# GEORGIA LAW REVIEW

VOLUME 47 WINTER 2013 NUMBER 2

ARTICLES

# COLLAPSING SUSPECT *CLASS* WITH SUSPECT *CLASSIFICATION*: WHY STRICT SCRUTINY IS TOO STRICT AND MAYBE NOT STRICT ENOUGH

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## I. INTRODUCTION

The Supreme Court's equal protection doctrine triggers heightened scrutiny[1] when a law invokes a suspect classification.[2] Under current case law, laws discriminating on the basis of race,[3] alienage,[4] or national origin[5] get strict scrutiny; that is, where the Court asks if the law is narrowly tailored to serve a compelling state purpose.[6] Laws discriminating against sex get intermediate scrutiny; that is, where the Court asks if the law is substantially related to an important governmental purpose.[7] Generally, this is how the Court enforces equality. It is an important tool of judicial review. Laws that do not invoke a suspect classification merely receive rational review, the most deferential standard of review. Under rational review, the legislation must have a legitimate purpose, and the means must be rationally related to that purpose. The tiers-of-scrutiny approach is a familiar feature of modern constitutional jurisprudence. While scholarly work often analyzes the nature of these tests,[8] their scope—what other groups or

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[1] This Article uses "heightened scrutiny" or "higher scrutiny" to mean any kind of scrutiny greater than rational review. Part II explores, in particular, the doctrine of strict scrutiny. The cases this Article considers are those arising under the Equal Protection Clause of the Fourteenth Amendment. While the distinction between federal and state power is constitutionally important, it is irrelevant to my argument. My conclusion would apply to federal legislation as well. After all, the Court applies the same tiers-of-scrutiny analysis whether Congress or a state has passed the law. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on state governments in enforcing equality).

[2] The Court also subjects laws that violate fundamental rights to heightened scrutiny. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments" or when it discriminates against "discrete and insular minorities" a stricter standard than rational review is merited). This Article focuses on the second horn of this principle. For an argument that strict scrutiny is problematic and unnecessary in the case of individual fundamental rights, see SONU BEDI, REJECTING RIGHTS (2009).

[3] *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

[4] *E.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[5] *E.g.*, Oyama v. California, 332 U.S. 633, 646 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[6] *E.g.*, *Graham*, 403 U.S. at 375–76.

[7] *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[8] Scholarly work analyzes issues such as the requirement of immutability, *see, e.g.*,

classifications ought to be included[9] and their typology[10]—this Article examines the underlying theory of equal protection. It analyzes the logic that triggers higher scrutiny.

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DAVID A.J. RICHARDS, IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES 3, 93, 179 (1999) (interpreting immutability not in biological terms but in identity terms and equating its moral status and role to that of religious identity); EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 296 (1999) (arguing that even if the biological requirement of immutability is met, it does not go far enough in ensuring equality under the law); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994) (arguing that pro-gay advocates needlessly divide the gay community by invoking arguments from immutability); Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1, 9 (2009) (suggesting that immutability ought to be about the inability to choose to enter the suspect classification rather than the inability to exit it); the nature of the purpose inquiry, *see, e.g.*, Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 301 (1997) (making an historical argument that the Court has moved in the direction of caring about government purpose rather than the means); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 24–25 (1972) (arguing that the Court should care more about means than ends in order to ensure equal protection); the application of strict scrutiny to race-conscious laws, *see, e.g.*, Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1228–66 (2002) (discussing the various ways to interpret strict scrutiny of race-based affirmative action laws); Pamela S. Karlan, Lecture, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573–94 (2002) (analyzing strict scrutiny applied to racial gerrymandering).

[9] The pressing question here is whether gays and lesbians ought to count as a suspect class under equal protection doctrine. For authors who answer in the affirmative, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 162–64 (1980); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 742 (1985); Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 264 (1996); Cass R. Sunstein, Essay, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1168 (1988); Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1756 (1996); and Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1287 (1985). For an argument that the presumption against sex discrimination is sufficient to invalidate sexual-orientation discrimination, see Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 220 (1994). *But see* Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 474 (2001) (arguing against a sex-discrimination approach to sexual-orientation discrimination).

Even the Executive Branch under President Obama has weighed in on this debate in a refusal to defend the Defense of Marriage Act in federal court. Letter from the Att'y Gen. to Cong. on Litig. Involving the Def. of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html ("[M]ost importantly, there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by

In doing so, this Article mounts a challenge to the theory of higher scrutiny and, in particular, strict scrutiny. The Article is primarily negative in character, pointing out the deficiencies of the current approach to equal protection. To that end, the Article seeks to analyze two questions: (1) What principles trigger heightened scrutiny? and (2) Why does the Court need to subject laws that discriminate on the basis of race to strict scrutiny? The first question concerns the underlying theory of equal protection doctrine: the "what" of higher scrutiny. Scholarly work that seeks to answer this question rightly distinguishes between principles of antidifferentiation and antisubordination;[11] principles underlying the Court's threshold decision to impose higher scrutiny. Yet this line of reasoning fails to realize that the Court endorses neither. By collapsing a suspect-*class* analysis—a focus on antisubordination—with a suspect-*classification* one—a focus on antidifferentiation—the Court's jurisprudence perverts both. It points to an inconsistent theory of reviewing legislation. This is a novel critique of the equal protection doctrine, one that has hitherto gone unnoticed.

The second question concerns the purpose or goal of strict scrutiny: the "why" of such scrutiny. Once we have decided that

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governmental as well as private entities, based on prejudice and stereotypes that continue to have ramifications today. . . . [S]cientific consensus accepts that sexual orientation is a characteristic that is immutable . . . .").

[10] For an argument that the Court actually adopts more than three models of higher scrutiny, see R. Randall Kelso, *Filling Gaps in the Supreme Court's Approach to Constitutional Review of Legislation: Standards, Ends, and Burdens Reconsidered*, 33 S. TEX. L. REV. 493, 497–504 (1992) (suggesting that the Court operates with six standards of review); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002) (arguing the Court's current cases threaten to increase the number of models).

[11] This distinction between formal equality, or antidifferentiation, and antisubordination, is a familiar one. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9–14 (2003) (summarizing the distinction); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005–16 (1986); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976) (distinguishing between the principles and endorsing antisubordination); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1472–73 (2004) (arguing that "American equal protection law has expressed anticlassification, rather than antisubordination, commitments").

strict scrutiny is necessary, what is it meant to accomplish? This Article focuses only on the doctrine of strict scrutiny, not intermediate, because it seeks to consider strict scrutiny's relationship to racial discrimination. Drawing from case law and John Ely's classic defense of judicial review,[12] this Article argues that the answer to the "why" question is either about remedying democratic defects of representation or distinguishing between benign purposes on one hand and racist or nefarious purposes on the other. If this is the "why" of strict scrutiny, it turns out to be both too strict and not strict enough. While scholars rightly criticize the Court for failing to deploy strict scrutiny in certain cases, namely those where unconscious racism may be afoot,[13] they do not hone in on the cost of deploying it.[14] This Article argues that strict scrutiny is too strict because it invalidates a wide range of laws that seek to better the status of racial minorities. After all, the more stringent the test or the stronger the presumption of

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[12] ELY, *supra* note 9.

[13] *See, e.g.*, Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-race Equal Protection?*, 98 GEO. L.J. 967, 998 ("Yet advocates for racial equality find themselves in a bind when trying to establish intent because when the Supreme Court gutted disparate impact theory—at least for purposes of constitutional analysis—the Court simultaneously increased the showing required to recover in cases alleging intentional discrimination."); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1031–36 (1988) (arguing that there is a blindspot in the Court's equal protection doctrine—one that primarily looks to purpose rather than effects); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (arguing that the Court fails to deploy strict scrutiny in cases where the law may not mention race but racism may be present); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 702–08 (2006) (providing an historical analysis of disparate impact theory and arguing that it has hobbled a more expansive understanding of racial discrimination).

[14] One notable exception is Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 508 (2004) (noting that strict scrutiny "requires application of the bias presumption even where the classification is aimed to remedy bias," as in the case of race-based affirmative action); *see also* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000) ("[W]e ought to judge whether laws violate Equal Protection by looking at the meaning or expressive content of the law or policy at issue."); Darren Leonard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 618 ("In its equal protection decisions, the Court has effectively inverted the concepts of privilege and subordination; it treats advantaged classes as if they were vulnerable and in need of heightened judicial protection, and it views socially disadvantaged classes as privileged and unworthy of judicial solicitude.").

invalidity, the less likely the law will be upheld. There is a real political and democratic cost to deploying it. According to one scholar, between 1990 and 2003, 73% of all laws that invoked race were struck down when subjected to strict scrutiny in federal courts.[15] The "overwhelming majority" of laws struck down in that period were those that sought to ameliorate the status of racial minorities, such as affirmative action policies.[16] Framing Justice Harlan's dissent in *Plessy v. Ferguson*[17] in a novel light, this Article argues that a rational-review analysis is sufficient to do the distinguishing work in cases where a law facially discriminates on the basis of race, a point that has escaped scholarly work on the Equal Protection Clause.[18] This Article draws from the recent decision by the Ninth Circuit Court of Appeals invalidating Proposition 8,[19] the California constitutional amendment defining marriage as between a man and a woman, to buttress this claim of the sufficiency of a rational-review analysis. Properly understood, rational review is both rigorous enough to invalidate explicit racial policies of exclusion while upholding policies of inclusion. After all, if such a review can invalidate legislation based on homophobia—mere hostility to gays and lesbians—it can invalidate legislation based on racism—mere hostility to racial minorities. But strict scrutiny simultaneously is not strict enough because constitutional doctrine fails to invoke it in those cases where a law is facially neutral but has a disparate impact on racial minorities. This Article concludes that strict scrutiny, as it is currently understood, is too blunt an instrument. We must be careful in deploying it, precisely because it stands at the center of our dual commitments to democracy and judicial review.

This Article proceeds in two parts. First, it explores the two diverging conceptions of equality in the Court's equal protection

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[15] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795, 839 & tbl.6 (2006).

[16] *Id.* at 834.

[17] 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

[18] Suzanne Goldberg offers a revised single standard of review to replace the Court's use of higher scrutiny. Goldberg, *supra* note 14, at 491–94. This Article references her approach in Part III. *See also infra* note 270.

[19] Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012), *cert. granted*, Hollingsworth v. Perry, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144).

cases: antisubordination and antidifferentiation. It argues that the Court fulfills neither principle. It perversely generates its list of suspect classifications by engaging in a suspect-class analysis. Second, this Article argues that strict scrutiny is wrongly deployed in cases of racial discrimination. It is unnecessary, even counterproductive, in those instances where the law facially discriminates on the basis of race, and it is unavailable in those circumstances where such higher scrutiny may be useful.

## II. PERVERSITY OF EQUAL PROTECTION THEORY

The Equal Protection Clause is a limitation on state legislation: "[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[20] The clause does not require that states pass particular laws or policies. Rather, the clause simply invalidates legislation that violates equality. The current doctrinal test imposes heightened scrutiny on those laws and policies that invoke a suspect classification. Again, under current case law, laws discriminating on the basis of race,[21] alienage,[22] and national origin[23] get strict scrutiny; that is, where the Court asks if the law is narrowly tailored to serve a compelling state purpose.[24] Laws discriminating against sex get intermediate scrutiny;[25] that is, where the Court asks if the law is substantially related to an important governmental purpose.[26]

But what is the underlying theory that explains why these classifications trigger such heightened scrutiny?[27] This is an

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[20] U.S. CONST. amend. XIV, § 1.

[21] *E.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967).

