildren. But I need not now decide how I might ultimately strike [that] balance[, for,] on this record, it is apparent that the State's purported concern with local control is offered primarily as an excuse rather than as a justification for interdistrict inequality.

In Texas, statewide laws regulate in fact the most minute details of local public education. [And it] ignores reality to suggest—as the Court does—that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control. [In] my judgment, any substantial degree of scrutiny [reveals] that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control.*

The final case in this section, *Rucho v. Common Cause* (2019), brings us back to voting rights. As you read, compare the Court's priorities and concerns both with *Reynolds*—the last case in which the Court had to decide whether to intervene in electoral districting in a major way—and with *Dandridge* and *Rodriguez*, where, as you've seen, the Court sought to keep its distance from "intractable economic, social, and even philosophical problems."

Rucho v. Common Cause

139 S. Ct. 2484 (2019)



▪ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Voters [in] North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated [the] Equal Protection Clause of the Fourteenth Amendment[.]*

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. [The] districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

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* [A concurrence by JUSTICE STEWART, a dissent by JUSTICE WHITE (joined by JUSTICE DOUGLAS and JUSTICE BRENNAN), and a dissent by JUSTICE BRENNAN are all omitted. —BE]

* [Discussion of the plaintiffs' other legal theories, including a First Amendment claim, is omitted. —BE]

I

The first [challenge involves] the congressional redistricting plan enacted by [the] North Carolina General Assembly in 2016. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." [The second challenge concerns the map adopted by the Democrat-controlled Maryland Legislature in 2011.] [It was undisputed that the Democrats "use[d] the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district.]

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'"

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison* (1803). Sometimes, however, [the] law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights[.] In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. [The] question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.

B

Partisan gerrymandering is nothing new. Nor is frustration with it. [The] Framers were familiar with it at the time of the drafting and ratification of the Constitution.

[The] Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. [Congress has used that power at various times to require compactness or contiguity, although o]nly the single member district requirement remains in place today.

[The defendants] suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts.

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. [At] no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

[Partisan] gerrymandering claims have proved far more difficult to adjudicate [than population-equality or racial-gerrymandering claims]. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering."

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." [The Court described here prior cases in which it had divided over whether partisan gerrymandering claims are justiciable, without a majority opinion. —BE]

III

[As] noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *Vieth v. Jubelirer* (2004) (Kennedy, J., concurring in judgment). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Ibid.*

[Partisan] gerrymandering claims invariably sound in a desire for proportional representation. ["Our] cases, however, clearly foreclose any claim that the Constitution requires proportional representation." *Davis v. Bandemer* (1986) (O'Connor, J., concurring in judgment). [The] Founders certainly did not think proportional representation was required.

[Unable] to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.

[The] initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. [On] the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. [Or] perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts.

[Deciding] among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" [Even] assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. [Appellees] contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. [But] "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. [That] requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters.

IV

[The plaintiffs] and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

[The] dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the "median" map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." *Vieth* (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? [The] dissent's answer says it all: "This much is too much." That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. [Here], on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as "substantial risk" or "substantial harm," but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See Art. I, § 4, cl. 1 [the Elections Clause].

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature v. Arizona Independent Redistricting Comm'n* (2015), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.

[What] the [plaintiffs] and dissent seek is an unprecedented expansion of judicial power. [The] expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting[.] Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. [Summary of efforts to limit partisan gerrymandering at the state level omitted. —BE]

[As] noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H.R. 1, 116th Cong., 1st Sess. (2019). [Dozens] of other bills have been introduced to limit reliance on political considerations in redistricting.

[We] express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

▪ JUSTICE KAGAN, with whom JUSTICES GINSBURG, BREYER, and SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. [If] left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process.

But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

I

[The] majority concedes (really, how could it not?) that gerrymandering is "incompatible with democratic principles." [That] recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. The majority's idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic's earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today's gerrymandering altogether different from the crude line-drawing of the past. [While] bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides.

[Partisan] gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. [The] Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds v. Sims* (1964). And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Ibid*. [The] constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation.

[Once] again, the majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply.

[I'll] give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can't be done *has* been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process).

[Start] with the standard the lower courts used. [B]oth courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

[The] majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. But that is wrong. [W]hen political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far.

[On] to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. [Consider] the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." [The] approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except* for partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.,* the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution. See generally Brief for Eric S. Lander as *Amicus Curiae* 7-22.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. [Every] single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. [Based] on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." [Consider] neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments.

[The] majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions.

[The] majority's "how much is too much" critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only* one that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. [If] the majority had done nothing else, it could have [forbidden] any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. [Nor] is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. [As] this Court recently noted, "the law is full of instances" where a judge's decision rests on "estimating rightly . . . some matter of degree"—including the "substantial[ity]" of risk or harm[.]