[22] *E.g.*, Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[23] *E.g.*, Oyama v. California, 332 U.S. 633, 646 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[24] *E.g.*, *Loving*, 388 U.S. at 11.

[25] *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[26] *E.g.*, Clark v. Jeter, 486 U.S. 456 (1988).

[27] This Article leaves to one side the issue of ascertaining an originalist or historical understanding of equal protection. It will not suffice simply to argue that the Court ought to strike down legislation by looking to what "equal protection" originally meant as an historical matter. Originalism's failure as a method of constitutional interpretation here is clearest in considering two cases: *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating state antimiscegenation laws) and *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating racial

important question that is often missed in the doctrinal interpretation of the Equal Protection Clause. Consider *Craig v. Boren*, where the Court invalidated an Oklahoma law that made the sale of low-alcohol beer dependent on one's sex.[28] The Court subjected the law to intermediate scrutiny, reasoning that "normative philosophy . . . underlies the Equal Protection Clause."[29] This Article interrogates this "normative philosophy," analyzing the theory that underlies the Court's threshold decision to impose higher scrutiny.

The relevant question is what kind of equality underlies the Court's interpretation of "equal protection." Legal scholars generally posit two diverging norms of equality.[30] These two norms are, to borrow Ruth Colker's language, antidifferentiation and antisubordination.[31] Part II analyzes the way in which the Court understands equality. That is, this Article asks which of these principles of equality has the Court adopted. In answering this question of applied political theory, this Article elucidates these kinds of equality, pointing out how they diverge in

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segregation in the District of Columbia). While there may be an originalist defense of *Brown*, *see generally* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995), there is no similar evidence that the Equal Protection Clause even contemplated application to social legislation like prohibitions on interracial marriage, *see generally* Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1996). But the idea that *Loving* was wrongly decided—that the Constitution would not invalidate antimiscegenation laws—seems beyond the acceptable limits of constitutional interpretation.

Even more definitively, since the District of Columbia is a federal instrumentality, the equal protection clause of the Fourteenth Amendment does not even apply. Rather, the relevant provision for federal legislation is the Fifth Amendment. In *Bolling* the Court stated that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling*, 347 U.S. at 500. But "unthinkable" is not the same as in accord with originalist principles. Reading the doctrine of strict scrutiny into the Fifth Amendment flies in the face of originalism. Jack Balkin, *Scalia's Biggest Problem Isn't* Brown*, It's* Bolling *and* Loving, BALKINIZATION (Oct. 28, 2009, 7:35 AM), http://balkin.blogspot.com/2009/10/scalias-biggest-problem-isnt-brown-its.html; Scott Lemieux, *Scalia and Thomas: Originalist Sinners*, THE AM. PROSPECT (June 29, 2007), *available at* http://www.prospect.org/article/scalia-and-thomas-originalist-sinners. While some version of originalism may still be relevant for other provisions in the Constitution, it simply is a nonstarter for understanding equality under the law.

[28] 429 U.S. at 204.

[29] *Id.*

[30] *See, e.g.*, Colker, *supra* note 11, at 1005.

[31] *Id.*

constitutional cases concerning race-based affirmative action. It then suggests that, in triggering higher scrutiny by defining the list of suspect classifications, the Court fulfills neither principle.

### A. THE PRINCIPLES OF ANTIDIFFERENTIATION AND ANTISUBORDINATION

The two diverging conceptions of equality are antidifferentiation (AD) and antisubordination (AS).[32] As a general matter, AD maintains that the law should not treat individuals differently on the basis of characteristics such as race, sex, sexual orientation, blood type, hair color, and the like.[33] Thus, AD values formal equality.[34] Formal equality does not mean that the law may not deploy any distinctions—this would be an easily defeated position. After all, the law invariably makes distinctions on the basis of some classifications or differences. The law distinguishes between landlords and tenants, those who are married and those who are single, and those who steal and those who do not. Formal equality contends that the law ought not to deploy distinctions that are irrelevant, that bare no relation to one's role in society. Michael W. McConnell, a legal scholar and former judge on the Tenth Circuit Court of Appeals, characterizes the AD rationale in just this way: "The principle of equal protection of the laws can be understood as a rule of strict formal equality, requiring all citizens to be treated without regard to race or other morally irrelevant distinctions."[35]

Though now overruled, *Hopwood v. Texas*, a Fifth Circuit Court of Appeals decision, reasoned that the "use of race, in and of itself . . . is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants."[36]

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[32] *Id.*

[33] *E.g.*, *id.* at 1005–06.

[34] Lisa Eichom, *Hostile Environment Actions, Title VII, and the ADA: The Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 607 (2002).

[35] Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1282 (1997); *cf.* JOHN RAWLS, A THEORY OF JUSTICE 14 (1971) (arguing for "equality in the assignment of basic rights and duties").

[36] Hopwood v. Texas, 78 F.3d 932, 945 (5th Cir. 1996), *overruled by* Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003) (holding racial diversity is a compelling purpose for

According to AD, an individual's race, sex, sexual orientation, hair color, blood type, and the like should not dictate varying treatment under the law.

In this way, AD cares about individuals, not groups or classes.[37] Every individual can be identified by "morally irrelevant" characteristics. It is of no importance to AD that someone is black, white, blood type AB negative, gay, or straight. It is precisely because these characteristics do not (or rather ought not) make a difference, that AD eschews a focus on groups or classes. The individual is of normative significance to formal equality, not the group or groups he or she belongs to. A law that invokes a morally irrelevant characteristic is sufficient to deem it unconstitutional under AD.

On the other hand, an AS understanding of equality places groups at the locus of equality.[38] It matters under this norm of equality what group an individual belongs to. There are many kinds of groups in society: blacks, whites, those with type AB-negative blood, brunettes, women, or men. AS cares about those groups that are historically or currently disadvantaged.[39] The fact that one is black or white is centrally relevant to AS. Laws that discriminate against whites do not raise the same equal protection concerns as a law that discriminates against blacks. As Colker writes, AS "seeks to eliminate the power disparities between men and women, and between whites and non-whites, through the development of laws and policies that directly redress those disparities."[40] This approach eschews an individual-based outlook, relying instead on remedying group powerlessness.

An AS theory of the Equal Protection Clause does not require that the state pass legislation to ameliorate the status of certain groups. Again, the Equal Protection Clause is a limitation on state legislation; it does not require that states pass particular laws or policies. The question here is what theory of equality the Court ought to adopt. The AD approach invalidates all laws that invoke

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affirmative-action programs).

[37] Colker, *supra* note 11, at 1005.

[38] *Id.* at 1008.

[39] *Id.* at 1009.

[40] *Id.* at 1007 (contending that the Court should adopt such an interpretation).

morally irrelevant characteristics. The AS approach permits such laws if they seek to remedy group powerlessness. Instead of a focus on classifications, AS looks to the class—to the particular minority group. AS identifies vulnerable minorities or groups, such as blacks, gays, and women, and argues that laws must occasionally invoke certain classifications to remedy powerlessness. According to AS, individuals may very well need to be treated differently on the basis of race, sex, or sexual orientation in order to do the necessary antisubordination work. Simply because a law invokes a "morally irrelevant" characteristic, then, is not sufficient to invalidate it under AS.

The Court's earlier equality cases invoke both AD and AS in invalidating legislation under the Equal Protection Clause. For example, in *Strauder v. West Virginia*,[41] the Court spoke to both principles in invalidating a law that categorically excluded blacks from grand or petit juries. First, it reasoned that the Fourteenth Amendment grants to blacks "the right to exemption from unfriendly legislation against them distinctively as colored" as well as an "exemption from legal discriminations, implying inferiority in civil society . . . and discriminations which are steps towards reducing them to the condition of a subject race."[42] Here the focus is on the suspect class—blacks. That is, the Court deemed the law unconstitutional by looking to the racial group the petitioner belonged to, in this case blacks.[43] The law violated equality, then, since it treated a particular class as inferior. The Court's use of "unfriendly" suggests that remedial (or "friendly") race-conscious legislation may very well be permissible.[44] This is the AS position, which permits categorization on the basis of race as long as the categorizing is done to remedy subordination. Second, the Court stated that the Fourteenth Amendment stands "against discrimination because of race or color."[45] Here the Court's logic appeals to individuals rather than a particular group or class. The

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[41] 100 U.S. 303 (1879).

[42] *Id.* at 308.

[43] *Id.* at 310.

[44] PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 355 (5th ed. 2006).

[45] *Strauder*, 100 U.S. at 310.

Court reasoned that a law is invalid if it invokes a particular characteristic or attribute—here race. This norm of AD prohibits discrimination against any racial group, whether blacks or whites. The race of the petitioner here was irrelevant to the equal protection argument. Under this interpretation of equality, the law's use of race is sufficient to invalidate it.

Justice Harlan's dissent in *Plessy v. Ferguson*[46] also articulates principles of both AD and AS.[47] In upholding the principle of formal equality, he writes, "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."[48] The focus here is on race—black or white. The law is meant to be "color-blind." Since race is a characteristic that bears no relationship to one's role in society, the law, as AD contends, must be blind to race. Yet, in contending that such racial segregation is unconstitutional, Justice Harlan also appeals to AS, articulating claims of group powerlessness and domination. Refuting the contention that segregation equally affects blacks and whites, Harlan reasons:

> Every one knows that the statute in question 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. . . .
>
> 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?[49]

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[46] 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

[47] *See also infra* Part III.A.*3* (discussing *Plessy*).

[48] 163 U.S. at 559 (Harlan, J., dissenting).

[49] *Id.* at 557–60.

Here Harlan's focus is not so much that the law categorizes on the basis of race, but that it specifically injures blacks. These passages of his dissent focus on the suspect class, namely blacks. The logic here is that this kind of law violates equality because it focuses on a particular group—a racial minority—and not simply because it invokes race.

Similarly, in *Loving v. Virginia*, the Court made a dual argument, protesting the law's maintenance of "White Supremacy" (an emphasis on subordination) and its restriction based solely on "racial classifications" (an emphasis on formal equality).[50] The *Loving* Court appealed to the principles of both AS and AD. *Brown v. Board of Education*[51] also looked to class and classification. In focusing on the class, it held that racial segregation harmed blacks, generating "a feeling of inferiority as to their status in the community."[52] Still, *Brown* framed the constitutional question by asking whether "segregation on children in public schools solely on the basis of race" is equal—focusing on the classification.[53]

In these four cases the legislation in question not only picked out a morally irrelevant characteristic—race—but also discriminated against a subordinated minority—blacks. It is not surprising that these opinions looked to AD and AS in grounding their arguments. In other words, maintaining formal equality and remedying powerlessness were both clearly relevant. Either principle can trigger heightened scrutiny because both class and classification can do the work in these cases.

### B. THE PRINCIPLES DIVERGE: RACE-BASED AFFIRMATIVE ACTION

AD and AS, however, diverge with race-based affirmative action programs. Under AD such programs are presumptively problematic because the nonminority is being categorized according to an irrelevant characteristic such as race or sex. Under AS, though, such group-conscious programs would not

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[50] 388 U.S. 1, 11–12 (1967).
[51] 347 U.S. 483 (1954).
[52] *Id.* at 494.
[53] *Id.* at 493.

receive heightened scrutiny because the group being disadvantaged—whites or men—would not be a suspect class. In the famous footnote four of *United States v. Carolene Products Co.*, the Court reasoned that we should be wary "when legislation appears on its face" to discriminate "against discrete and insular minorities."[54] Such legislation may very well "call for a correspondingly more searching judicial inquiry."[55] John Hart Ely expounds upon this "discrete and insular" proposition by proffering his classic representation-reinforcement thesis.[56] According to Ely, we need only be wary of laws that discriminate against a political minority.[57] Whites do not need protection from the democratic process because they are not a "discrete and insular" group in the same way as blacks. They are not a democratic minority. Consequently, there is no presumptive problem in discriminating against them.

This divergence is evident in the Court's race-based affirmative action cases. In *Regents of the University of California v. Bakke*, the Court analyzed, for the first time, an affirmative action program that benefited a minority by disadvantaging a nonminority.[58] At issue was a quota system at the University of California at Davis Medical School that accepted certain students from "disadvantaged" minority groups under a special admission program distinct from its general admission counterpart.[59] Allan Bakke, a white male applicant whom the school rejected, instituted the legal action. At the time of his rejection, four unfilled minority quota spots were still available.[60] Bakke argued that the group-conscious program was unconstitutional. The Court agreed, holding that the university had violated equal protection.[61] In subjecting the program to heightened scrutiny, the Court dismissed the AS rationale. It explicitly rejected the contention that since white males "are not a 'discrete and insular

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[54] 304 U.S. 144, 152–53 n.4 (1938).
[55] *Id.* at 153 n.4.
[56] ELY, *supra* note 9, at 87.
[57] *Id.* at 103; *see also infra* Part III.
[58] 438 U.S. 265, 319 (1978).
[59] *Id.* at 272–73.
[60] *Id.* at 276.
[61] *Id.* at 320.

minority' requiring extraordinary protection from the majoritarian political process," strict scrutiny should not apply.[62] According to the Court, it makes no difference whether the law discriminates against a disadvantaged minority such as a racial minority, or a privileged majority such as whites. "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[63] Under *Bakke*'s logic, all that is important is that the law invokes a morally irrelevant characteristic, namely race. This represents an unequivocal repudiation of AS.

Similarly, in *Adarand Constructors, Inc. v. Pena* the Court held a federal provision providing additional compensation in government contracts to contractors who hired minority subcontractors must satisfy strict scrutiny.[64] In *City of Richmond v. J. A. Croson Co.*, the Court had rejected Richmond's similar policy requiring contractors to use a certain percentage of minority subcontractors.[65] Echoing the AD approach and its focus on individuals rather than groups, the *Adarand* Court reasoned that the Fourteenth Amendment "protect[s] *persons*, not *groups*."[66] By refusing to consider the group the law discriminated against, caring only about the characteristics or classification it invoked, the Court once again championed AD and its focus on the rights of individuals.

The most recent affirmative action case, *Grutter v. Bollinger*,[67] seems to confirm the AD approach. Though *Grutter* upheld the University of Michigan Law School's nonquota-based affirmative action program on the ground that diversity constitutes a compelling purpose, the Court still subjected the program to strict scrutiny.[68] Here, too, the petitioner was white and alleged unconstitutional discrimination.[69] Reaffirming the AD principle,

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[62] *Id.* at 290.
[63] *Id.* at 295.
[64] 515 U.S. 200, 227 (1995).
[65] 488 U.S. 469, 511 (1989).
[66] *Adarand*, 515 U.S. at 227.
[67] 539 U.S. 306 (2003).
[68] *Id.* at 325–26.
[69] *Id.* at 316–17.

*Grutter* quoted from *Adarand*, stating that "[b]ecause the Fourteenth Amendment 'protect[s] *persons*, not *groups*,' all 'governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.' "[70] The emphasis on the morally irrelevant classification and not the disadvantaged racial minority points to the AD norm of equality. All members of the *Grutter* court agreed that a law that discriminates on the basis of race ought to receive strict scrutiny, irrespective of whether it discriminates against a racial majority or minority.[71] In *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts, writing for the Court, invalidated two school-district plans that assigned students to schools based on race to ensure racial diversity.[72] The Court subjected the law to strict scrutiny,[73] reasoning that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[74] Most scholars therefore conclude that the Court affirms AD.[75]

But adherence to AD means that race-based affirmative action likely will not be upheld. Again, consider that from 1990 to 2003, federal courts invalidated 73% of all democratically enacted laws discriminating on the basis of race.[76] The "overwhelming majority" of laws in this period were those that sought to ameliorate the status of racial minorities.[77] This is the cost of deploying strict

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[70] *Id.* at 326 (quoting *Adarand*, 515 U.S. at 227).

[71] Justice O'Connor's majority opinion affirms this approach, with Justices Stevens, Souter, Ginsburg, and Breyer joining her. Chief Justice Rehnquist's dissent also affirms the need for strict scrutiny while arguing, however, that the majority failed to take strict scrutiny seriously. *Grutter*, 539 U.S. at 379–80 (Rehnquist, C.J., dissenting).

[72] 551 U.S. 701, 748 (2007).

[73] *Id.* at 720.

[74] *Id.* at 748.

[75] *See supra* note 11; *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 621–22 (discussing the Court's adoption of AD); Amy H. Nemko, *Single-Sex Public Education After* VMI*: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19, 28 (1998) (noting that AD is the "dominant vision" in legal doctrine).

[76] *See* Winkler, *supra* note 15, at 839 & tbl.6.

[77] *Id.* at 834. The major exception was a lower federal case leading to *Johnson v.*

scrutiny for all laws that facially discriminate on the basis of race. Consequently, the Court undoubtedly will impose strict scrutiny in reviewing the constitutionality of a Texas affirmative action policy that was upheld by the Fifth Circuit Court of Appeals.[78] The Court may very well revisit its holding in *Grutter*.[79] But many scholars in fact criticize the Court for endorsing the formal equality principle of equal protection.[80] After all, the AS approach straightforwardly permits remedial legislation such as race-based affirmative action programs. AS seeks to remedy group power differentials, and this may very well require categorizing an individual on the basis of an otherwise allegedly irrelevant characteristic. For example, to help the position of blacks as a group, the law may very well have to disadvantage or harm individual whites. This Article does not weigh in on the debate over which conception of equality is better suited to equal protection theory.

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*California*, 543 U.S. 499 (2005). This Article discusses *Johnson* in Part III.

[78] Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 216–17, 246–47 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).

[79] *See, e.g.*, David Gans, Fisher v. University of Texas*, Justice Kennedy, and the Text and History of the Fourteenth Amendment*, BALKINIZATION (Feb. 28, 2012, 4:40 PM), http://balkin.blogspot.com/2012/02/fisher-v-university-of-texas-justice.html (describing *Fisher* as "an attempt to seek a do-over of" *Grutter*).

[80] *See generally* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Frank R. Parker, Essay, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763 (1996); Reva B. Siegel, *Discrimination in the Eyes of the Law: How "Color Blindness" Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77 (2000); *see also* David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 658 (identifying the Court's "flawed doctrinal choice of a 'colorblind' theory"). In the context of sex discrimination and equal protection, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987–1002 (1984) (discussing the Court's deferential scrutiny of sex-based classifications); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1284–85 (1987) (arguing against formal equality in the context of sex discrimination). *But see* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1472 (2000) (suggesting that there may be value to the formal equality approach).

### C. COLLAPSING CLASS WITH CLASSIFICATION: ENDORSING NEITHER NORM OF EQUALITY

This Article argues the Court's equal protection theory turns out to endorse *neither* norm of equality. By focusing simply on the surface of equal protection doctrine, scholars conclude that the Court has adopted AD.[81] This Article argues that when we interrogate the underlying theory of higher scrutiny we realize that the Court perverts both principles. The crux of this argument entails realizing that beneath the distinction between AD and AS is case law's distinction between classification and class. Classifications include race, sex, hair color, sexual orientation, blood type, and the first letter of one's last name. Their respective classes would be blacks, whites, men, women, redheads, blondes, gays, straights, blood type O, blood type AB negative, and those with last names beginning with A–R. AD contends that when a law categorizes on the basis of a suspect *classification*, it should trigger heightened scrutiny. AS triggers such scrutiny only when the law discriminates against a suspect *class* or group. AD worries that legislation will categorize on the basis of race, sex, sexual orientation, hair color, blood type, or first letter of one's last name, while AS seeks to mitigate or remedy the subordinated status of minorities such as blacks, gays, and women. Again, the crucial question here is what grounds or principles trigger the Court's initial doctrinal decision to impose higher scrutiny.

So under AS, a characteristic may be "morally irrelevant"—blood type or first letter of one's last name—but not define a disadvantaged group—those with type AB-negative blood or with last names beginning with A–R. Legal distinctions that discriminate against such groups would not trigger AS concerns. AS protects only those groups that occupy some kind of subordinated status in society. For example, a law that regulated the sexual activity of blondes or redheads would not violate the principle of AS. Blondes and redheads have not suffered a history of discrimination. After all, according to AS, suspectness arises not from an argument of moral irrelevance but from a group's

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[81] *See supra* note 75.

subordinated status. At the very least, one would have to go outside the principle of AS to strike down such a law. AD, on the other hand, would take issue with a law discriminating against blondes or redheads. Such a law invokes an irrelevant classification. Under this logic, adherence to only AS may very well be insufficient from an equality perspective. But again, my purpose is not to advocate for one kind of equality over another. I only seek to show that the Court fulfills neither principle.

Though the classification and class analyses are conceptually distinct, the Court collapses them. For instance, hair color or the first letter of one's last name may be a suspect classification—a "morally irrelevant" characteristic that the law ought not to invoke. However, blondes or those with last names beginning with A–R may not be a suspect class. The Court perverts AS and AD by conflating the class analysis with its classification counterpart.

The Court articulates the criteria for suspect classes, only to have such an analysis improperly inform the list of suspect classifications. Through the years, the Court has elucidated various criteria in determining suspectness.[82] In *Lyng v. Castillo* the Court upheld a federal law that did not treat a group of distant relatives as a household for purposes of food stamp eligibility.[83] The Court did not subject the law to heightened scrutiny, reasoning that "[c]lose relatives are not a 'suspect' or 'quasi-suspect' class."[84] Importantly, the Court concluded that this class did not meet any of the criteria for suspect status: "As a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless."[85] Currently, as a matter of equal protection

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[82] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 720 (3d ed. 2009) (describing indicia of suspectness include political powerlessness, the history of discrimination, immutable characteristics, and relevancy between classification and governmental purpose); KATHLEEN M. SULLIVAN & GERALD GUNTER, CONSTITUTIONAL LAW 647 (14th ed. 2001) (same). For a good summary of this constellation of criteria, see Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1206–15 (2006).

[83] 477 U.S. 635, 639–43 (1986).

[84] *Id.* at 638.

[85] *Id.*; *see also* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (quoting *Lyng*).

doctrine, gays and lesbians do not count as a suspect class, though scholarly work has argued that they ought to.[86]

The Court's equal protection jurisprudence points to the following criteria to determine if the trait or class at issue is suspect: immutability,[87] irrelevance,[88] a history of discrimination,[89] and political powerlessness.[90]

*1. Immutability.* In *Frontiero v. Richardson*,[91] the Court held that women count as a suspect class. The Court reasoned that sex is an "immutable characteristic determined solely by the accident of birth."[92] In *Watkins v. United States Army*, a panel of the Ninth Circuit held that gays constitute a suspect class, stating that "we have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine."[93] (This part of the decision was ultimately vacated en banc because the court found for the plaintiff on alternative grounds.[94])

*2. Irrelevance.* Traits that are "accidents of birth" are also often unrelated or irrelevant to one's ability to contribute to society.[95] *Frontiero* also held that "the sex characteristic

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[86] *See supra* note 9. In fact, the Obama administration also contends that as a constitutional matter, gays and lesbians ought to count as a suspect class. In a letter refusing to defend the Defense of Marriage Act, the federal law that does not recognize valid state same-sex marriages, Attorney General Eric Holder argues that gays and lesbians meet all four relevant criteria for suspect status. Letter from the Att'y Gen., *supra* note 9.