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians' districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that "our oath and our office require no less." *Reynolds*. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. [For] here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms[.]

[Of] all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

THE ANTI-*CAROLENE* COURT?

Throughout the semester, we have seen the "political process theory" of judicial review invoked in, or looming in the background of, various areas of constitutional law. That theme reflects at least one central facet of the conventional modern understanding of the Supreme Court's role. But after *Rucho*, is this theory dead in practice? Consider this argument by Nicholas Stephanopoulos, in an article entitled *The Anti-Carolene Court*:

> Once upon a time, roughly in the middle of the twentieth century, *Carolene Products*'s famous footnote captured much of the Supreme Court's constitutional decision making. *Carolene* included three key prescriptions. First, the Court should *not* strike down ordinary social and economic legislation: the sorts of laws the Court had routinely nullified in the preceding *Lochner* era. Second, the Court should block efforts by incumbent politicians to distort the political process in their favor. These efforts are a democratic malfunction—a breach of the majoritarian ideal—that the Court is well positioned to resolve. And third, the Court should also intervene when a minority group is consistently the loser of political battles. There's no majoritarian problem in this scenario, but there is a violation of a different democratic value: pluralism, the idea that groups should endlessly make and break alliances as they compete over public policy, and no group should find itself perennially outside the winning coalition.
>
> It's evident that the contemporary Court no longer heeds *Carolene's* first directive. A Court that prevents states from restricting the possession of firearms, or that forbids Congress from mandating the purchase of health insurance under the Commerce Clause, isn't a Court that's willing to defer to most social and economic legislation. It's equally plain that *Carolene*'s third pillar has crumbled. If it still stood, the Court would celebrate (or at least tolerate) laws that benefit politically weak minority groups, like affirmative action and school integration. But the Court subjects these policies to the strictest scrutiny and usually invalidates them, even though it's implausible that America's white majority is the victim of a pluralist failure.
>
> Some observers had thought, however, that the second leg of *Carolene*'s tripod was still sound: that the Court would still stop politicians from entrenching themselves in office through electoral machinations. Michael Klarman wrote in 1991 that the majoritarian "prong of political process theory has emerged relatively unscathed from the barbs of [its] critics." A decade later, Michael Dorf and Samuel Issacharoff stated that "most have assumed that correcting [majoritarian] defects is a legitimate judicial function."

> And at his 2005 confirmation hearing, then-Judge John Roberts described the special judicial obligation to safeguard the electoral process: "Without access to the ballot box, people are not in the position to protect any other rights that are important to them."
>
> The Court's recent decision in *Rucho v. Common Cause* shows that the academic commentators were wrong. It also highlights the gulf between Roberts's 2005 words and his deeds as Chief Justice. The Court he now leads—and for which he wrote the majority opinion in *Rucho*—is comprehensively anti-*Carolene*, as hostile to its second directive as to its first and third. [North] Carolina's gerrymander deliberately "restrict[ed] those political processes"—elections—"which can ordinarily be expected to bring about repeal of undesirable legislation"—by replacing one party's legislators with the other's. *Carolene Products* [*supra*, p. IV-54]. But the Court declined to step in. And not only did it stay on the sidelines, it also barred any future Court from entering the field, by declaring partisan gerrymandering categorically nonjusticiable. And not only that, the Court also mocked the very idea of a judicial responsibility to guard the political process from the ploys of self-interested insiders. Yes, "gerrymandering is incompatible with democratic principles," the Court conceded. But, contra *Carolene*, that "does not mean that the solution lies with the federal judiciary."
>
> I doubt anyone would seriously contest this claim: that *Rucho* is, at its core, an anti-*Carolene* decision. But I want to push the point further. Not only is *Rucho* an anti-*Carolene* decision, its reasons for defying *Carolene* are the same ones that judges and scholars have always given for resisting *Carolene*'s logic. [Consider] the Court's argument that, to strike down North Carolina's gerrymander, it would first need to determine what a "fair" district map is. But "it is not even clear what fairness looks like in this context," and "[d]eciding among . . . different visions of fairness . . . poses basic questions that are political, not legal."
>
> The dissenters in the great one-person, one-vote cases of the 1960s objected to the Court's rulings in exactly these terms. [Similarly,] when John Hart Ely published his seminal defense of *Carolene* in 1980, the most common academic critique was that Ely, like *Carolene*, asked judges to make indeterminate, and inappropriate, decisions among dueling democratic theories. [*Rucho*], then, is an anti-*Carolene* decision from top to bottom.

Is Stephanopoulos's analysis correct? And if the Court *has* abandoned the *Carolene Products* conception of its role, why?