[87] *E.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–43 & n.10 (1985); Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[88] *See, e.g.*, *Frontiero*, 411 U.S. at 686 ("[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society.").

[89] *See, e.g.*, *City of Cleburne*, 473 U.S. at 443 ("[L]awmakers have been addressing [the mentally disabled] in a manner that belies a continuing antipathy . . . ."); *Frontiero*, 411 U.S. at 684–85 (describing the history of discrimination against women); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process.").

[90] *See Rodriguez*, 411 U.S. at 28 (finding no "position of powerlessness").

[91] 411 U.S. at 682–88.

[92] *Id.* at 686.

[93] 847 F.2d 1329, 1347–49 (9th Cir. 1988), *vacated by* 875 F.2d 699 (9th Cir. 1989) (en banc); *see also* Windsor v. United States, 699 F.3d 169, 183–84 & n.4 (2d Cir. 2012) (subjecting sexual-orientation discrimination to heightened scrutiny in part because it is sufficiently immutable), *cert granted*, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-307).

[94] *Watkins*, 875 F.2d at 711.

[95] *Frontiero*, 411 U.S. at 686.

frequently bears no relation to ability to perform or contribute to society."[96] Moreover, the concurrence to the en banc *Watkins* decision made clear that sexual orientation is irrelevant to one's ability to contribute to society: the "irrelevance of sexual orientation to the quality of a person's contribution to society also suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes."[97]

But—and this is the crucial point—immutability and irrelevance are *not* sufficient on their own to gain suspect status. If they were sufficient, the Court would deem all the following traits as articulating suspect classifications: blood type, height, or the first letter of one's last name. Each of these traits is immutable and does not bear any relation to one's ability to contribute to society. Consider that in *Massachusetts Board of Retirement v. Murgia* the Court upheld a Massachusetts forced-retirement policy for police officers who reached the age of fifty. Age is obviously an immutable characteristic—you simply cannot change how old you are. And generally, though of course there may be exceptions on either end of the spectrum, age is not an indicator of your ability to contribute to society. But the Court refused to grant suspect status:

> 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. The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not

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[96] *Id.*

[97] *Watkins*, 875 F.2d at 725 (en banc) (Norris, J., concurring).

> define a "discrete and insular" group in need of "extraordinary protection from the majoritarian political process." Instead, it marks a stage that each of us will reach if we live out our normal span. Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny.[98]

If immutability and irrelevance were alone sufficient, the Court would indeed accept the AD understanding of equal protection.[99] But the Court also looks to a history of discrimination and political powerlessness, as these criteria are crucial to the suspect *class* (not just *classification*) doctrine.

*3. History of Discrimination.* In *Frontiero*, the Court cited concerns of discrimination in addition to immutability: "[I]t 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."[100] Consider that in *San Antonio Independent School District v. Rodriguez*, the Court upheld the Texas property-tax system challenged by children of poor families.[101] With regard to the Equal Protection Clause, the Court held that this group did

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[98] *Id.* at 313–14 (citation omitted).

[99] Suzanne Goldberg recognizes this incongruity but fails to connect it to the underlying norms of equality:

> With respect to the history-of-discrimination inquiry, for example, a dominant group, such as whites, will not have suffered a history of discrimination based on race while the minority or subordinated group, here people of color, will be able to demonstrate that history. . . . Subgroup membership is what matters. Yet to the Court, the classification—and not the affected class—is what will trigger heightened review. This deeply rooted conflict suggests that the current analytic framework, or at least the way it has been developed by the Court, may not be as carefully conceived or applied as its widespread acceptance suggests.

Goldberg, *supra* note 14, at 504 (footnote omitted).

[100] *Frontiero*, 411 U.S. at 686.

[101] 411 U.S. 1 (1973).

not count as a suspect class. The Court reasoned that the poor constitute "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."[102] In turn, this "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."[103] In fact, in his letter to Congress, Attorney General Holder argues "a significant history of purposeful discrimination against gay and lesbian people" is the "most important[ ]" criterion in the analysis.[104]

*4. Political Powerlessness.* Whereas a history of discrimination is an historical fact—whether individuals have been discriminated on the basis of the trait—political powerlessness is a present condition about the failure to represent the interests of the class. These two criteria often go hand-in-hand. In *Graham v. Richardson*, the Court held that aliens constitute a suspect class, invalidating welfare legislation that discriminated between citizens and aliens.[105] The Court cited *Carolene Products*, reasoning that aliens are indeed a "discrete and insular" minority.[106] Obviously, noncitizens by definition do not have political power—they cannot vote in most state and federal elections.

But these four criteria only outline the relevant suspect *class*, not the *classification*. Again, if the Court only cared about immutability and irrelevance, this would point to an AD understanding of equal protection. But the Court perverts AD by incorporating into it a principle of AS. After all, even though AD views hair color as a suspect classification, the Court does not consider it one. This is because the Court strangely looks to a suspect-class analysis, with a focus on history of discrimination

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[102] *Id.*

[103] *Id.* (emphasis added).

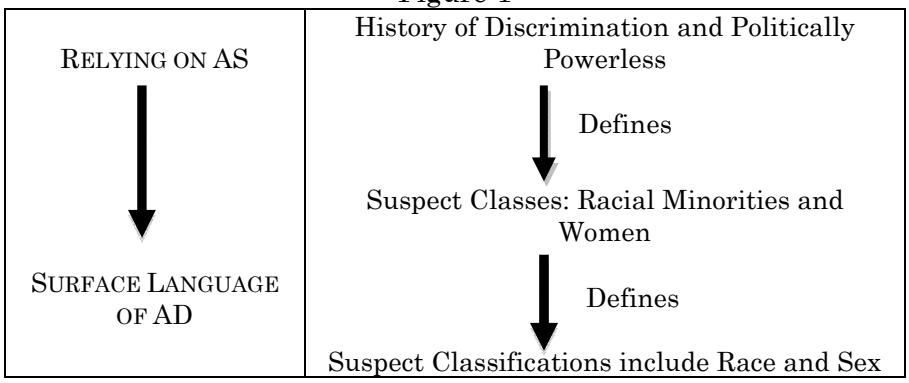
[104] Letter from the Att'y Gen., *supra* note 9.

[105] 403 U.S. 365, 376 (1971).

[106] *Id.* at 372 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)).

and political powerlessness, to generate its list of suspect classifications.

Figure 1




So while the Court speaks in the language of AD, it relies on AS in deciding when to impose higher scrutiny. The surface of the equal protection doctrine may point to a formal-equality approach, but a closer look reveals that AS is at work. As Figure 1 demonstrates, the Court considers history of discrimination and political powerlessness to be centrally important in defining its list of suspect classes. Relying on AS, these classes include racial minorities and women, but the Court perversely uses these classes to define its list of prohibited classifications. After all, whites and men have not suffered from invidious legal discrimination. They are not politically powerless. The Court turns a concern with subordinated classes or groups into a focus on "morally irrelevant" classifications.

In *Plyler v. Doe*, the Court struck down a Texas law that denied enrollment and funds to educate the children of illegal immigrants.[107] In doing so, the Court held that children of such immigrants are not a suspect class[108] and stated that the "Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications

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[107] 457 U.S. 202, 230 (1982).

[108] *Id.* at 223.

that disadvantage a 'suspect class.' "[109] The Court deems off-limits those *classifications* that discriminate against a minority. In fact, the Court cited *Carolene Products* in the footnote to this quotation.[110] While the Court's equal protection theory affirms the AD approach's focus on classifications, it appeals to AS in doing the equality work.

To truly take AD seriously, the Court would have to give heightened scrutiny to *all* allegedly morally irrelevant characteristics. Yet, and this is the crucial point, case law only deems race, sex, alienage, and national origin to be suspect classifications.[111] Under the Court's logic, laws that classify according to hair color, eye color, blood type, or the first letter of one's last name would not get heightened scrutiny. Such laws would only get rational review.[112] But the use of these may be just as arbitrary as their race- and sex-based counterparts. While these traits all meet the irrelevancy criterion,[113] they would not be considered suspect precisely because they do not exhibit a history of discrimination or political powerlessness. Again, these criteria, encompassing concerns of AS, seem necessary for a group to gain suspect status. This is why every case explicitly discussing suspect status under the Equal Protection Clause rehearses this subordination requirement. If the Court truly cares about formal equality as a reason such laws trigger heightened scrutiny, all irrelevant or arbitrary classifications should get similar treatment.

Discussion of discrimination or political powerlessness would be immaterial to suspect status if the Court truly accepted AD. According to AD, the fact that race has been used in the past to oppress and subjugate cannot be the reason for triggering higher scrutiny. If that were the case, AD would, as a conceptual matter, undermine its operating assumption that only the morally irrelevant status of a characteristic calls for higher scrutiny. Formal equality must deem race a questionable classification

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[109] *Id.* at 216.

[110] *Id.* at 223–24 n.14.

[111] *See supra* notes 3–7 and accompanying text.

[112] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 640 n.1 (1996) (Scalia, J., dissenting) (describing relationship between rational review and non-"suspect" classes).

[113] *See supra* Part II.C.*2*.

because of its normative irrelevance, not because blacks or any other minority may currently be powerless or subordinated. The arguments of powerlessness and subordination that stand at the heart of the equal protection doctrine are the province of AS, not AD.[114]

Since this clearly is not the approach the Court takes, the Court fails to fully endorse AD. Again, the Court routinely discusses the criteria of discrimination and powerlessness to decide which groups count as suspect and which do not. Because the Court determines the list of suspect classifications by engaging in a suspect-class analysis—looking to political powerlessness and to a history of discrimination on the basis of an immutable characteristic—it does not completely adhere to formal equality. Take Justice Thomas's dissent in *Grutter*. Thomas chastises the majority for not truly subjecting Michigan's race-based affirmative action program to strict scrutiny.[115] Yet he also concedes the following:

> The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to "merit." For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called "legacy" preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a "true" meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities. The Equal Protection Clause does not, however, prohibit

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[114] *Cf.* Gratz v. Bollinger, 539 U.S. 244, 301 (Ginsburg, J., dissenting). In *Gratz* Justice Ginsburg seems to suggest, in line with the AS approach, that the suspectness of race arises not from its irrelevance but from its historical use to discriminate against blacks. Though she confuses class with classification, she writes, "[o]ur jurisprudence ranks race a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purposes of maintaining racial inequality.' " *Id.*

[115] Grutter v. Bollinger, 539 U.S. 306, 354–56 (2003) (Thomas, J., dissenting).

> the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. What the Equal Protection Clause does prohibit are classifications made on the basis of race.[116]

Thomas states that "unseemly legacy preferences" are just as "arbitrary" with respect to merit as race. However, he refuses to subject such arbitrary legacy classifications to higher scrutiny. Thus, he does not endorse AD. But he also does not support AS; after all, AS would *not* subject an affirmative action program that benefits a racial minority to higher scrutiny.[117] Exemplifying the confusion of the Court's approach to equal protection, Thomas accepts neither principle of equality.

The Court perverts AD's central assumption by looking instead to AS's core claim of powerlessness. By failing to treat other clearly "morally irrelevant" characteristics as suspect, its equal protection logic deems such classifications—hair color, blood type, physical size, legacy status—as presumptively valid. As a result, the Court's logic undercuts the salient advantage of AD, namely its prima facie repudiation of laws that take into consideration such arbitrary factors. The Court claims adherence to AD's policies, yet it ends up incorporating part of the AS approach through the back door. This is because the Court explicitly denies the need for remedying subordination. It refuses to fully endorse AS, since it deems affirmative action presumptively invalid.[118] By only deeming suspect those classifications that entail suspect classes while *simultaneously* touting the merits of formal equality, the Court turns AS and AD on their heads. It subjects race-based affirmative action programs to heightened scrutiny but fails to apply such scrutiny to laws that invoke other allegedly irrelevant classifications.

This perverse logic is clearest in considering a law that segregates individuals on the basis of the first letter of their last name. Consider a legal regime where those whose last names

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[116] *Id.* at 367–68.

[117] *See supra* notes 38–40 and accompanying text.

[118] *Grutter*, 539 U.S. at 326 (stating that "racial classifications" are unconstitutional unless "narrowly tailored to further compelling governmental interests").

begin with S–Z have to sit in the back of the bus, drink from different water fountains, and the like. Public facilities and transportation will be similarly segregated. Assume that S–Zs constitute a political minority with A–Rs being the political majority. Under the Court's alleged formal-equality approach, such a law would be presumptively valid; it would only get rational review. This exposes the Court's flawed conception of AD. Under AD, as long as the characteristic is "morally irrelevant," legislation invoking it should be treated as suspect. Because the Court's equal protection analysis deems only *some* irrelevant classifications as suspect, it fails to fully realize AD, while simultaneously refusing to endorse AS. By collapsing a class analysis with its classification counterpart, the Court's equal protection theory perverts both principles of equality.

Consider the following chart:

Figure 2

| Discrimination | AD | AS | Equal Protection Theory |
|---|---|---|---|
| Against whites | Higher scrutiny | No higher scrutiny | Higher scrutiny |
| Against blacks | Higher scrutiny | Higher scrutiny | Higher scrutiny |
| Against blondes or S–Zs. | Higher scrutiny | No higher scrutiny | No higher scrutiny |

An AD norm would impose higher scrutiny for discrimination against whites, blacks, blondes, or S–Zs. An AS norm would do so only for discrimination against blacks and other subordinated groups. Equal protection theory, however, adopts neither principle. It perversely imposes higher scrutiny for laws that discriminate against whites, thereby confounding AS, while simultaneously refusing to impose such scrutiny for laws that discriminate against blondes or in S–Zs, thereby confounding AD.

## III. STRICT SCRUTINY WRONGLY DEPLOYED

Even if the Court were to decide on one or the other kind of equality, what is the purpose or rationale for strict scrutiny? Why does the Court even need it? Part III argues that, on one hand,

strict scrutiny is unnecessary for laws that facially discriminate on the basis of race; on the other hand, it is currently unavailable for laws that, while facially neutral, have a disparate impact on racial minorities.

### A. STRICT SCRUTINY IS UNNECESSARY FOR LAWS THAT FACIALLY DISCRIMINATE ON THE BASIS OF RACE

*1. Reasons for Strict Scrutiny.* There are two primary rationales for deploying strict scrutiny, rationales that accord with the two principles of equality analyzed above: remedying defects in the democratic process (AS) and distinguishing between benign and racist purposes (AD). John Hart Ely provides the classic defense of judicial review in terms of remedying democratic defects.[119] Ely argues that the Court should step in only when democracy breaks down—when the democratic system malfunctions.[120] In particular, the purpose of judicial review is to ensure that the democratic process keeps the channels of voting, political debate, and protest clear and properly represents those who are political minorities in the process. According to Ely,

> [M]alfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[121]

The second prong of Ely's defense of judicial review is important for this Article. When groups are excluded from the democratic

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[119] ELY, *supra* note 9, at 101–04.
[120] *Id.*
[121] *Id.* at 103.

process—when they are "systematically disadvantaged"—the Court ought to intervene. So when a law discriminates against a democratic minority, it ought to trigger concern by the Court. Since certain groups are indeed political minorities in this process—they are "discrete and insular"—the majority may not represent their interests properly. The various states that passed Jim Crow laws, for instance, clearly did not take into account the interests of the black minority. This is the core of Ely's democratic-defects argument.

Central to Ely's account of judicial review is determining which groups or classes the Court ought to be worried about with regards to representation.[122] With respect to those groups, the Court ought to examine the law more carefully. Ely's argument draws from AS in generating a list of those who are "in" for purposes of equal protection and who are "out." Ely considers the case of individuals, such as himself, with high blood pressure, a condition that may very well be immutable. He argues that it would be

> nonsense to treat a disqualification based on high blood pressure as constitutionally suspicious. It is true that a majority of people do not have it and probably are unaware of the extent to which they are surrounded by people who do. It is also true, however, that there are a good number of us—about 35 million in the United States—interacting with you daily, perhaps even marrying your children, and should one of you even announce your overdrawn stereotype, let alone try to legislate on the basis of it, you would rightly expect us to say "Hold it, Lester, there are lots of us with high blood pressure who don't fit your

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[122] For a criticism of reading "discrete and insular" narrowly, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); *see also* Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider*,*"* 134 U. PA. L. REV. 1291, 1331–33 (1986) (arguing that the procedural democratic-defects argument cannot work without a substantive theory about democracy).

> generalization," or to bear the consequences of keeping silent.[123]

However, according to Ely, it is appropriate to treat gays and lesbians as a suspect class:

> The reason homosexuals don't say "Hold it, Lester, *I'm* gay, and my wrist's not the least bit limp," is that because of the prejudices of many of the rest of us there would be serious social costs involved in such an admission. It is therefore a combination of the factors of *prejudice* and hideability that renders classifications that disadvantage homosexuals suspicious.[124]

If the Court's role is to step in when the majority fails to represent a group's interests, this requires that the law single out those groups whose interests may not be represented. So while the majority will represent the interests of those with high blood pressure, it may not represent the interests of gays and lesbians. After all, we are not worried that the democratic majority will not represent the interests of those with a certain hair or eye color. How do we determine which groups are prone to a failure in representation? It is precisely the presence of a history of discrimination or political powerlessness that does the distinguishing work. This is why these criteria are so crucial to the Court's current approach. The existence of prejudice against a group is evidence that the democratic majority may not represent that group's interests properly. The majority may act on negative stereotypes or mere hostility in legislating against such a group. There are no similar concerns regarding those with high blood pressure or those with a certain hair or eye color. Subordination triggers possible concerns of representation.

Ely argues that in these instances higher scrutiny is necessary in order to expose the unconstitutional motivations—"simple hostility"—that underlie the legislation at issue.[125] In the context

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[123] ELY, *supra* note 9, at 163.

[124] *Id.* (second emphasis added).

[125] *Id.* at 146; *see also* Ackerman, *supra* note 122, at 716 n.5 ("[E]ven when it is not cited

of laws that discriminate against racial minorities, strict scrutiny permits the Court to second-guess the relevant legislative body.[126] Higher scrutiny aids the Court in determining whether the law represents the interests of the political minority—here, people of color.

The rationale of protecting political minorities, and, in particular, racial minorities in the democratic process is an expression of antisubordination. The implication is that there is no need to protect the political majority or those who have not been so discriminated against. If a law discriminates against a racial majority, there is no need for the Court to consider striking it down. The assumption is that a majority will most certainly represent its own interests. There is no worry that the majority will systematically disadvantage itself. If there is no worry about a failure of representation, there is no need to impose strict scrutiny.

According to this rationale of remedying democratic defects, the fact that the law invokes a morally irrelevant characteristic such as race is not sufficient to trigger higher scrutiny. After all, if the racial characteristic belongs to the majority, there is no presumptive problem of malfunction in the democratic process, and no higher scrutiny is necessary. Only when the law discriminates against a "discrete and insular" *group* ought the Court impose higher scrutiny.

The other rationale for strict scrutiny tracks the formal-equality approach. Under this approach, the Court deploys strict scrutiny to ferret out laws that are based on nefarious purposes. That is, such scrutiny aids the Court in determining whether a law is indeed benign or illegitimate.[127] Consider two familiar laws, *(B)* being passed after *(A)*:

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explicitly, the *Carolene* idea plays a role in standard judicial justifications for strict judicial scrutiny of legislation burdening 'suspect' classes.").

[126] ELY, *supra* note 9, at 146.

[127] Elizabeth Anderson calls this the "skepticism" approach. Anderson, *supra* note 8, at 1230; *see also* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (arguing that the Court regrettably has moved away from deploying strict scrutiny to "smok[e] out" legislation with an invidious purpose); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 19 (2000) (noting that strict scrutiny is necessary to distinguish legitimate and

> (A) Public facilities and transportation will be segregated on the basis of race. This means that, among other things, blacks must sit at the back of trains and buses.
> (B) Blacks will receive some kind of preference in educational admissions or hiring.

In *Croson*, the Court suggested that strict scrutiny is necessary to distinguish between *(A)* and *(B)*: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are . . . in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[128] In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court struck down two school districts' proposed racial integration plans by subjecting them to strict scrutiny.[129] Justice Thomas's concurrence agrees that strict scrutiny is necessary; otherwise, "[h]ow does one tell when a racial classification is invidious?"[130] He then cites segregationists who "argued [in *Brown v. Board of Education*] that their racial classifications were benign, not invidious."[131] The need to distinguish *(A)* from *(B)* requires strict scrutiny—or so it appears.

*2. Resuscitating a Rational-Review Standard.* Imagine, given these two purposes of strict scrutiny, that we discover a country with a history of discriminating against individuals with last names beginning with the letters S through Z—what this Article calls "letterism." Letterism is the belief that the first letter of one's last name biologically or genetically tracks a kind of status or hierarchy. People whose last names begin with such letters have to sit in the back of the bus, have to drink from different water fountains, and are forbidden from voting. Identification cards ensure that the state knows the first letter of your last name. Those whose last names begin with A through R—assume these last names constitute the

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illegitimate governmental purposes).

[128] City of Richmond v. J.A. Croson Co., 458 U.S. 469, 493 (1989); *see also* Rubin, *supra* note 127, at 19 & n.49 (citing *Croson*).

[129] 551 U.S. 701, 747–48 (2007).

[130] *Id.* at 778 n.27 (Thomas, J., concurring).

[131] *Id.*

majority of individuals—benefit from this system of letterism. In fact, to perpetuate this system, the A–Rs pass laws that prevent marriage between these two groups. Some scientists even generate studies to show that S–Zs are genetically inferior to A–Rs.

Consider then the following analogous set of laws (again with *(D)* being passed after *(C)*):

> (C) Public facilities and transportation will be segregated on the basis of the first letter of one's last name. This means that, among other things, S–Zs must sit at the back of trains and buses.
> (D) S–Zs will receive some kind of preference in educational admissions or hiring.

Our immediate reaction would be that letterism is arbitrary, irrational, or just plain stupid. In fact, we may even chuckle at the thought that a country could institute such a scheme. Would the Court need strict scrutiny to invalidate *(C)*? After all, it just does not make sense to segregate individuals on the basis of the first letter of their last name in this way. The belief that the first letter of one's last name genetically tracks a kind of status is downright irrational.

The similarity between letterism and racism is all too clear. Like race, the first letter of one's last name is an immutable characteristic. It is something one is born with rather than something one has voluntarily chosen. Both are characteristics deployed for no other reason than mere prejudice. There is simply no evidence that race or the first letter of one's last name intrinsically track some kind of status or hierarchy. Racism, like letterism, makes no sense.[132] According to Anthony Flew, racism

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[132] This Article does not argue that race itself is groundless, even though according to many biologists and anthropologists there is nothing biological about the category of race. *See, e.g.*, Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1378 (1999) (citing "unequivocal evidence that race is nonbiological"); *see also generally* Frank Livingstone, *On the Non-Existence of Human Races*, 3 CURRENT ANTHROPOLOGY 279, 279 (1962) ("[T]here are excellent arguments for abandoning the concept of race with reference to the living population of *Homo sapiens*."); RICHARD LEWONTIN, CRITICAL RACE THEORY: ESSAYS ON THE SOCIAL CONSTRUCTION AND REPRODUCTION OF RACE (E. Nathaniel Gates ed., 1997).

is "advantaging or disadvantaging someone . . . for no other or better reason than that they belong to one particular racial set and not another."[133] Laws based on racist beliefs, then, seek to discriminate against a group for no legitimate purpose. So, if rational review is sufficient to strike down *(C)*, we do not need strict scrutiny to strike down *(A)*.[134]

First, we do not need such scrutiny to realize that *(C)* represents a malfunction in the democratic process. Here, too, the majority is discriminating against a democratic minority. The interests of S–Zs are not being taken into account. Imagine, then, that the Court were to analyze *(C)* after a state suddenly adopted a policy of letterism. As a doctrinal matter, discrimination on the basis of letters would not get higher scrutiny by the Court because, although immutable, there is no history of discrimination on the basis of letters; such a group is not powerless.[135] But would the Court need higher scrutiny to reject *(C)*? What legitimate purpose could there be for such a segregation scheme? Again, the Court would immediately deem the law to be irrational, ridiculous, or, better yet, just plain stupid! It would not need to scrutinize the law carefully to realize that it fails to represent the interests of those with last names beginning with S through Z. Rather, the Court would proclaim that because *(C)* seeks to accomplish some letterist purpose, it blatantly fails to take into account the interests of a political minority, here S–Zs.

Second, we do not need to closely examine *(C)* to realize that it rests on an arbitrary and hence illegitimate purpose. While the institutional apparatus of letterism may work quite well, its effectiveness is not the issue; the decision to pick out the first letter of a last name—like picking out skin color or hair color—in order to segregate and effectuate a letterist purpose is arbitrary. Searching examination is unnecessary to realize that the distinction deployed in *(C)* represents simple animus or prejudice

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[133] ANTHONY FLEW, ATHEISTIC HUMANISM 275 (1993).

[134] For an argument that the Court's insistence on deploying strict scrutiny in this regard turns out to rationalize racism see Sonu Bedi, *How Constitutional Law Rationalizes Racism*, 4 POLITY 542 (2010).

[135] This, in turn, constitutes the perverse conflation of classification with class analyzed in Part II.

against a group. The Court would not need to determine whether the law's means are narrowly tailored to achieve a compelling purpose. The Court would easily realize that *(C)*'s actual purpose is illegitimate. The Court would no doubt invalidate the law, proclaiming that letterism does not pass rational review. So if a Court can realize that *(C)* rests on a nefarious purpose without higher scrutiny, it can do so for laws like *(A)*.

However, is there not an important difference between letterism and racism? While letterist legislation was not an historical reality, racist legislation was. As noted above, a history of discrimination is crucial to justifying higher scrutiny. Again, because racial minorities constitute a democratic minority, we ought to be worried that they will not be represented properly in the political process. That is, the Court flags racial discrimination precisely because particular minorities have been subjected to a history of abuse. Is this argument not disregarding that history, failing to give it due credit in criticizing the tiers-of-scrutiny approach? Put provocatively, isn't this argument trivializing racism? Given our history with racism in the United States, should we not be on guard with laws that discriminate on the basis of race?

Racist legislation was a reality, unlike its fictive letterist counterpart, so we should be worried that a state may once again pass such legislation. In fact, perhaps it is more likely that a white majority will not represent the interests of racial minorities than that A–Rs will not take into account the interests of S–Zs. But how do we go from these claims, all which are uncontroversial, to contending that higher scrutiny by the Court is necessary? In those instances where the majority does act tyrannically, courts will be crucial in striking down legislation. Ely's defense of judicial review rightly places the Court as the referee in the democratic-representation process. Obviously, this Article does not suggest that we get rid of courts or their power to review legislation.[136] Rather, the point is that they can accomplish this

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[136] *See* Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 281 (2002) (arguing that we should rely on the legislatures rather than the courts in ensuring the rights to equality).

purpose without strict scrutiny. We ought to separate the emphasis on remedying malfunctions in the democratic process from the doctrine of strict scrutiny. Accepting the former does not mean we need to adopt the latter.

The Court can distinguish between benign and nefarious purposes and fulfill its role in refereeing the democratic process—á la Ely—without strict scrutiny. Crucial to this argument is the meaning of rational review. Recent cases point to a stricter understanding of rational review, one that is sufficient to do the equal protection work.[137] Unfortunately, these cases taken together do not amount to a clear articulation of the meaning of such review.[138] This Article proposes a standard that seeks to provide some clarity. Rational review, like strict scrutiny, contains two prongs: a purpose requirement and a means constraint. Under rational review, the legislation must have a legitimate purpose, and the means must be rationally related to that purpose.[139] This Article suggests that there are two distinct components to determining whether a law passes rational review: (1) defining "legitimate" and (2) a requirement of good faith, which this Article argues is tied to the means constraint.

First, the Court deems legitimate those purposes that promote the health and safety of the general public. This is the scope of a

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[137] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) (affirming "a more searching form of rational basis review"); Tuan Anh Nguyen v. INS, 533 U.S. 53, 76 (2001) (O'Connor, J., dissenting) ("Rational basis review . . . is much more tolerant of the use of broad generalizations about different classes of individuals, so long as the classification is not arbitrary or irrational."); Romer v. Evans, 517 U.S. 620, 631–36 (1996) (employing a kind of rational review with bite to invalidate Colorado's homophobic constitutional amendment); Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) (stating that rational review is satisfied if "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational"); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988) ("[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review."); *see also* Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 787–800 (1987) (surveying case law employing "rational basis with bite").

[138] *See* Neelum J. Wadhwani, Note, *Rational Review, Irrational Results*, 84 TEX. L. REV. 801, 801 (2006) ("In fact, the application of traditional rational basis review in one case is often quite distinct from its iteration in other cases.").

[139] *See, e.g.*, *Nordlinger*, 505 U.S. at 11 (explaining the interaction between purpose and means).

state's "police powers."[140] The Court has deemed illegitimate legislation that simply advances the morals of the public.[141] That is, rational review may invalidate morals legislation.[142] In this way, the Court shares some synergy with the liberal commitment to public reason.[143] Rational review importantly also invalidates laws and policies that are arbitrary or irrational. In *Romer v.*

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[140] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991) ("The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals . . . ."). Such general police powers belong to the state, not the federal government. Again, my analysis does not hinge on this federalist structure. *See supra* note 1.

[141] *See, e.g.*, Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking Before and After* Lawrence v. Texas, 88 MINN. L. REV. 1233, 1235–36 (2004) ("Rather than representing a break with tradition, *Lawrence* reflected the Court's long-standing jurisprudential discomfort with explicit morals-based rationales for lawmaking . . . . Indeed, since the middle of the twentieth century, the Court has never relied exclusively on an explicit morals-based justification in a majority opinion that is still good law."); BEDI, *supra* note 2, at 145–64 (describing the evolution of the Court's view of morality as a public purpose); Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 CLEV. ST. L. REV. 447, 452–54 (2006) (describing the connection between morals legislation and privacy).

[142] *See* Bedi, *supra* note 141, at 454 ("*Lawrence v. Texas* . . . took an unprecedented step towards re-conceptualizing rational review by rejecting mere morality as a legitimate rationale.").

[143] Public reason rules out laws and policies that are based on a particular comprehensive conception of the good. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 10–12 (1980) (advocating for government neutrality because of the merits of public reason); RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM 40–41 (John M.M. Farrell trans., Univ. of Cal. Press 2002) (1994) (explaining Rawls's theory of the role public reason plays in shaping moral limits); JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 121 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983) (describing the role of public reason in shaping universalist morals); JÜRGEN HABERMAS, *Remarks on Legitimation Through Human Rights*, *in* THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 113, 116–18 (Max Pensky ed. & trans., MIT Press 2001) (1998) (explaining the struggle between individual rights, popular sovereignty, and the role of public reason); CHARLES E. LARMORE, PATTERNS OF MORAL COMPLEXITY 50–55 (1987) (describing the benefits of using public reason to pass neutral laws); JOHN RAWLS, POLITICAL LIBERALISM 216–18 (1993) (explaining the necessity of public reason in civic discourse). For an argument that constitutional jurisprudence generally accepts this constraint of public reason, see BEDI, *supra* note 2, at 121–64 (gathering cases that begin to apply public reason in assessing statutes); COREY BRETTSCHNEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT 79–81 (2007) (discussing the role of public reason in *Lawrence v. Texas*); RONALD C. DEN OTTER, JUDICIAL REVIEW IN AN AGE OF MORAL PLURALISM 231–90 (2009) (collecting noteworthy cases and examining the Court's use of public reason); Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 978–80 (1993) (applying theories of public reason to techniques of constitutional interpretation).

*Evans*, the Court struck down an amendment (called Amendment 2) to the Colorado Constitution prohibiting all local and state legislative, executive, and judicial action from protecting gays, lesbians, and bisexuals from discrimination.[144] This amendment stripped gays and lesbians of legal rights that existed under local antidiscrimination ordinances in various localities in Colorado.[145] As a matter of current constitutional doctrine, discrimination against gays and lesbians does not trigger higher scrutiny.[146] This did not stop the Court from invalidating the amendment under a rational-review analysis. The Court reasoned that this standard of review requires that there be "a sufficient factual context" to justify the legislation.[147] In this case, the discrimination against the group was "born of animosity."[148] If " '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."[149] *Romer* stands for the constitutional proposition that laws may not be based on mere hostility or animus against a particular group.

Importantly, the Court did not have to deem gays and lesbians a suspect class to strike down the Colorado Amendment. This is telling. It is precisely because there was no doctrinal language of strict scrutiny accompanying sexual-orientation discrimination that the Court put real weight on the rational-review analysis. In *Perry v. Brown*, Judge Stephen Reinhardt invalidated Proposition 8, a California state amendment that defined marriage as between a man and woman.[150] The litigation arose from a California Supreme Court decision that invalidated that state's ban on same-sex marriage under the California Constitution.[151] Consequently, the voters of California amended their Constitution by initiative to undo the ruling, defining marriage as only a union between a man

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[144] 517 U.S. 620, 623–24 (1996).
[145] *Id.* at 624.
[146] *Id.* at 650 n.3 (Scalia, J., dissenting).
[147] *Id.* at 632–33.
[148] *Id.* at 634.
[149] *Id.* (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).
[150] 671 F.3d 1052, 1063 (9th Cir. 2012), *cert. granted*, Hollingsworth v. Perry, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144).
[151] *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008).

and a woman.[152] The Ninth Circuit Court of Appeals invalidated Proposition 8, drawing from the logic in *Romer*.[153] The court reasoned that California violated the Equal Protection Clause by "taking away" the right of gays and lesbians to marry under the California Constitution.[154] While the case did not decide the ultimate issue of whether a state ban on same-sex marriage per se violates the U.S. Constitution,[155] it made clear that a rational-review analysis is sufficient to strike down Proposition 8, just as it was sufficient to doom Colorado's Amendment 2 in *Romer*:

> Proposition 8 is remarkably similar to Amendment 2. Like Amendment 2, Proposition 8 "single[s] out a certain class of citizens for disfavored legal status. . . ." Like Amendment 2, Proposition 8 has the "peculiar property" of "withdraw[ing] from homosexuals, but no others," an existing legal right—here, access to the official designation of 'marriage'—that had been broadly available, notwithstanding the fact that the Constitution did not compel the state to confer it in the first place.[156]

The court in *Perry* reasoned that withdrawing the right to marriage could not be justified under a rational-review analysis.[157] In particular, the court concluded that even if the purported reasons or purposes for Proposition 8 were legitimate (e.g., responsible procreation and childrearing), withdrawing the right of gays and lesbians to marry was not rationally related to them.[158] Ultimately, the Ninth Circuit concluded that California voters passed Proposition 8 because of "disapproval of gays and lesbians

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[152] *Perry*, 671 F.3d at 1067.

[153] *Id.* at 1096.

[154] *Id.* at 1085.

[155] *Id.* at 1069.

[156] *Id.* at 1080–81 (alterations in original) (citations omitted) (quoting Romer v. Evans, 517 U.S. 620, 627, 632–33 (1996)).

[157] *See id.* at 1086–95 (examining each of the purported reasons for Proposition 8 and determining that none of them passed rational review).

[158] *Id.* at 1092.

as a class."[159] Simply put, "Proposition 8 enacts nothing more or less than a judgment about the worth and dignity of gays and lesbians as a class."[160] And this judgment, this bare "desire to harm . . . cannot constitute a *legitimate* governmental interest" under rational review.[161]

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[159] *Id.* at 1093.

[160] *Id.* at 1094.

[161] *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted); *see also Romer*, 517 U.S. at 633–35 (also concluding that Amendment 2 represented a bare desire to harm and so did not bear a rational relationship to a legitimate governmental purpose). Similarly, the district court in *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom*. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, Hollingsworth v. Perry, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144), which had also invalidated Proposition 8, did not impose higher scrutiny. Chief Judge Vaughn Walker made it clear that the "court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review." *Id.* at 997. The court concluded that Proposition 8 failed to survive even rational basis review. *Id.* The court, like the Ninth Circuit, honed in on the fact that Proposition 8 did not rest on a legitimate purpose:

> A state's interest in an enactment must of course be secular in nature. The state does not have an interest in enforcing private moral or religious beliefs without an accompanying secular purpose.
>
> Perhaps recognizing that Proposition 8 must advance a secular purpose to be constitutional, proponents abandoned previous arguments from the campaign that had asserted the moral superiority of opposite-sex couples.

*Id.* at 930–31 (citations omitted). The opinion considered whether the supporters of Proposition 8 had "any evidence" that refusal to permit marriage licenses to same-sex couples furthers a legitimate, secular purpose such as promoting "statistically optimal" child-rearing households or stability in relationships between "a man and a woman." *Id.* at 931, 937. Considering testimony and briefs submitted by the supporters of Proposition 8 during trial, Judge Walker concluded that these claims were groundless: "The evidence at trial . . . uncloaks the most likely explanation for [the proposition's] passage: a desire to advance the belief that opposite-sex couples are morally superior to same-sex couples." *Id.* at 1002–03. Judge Walker argued that any alleged secular rationales for limiting marriage to opposite-sex couples were simply proffered in bad faith. Ensuring that justifications are proffered in good faith is a doable enterprise, one that courts can accomplish under a rational-review analysis.

While not stated as explicitly as in *Perry*, the Massachusetts Supreme Judicial Court's opinion in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), also reasoned that any alleged secular rationales for banning same-sex marriage are proffered in bad faith. *Id.* at 968 ("The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so. The department has offered purported justifications for the civil marriage restriction that are starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children. It has failed to identify any relevant characteristic that would justify shutting the door to civil marriage to a person who wishes to marry someone of the same sex."); *see also* BEDI, *supra*

This means that rational review is sufficient to invalidate laws and policies that are indeed based on this kind of class-based hostility. Just as *Romer* and *Perry* held that under a rational-review analysis such "animus" is not a legitimate purpose,[162] so too may the Court do so for other policies of exclusion—laws like *(A)* and *(C)*. If the Court can deploy rational review to reject laws based simply on homophobic reasons (reasons that are arbitrary), it can do so for laws based on racist ones.[163] After all, racist laws and policies like Jim Crow are also based on nothing other than a bare desire to harm a particular class. They are based on nothing other than disapproval of a particular group. If such disapproval does not pass rational review, the Court does need strict scrutiny to invalidate racist laws like *(A)*. Just as *Romer*'s Amendment 2 was based on hostility or animus against "being gay," so too were Jim Crow laws based on hostility or animus against "being black." If rational review is sufficient to strike down the former kind of "bare desire to harm," it is sufficient to strike down the latter kind.[164]

Second, the Court must determine whether the law's *actual* purpose is legitimate. If the Court interprets the purpose prong to mean that the legislation could have *some* possible legitimate

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note 2, at 183–84 (examining the decision in *Goodridge* and arguing that the court "rightly reasoned that these rationales fail in good faith to minimize demonstrable harm").

[162] *Romer*, 517 U.S. at 632; *Perry*, 671 F.3d at 1102.

[163] In fact, failure to accept this reasoning may actually turn out to rationalize racism. *See* Bedi, *supra* note 134, at 545 ("In this way, constitutional advocates of affirmative action needlessly place themselves in a bind. They accept higher scrutiny for racist legislation—scrutiny that is unnecessary given the irrationality of racism—and then fight against it when championing remedial race-conscious legislation. They would do better to reject this scrutiny outright." (footnote omitted)).

[164] Akhil Amar argues that *Romer* is best understood as embodying the Constitution's ban on "bills of attainder." Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203 (1996). The "logic and spirit" of the Attainder Clause prohibits legislative majorities from singling out individuals or groups for who they are and not what they have done. *Id.* at 208. As Amar interestingly points out, the plaintiffs seeking to overturn racial segregation in *Bolling v. Sharpe*, 347 U.S. 497 (1954), specifically invoked the Attainder Clause: "Jim Crow laws, plaintiffs argued, had the purpose and effect of stigmatizing blacks—not for what they did, but for who they were. And that, plaintiffs argued, was a kind of attainder, a legislatively imposed stain and taint." *Id.* at 208–09. So while the principle of nonattainder was not explicitly invoked in *Romer* or *Perry*, it may inform the Court's rational-review analysis in these cases.

purpose, this may serve as too permissive a test.[165] After all, the Court could always find a conceivable purpose for *(C)*—for example, segregating on the basis of the first letter of one's last name increases economic productivity. If this could be a possible purpose for the law, then it would pass rational review. In that case, as one scholar suggests, rational review turns out to be "minimal scrutiny in theory and virtually none in fact."[166] This would be no review at all, upholding *any* law, including *(A)* and *(C)*. For instance, in *Williamson v. Lee Optical Co. of Oklahoma* the Court upheld an Oklahoma law that prohibited opticians from fitting lenses into frames without a prescription from an ophthalmologist or optometrist.[167] The Court subjected the law to rational review and reasoned that the "legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses" on grounds of the health and welfare of the people.[168] The language "might have concluded" means that the Court did not attempt to consider whether the actual purpose was legitimate.

According to Robert Farrell, this distinction between actual and possible purpose tracks the Court's current contradictory meanings of rational review.[169] Crucial to my analysis, then, is adopting a rational-review standard that analyzes the actual purpose of the law. This emphasis on actual purpose may inform what is seen as a kind of rational review "with bite."[170] The

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[165] *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." (citation omitted)).

[166] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[167] 348 U.S. 483, 491 (1955).

[168] *Id.* at 487.

[169] *See* Robert C. Farrell, *The Two Versions of Rational-Basis Review and Same-Sex Relationships*, 86 WASH. L. REV. 281, 285 (2011) (stating that rational review follows one of two different standards, either "a deferential standard that frequently amounts to no review at all, [or] . . . a more demanding version that carefully weighs evidence of the correlation between a classification and the actual purpose of a law").

[170] *See* Pettinga, *supra* note 137, at 786–87 (describing a more stringent rational-basis test).

distinction between actual and possible purpose came to a head in *United States Railroad Retirement Board v. Fritz*, where the Court upheld a congressional act that sought to restructure railroad-retiree benefits.[171] At issue in the case was a component of the law that preserved already-accrued benefits for some employees—those who had some "connection" to the railroad industry—but not others.[172] Both the majority and dissent agreed that rational review was the appropriate standard of review.[173] The majority upheld the law, holding that such review requires only that "there are plausible reasons for Congress' action," even if "this reasoning [did not] in fact underlay the legislative decision."[174] If there are such plausible reasons, the law does not violate the Equal Protection Clause. The majority concluded that since favoring "career railroaders"—those who had some "connection" to the industry—could have been a legitimate purpose for the law, it was constitutional.[175]

The dissent disagreed, arguing that rational review requires ascertaining if the "actual purpose" of the law is legitimate.[176] The "actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test."[177] The justification about favoring "career railroaders" was only an after-the-fact justification.[178] Central to determining whether the actual purpose is legitimate is analyzing the means deployed by the law.[179] Under the rational-basis review deployed by the dissent, a focus on the means may reveal that the actual purpose is not legitimate.

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[171] 449 U.S. 166, 174 (1980).
[172] *Id.* at 173.
[173] *Id.* at 174; *id.* at 183 (Brennan, J., dissenting).
[174] *Id.* at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).
[175] *Id.* at 178–79.
[176] *Id.* at 187 (Brennan, J., dissenting).
[177] *Id.*
[178] *Id.* at 189.
[179] *See id.* at 196 (stating that the means employed by the law were irrational, even accepting the majority's assessment of its purpose).

A focus on the means reveals whether a stated purpose is being proffered in bad faith. Farrell argues that the Court can glean the stated purpose from a variety of factors, including

> (1) a statement of purpose within the statute itself, (2) legislative history, including committee reports and the statements of individual legislators that make up the record of debate on the legislative floor, (3) the effects of a law, if they are sufficiently stark as to provide no alternate explanation for the law, (4) the historical background leading up to the adoption of a law, or (5) the specific sequence of events that led to the adoption of a statute.[180]

In *Fritz*, the dissent looked to the section of the reports accompanying the law entitled "Principle Purposes of the Bill," a section that stated that the law sought to preserve the vested benefits of retirees, not to favor career railroaders.[181] But the law did not actually seek to preserve vested benefits. After all, it specifically dissolved benefits for some retirees but not others.[182] The dissent concluded that the "line-drawing" undertaken by the restructuring was therefore "arbitrary."[183] Perhaps, as the dissent suggests, the law was a kind of favoritism for a certain class of employees, securing a windfall for the railroad labor unions.[184] Such favoritism is not legitimate.

The *Fritz* majority's more permissive understanding of purpose does not contain a requirement of good faith. In fact, it invites the kind of post hoc rationalizations that effectively undo constitutional review by the Court. If the Court's task is to determine if there is a conceivable legitimate purpose for the law, it can invariably find such a reason or rationale, as it did in *Fritz*. The more stringent understanding of purpose takes seriously the

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[180] Farrell, *supra* note 169, at 288–89 (footnotes omitted).
[181] *Fritz*, 449 U.S. at 185–86 (Brennan, J., dissenting).
[182] *Id.* at 186.
[183] *Id.* at 196–97 nn.11–12.
[184] *Id.* at 191.

requirement of good faith. It asks the Court to determine whether the actual purpose is legitimate.

Now, there is an important difference between asking what the *actual purpose* of a law is and whether this purpose is *legitimate*. The former inquiry is more difficult and problematic. In passing a statute, individual legislators may have various—even diverging—motivations in mind. Most problems with deciphering legislative intent occur when a statute's purpose is unclear or ambiguous.[185] Here, the debates over originalism, history, and principle become relevant, informing various theories on how courts should ascertain legislative purpose. But these debates are not about whether the law's purpose is legitimate under the Equal Protection Clause. They entail other institutional or jurisprudential concerns, such as whether the statute intends to exceed legislative authority, whether it aims to apply only to certain transactions or cases, or whether it seeks to have retroactive effect. This Article avoids these thorny issues because my argument does not require a determination of the legislative purpose. Rather, my argument simply requires that courts determine whether the law's actual purpose is legitimate or not. Smoking out a plainly illegitimate purpose is conceptually prior and more straightforward. This task does not involve deciphering the motivations of legislators, though an inquiry into purpose may very well reveal them.

Said differently, a court does not need to know a law's actual purpose to determine if this purpose is indeed legitimate or not. The court simply has to rule out the possibility that the law is actually based on some legitimate end. For instance, there could be a myriad of illegitimate rationales for a particular law or policy. The court does not need to ascertain which illegitimate purpose is the true basis of the law. All the court must figure out is that the law as currently framed cannot be based on a legitimate rationale. Central to this inquiry is a requirement of good faith, which ensures that the state does not act in bad faith when justifying

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[185] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 85–101 (2007) (identifying the role of legislative purpose in statutory interpretation and applying it to three example cases); RONALD DWORKIN, LAW'S EMPIRE 313–54 (1986); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14–36 (1997) (discussing statutory interpretation and problems with determining legislative intent).

laws and policies. For instance, imposing a good faith requirement, a court would realize that the purpose of a law like *(C)* is not to increase economic productivity but rather to discriminate against a group simply to discriminate against it. In particular, the law seeks to achieve some letterist end. Analogously, the actual purpose of Jim Crow laws was to oppress racial minorities to effectuate a racist purpose. These ought not to count as legitimate ends. Again, we do not need to know what kind of racist purpose is afoot, only that *some* illegitimate rationale is at work. Laws like *(A)* and *(C)* would fail the purpose prong of this kind of rational review.

Assuming the actual purpose of the law is legitimate, rational review also requires that the means be rationally related to this purpose. The Court faced this prong in *Railway Express Agency v. New York*.[186] At issue in the case was the traffic nuisance posed by advertising signs affixed to vehicles. In seeking to minimize this nuisance, the New York legislature passed a law prohibiting a subset of advertising signs, namely those unrelated to a driver's business.[187] Under a rational-review standard, the Court upheld the law. First, it deemed that the actual purpose of the law, reducing traffic nuisance, was indeed legitimate.[188] Second, the Court held that the distinction between an advertising sign that is related to one's business and one that is not was rationally related to this purpose.[189] The Court reasoned that signs unrelated to the driver's business could be more obnoxious or distracting than signs that are so related.[190] This one-step-at-a-time measure was constitutional because, as the Court reasoned, the distinction deployed in the statute was relevant to minimizing traffic nuisance.[191]

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[186] 336 U.S. 106 (1949).

[187] *Id.* at 107–08.

[188] *See id.* at 109.

[189] *Id.* at 110.

[190] *Id.* Justice Jackson's concurrence in the case, however, seems too permissive. He contends that even if the two signs were equally obnoxious, the city could still distinguish between them. *Id.* at 114–15 (Jackson, J., concurring). My position therefore tracks the majority opinion. There has to be something about the distinction that somehow aids in the reduction of traffic.

[191] *See id.* at 110 ("It is no requirement of equal protection that all evils of the same genus

In contrast, it would be unconstitutional if the city only prohibited signs on trucks driven by individuals with last names beginning with S–Z. This distinction—S–Zs versus A–Rs—is unrelated to mitigating traffic nuisance. Although it would of course reduce a certain number of nuisance signs, the distinction deployed is unrelated to the traffic problem. In proposing a workable single standard of rational review, Suzanne Goldberg argues that this kind of approach—one that looks to the context of the distinction in achieving the law's purpose—is sufficient to invalidate this kind of legislation.[192] The distinction between A–Rs and S–Zs would not be a legitimate "one step at a time" measure. In fact, if a legislature did deploy it, it would invariably suggest that the purpose of the law was not to reduce nuisance but rather to discriminate against a group for letterist (and hence arbitrary) reasons.

In this way, determining whether the state proffers its justification in good faith is central to a rational-review analysis. One way of doing so is to realize rational review's means and purpose prongs are related. Analyzing the means the law deploys sheds light on whether its purpose is legitimate or proffered in bad faith. This rubric provides courts with a way to smoke out justifications that are proffered in bad faith.

In fact, this is exactly what the Ninth Circuit did in *Perry*. It analyzed each of the purported rationales for Proposition 8, concluding that they were not proffered in good faith.[193] For instance, the "primary rationale Proponents offer[ed] for Proposition 8 is that it advances California's interest in responsible procreation and childrearing."[194] The opinion made clear that even if these rationales are legitimate, "Proposition 8 had absolutely no effect on the ability of same-sex couples to become parents or the manner in which children are raised in

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be eradicated or none at all.").

[192] Goldberg, *supra* note 14, at 533.

[193] *See* Perry v. Brown, 671 F.3d 1052, 1095 (9th Cir. 2012), *cert granted*, Hollingsworth v. Perry, 133 S. Ct. 786 (Dec. 7, 2012) (No. 12-144) (concluding that "Proposition 8 operates with no apparent purpose but to impose on gay and lesbians, through the public law, a majority's disapproval of them and their relationships").

[194] *Id.* at 1086.

California."[195] Why? The opinion noted that Proposition 8 did not modify the state's existing laws and policies that provided same—and opposite—sex couples "identical rights with regard to forming families and raising children."[196] Also, Proposition 8 did not alter adoption laws that "continue to apply equally to same-sex couples."[197] After all, "[i]n order to be rationally related to the purpose of funneling more childrearing into families led by two biological parents, Proposition 8 would have had to modify these laws in some way. It did not do so."[198] That means that the *actual* reason for Proposition 8 was mere dislike or disapproval of a class of individuals, an illegitimate reason under rational review.

Consider also Justice Ginsburg's dissent in *Gonzales v. Carhart*[199] as an example of this rubric in practice. In *Gonzales*, the Court upheld a federal ban on a particular abortion procedure performed during the second trimester of pregnancy.[200] The law bans an intact dilation and extraction (D&E), where the fetus is partially delivered and then destroyed.[201] The other kinds of abortion procedures performed during the second trimester include a nonintact D&E (destroying the fetus piecemeal), medical induction (forcing the woman to go into labor), hysterotomy (removing the fetus by making an incision through the abdomen), and hysterectomy (removing the uterus).[202] The most common procedure in the second trimester was D&E.[203] The federal ban, then, prohibits one kind of D&E.[204] Congress's justification for the ban was to "promote respect for life, including life of the unborn."[205] Ginsburg argues, however, that this could not be the actual purpose of the law; thus, this justification was put forth in bad faith: "Today's ruling, the Court declares, advances . . . the

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[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.* at 1086–87.
[199] 550 U.S. 124 (2007).
[200] *Id.* at 132–33.
[201] *Id.* at 136–37.
[202] *Id.* at 134–36.
[203] *Id.* at 135.
[204] *Id.*
[205] *Id.* at 158.

Government's 'legitimate and substantial interest in preserving and promoting fetal life.' . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."[206] If a doctor may not deploy an intact D&E, he or she may still use a nonintact D&E. Hence, the congressional ban does not save fetuses, since it proscribes only one procedure of performing an abortion. Analyzing the means reveals that the actual purpose cannot then be one of preserving life. Ginsburg goes on to say that

> the Court emphasizes that the Act does not proscribe the nonintact D&E procedure. But why not, one might ask. Nonintact D&E could equally be characterized as "brutal," involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs. "[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational."
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> Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. . . . "Our obligation is to define the liberty of all, not to mandate our own moral code."[207]

By examining the means deployed by the law, Ginsburg argues that the law's actual purpose was one of enforcing morality. This, she contends, is a kind of unconstitutional morals legislation.[208] Again, we do not need to know what kind of moral code is at work. We do not need to know what the law's actual rationale or purpose

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[206] *Id.* at 181 (Ginsburg, J., dissenting).

[207] *Id.* at 181–82 (Ginsburg, J., dissenting) (alternations in original) (internal citations omitted) (quoting Planned Parenthood of S.E. Penn. v. Casey, 505 U.S. 833, 850 (1992) (internal quotation mark omitted)).

[208] *Id.* at 182.

is, only that the partial-birth-abortion ban is based on an illegitimate one. Similarly, the Ninth Circuit in *Perry* did not need to know why Californians disapproved of gays and lesbians as a class. The mere fact that this motivated Proposition 8 was sufficient to invalidate it under rational review.[209]

The first Supreme Court case explicitly subjecting a nonremedial law to strict scrutiny was *Korematsu v. United States*.[210] There, the Court upheld a racially discriminatory internment scheme, even given a heavy presumption of invalidity.[211] One of the first cases in which the Court invalidated a nonremedial law explicitly on the basis of strict scrutiny was *McLaughlin v. Florida*,[212] followed by *Loving v. Virginia*.[213] *McLaughlin* involved a challenge to a law that punished only interracial unmarried couples that were living together.[214] While the Court invalidated the law under the Equal Protection Clause, its reasoning is instructive. The Court began by noting that the law required some "overriding statutory purpose."[215] After all, this is the conventional sledgehammer that constitutional law deploys against laws that discriminate on the basis of race.

The State proffered the reduction of promiscuity as the purpose for the law. The Court reasoned that

> [w]e find nothing in this suggested legislative purpose, however, which makes it essential to punish promiscuity of one racial group and not that of another. There is no suggestion that a white person and a Negro are any more likely habitually to occupy the same room together than the white or the Negro couple or to engage in illicit intercourse if they do. [The law] indicate[s] no legislative conviction that promiscuity by the interracial couple presents any

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[209] *See supra* notes 157–61 and accompanying text.
[210] 323 U.S. 214, 216 (1944).
[211] *Id.* at 223–24.
[212] 379 U.S. 184 (1964).
[213] 388 U.S. 1 (1967).
[214] *McLaughlin*, 379 U.S. at 184–85.
[215] *Id.* at 192.

> particular problems requiring separate or different treatment if the suggested over-all policy of the [law] is to be adequately served. . . . This is not, therefore, a case where the class defined in the law is that from which "the evil mainly is to be feared."[216]

Even assuming that curtailing promiscuity was the actual purpose of the law, the distinction between same—and opposite—race cohabitation was irrelevant to accomplishing it. There was "no suggestion" that the means were related to the law's alleged purpose.[217] If that was the case, there was no need to subject the law to strict scrutiny. The Court could simply have concluded that singling out interracial cohabitation was arbitrary. The Court did not need to deploy a strong presumption of invalidity to strike down a law that singled out interracial cohabitation. Just as Proposition 8 and Amendment 2 reflected mere disapproval of a class (in those cases, gays and lesbians), here too the law reflected mere disapproval of a class, namely racial minorities. The same kind of animus that motivates homophobic legislation like Proposition 8 also motivates racist laws like those in *Loving* and *McLaughlin*.

What is so hard about distinguishing between an arbitrary policy based on animus (such as racial segregation or antimiscegenation) and one adopted to remedy its effects (such affirmative action)? If "notions of racial inferiority"[218] are just as irrational as notions of letter inferiority or homosexual inferiority, it seems quite easy and straightforward to determine that a law's actual purpose is based on such beliefs. Why do we need such "searching judicial inquiry"?[219] Of course, those who favored racial segregation claimed that their policies were "benign" and that they rested on "legitimate" beliefs. But why does Justice Thomas give credence to these claims,[220] if they are and always were as baseless

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[216] *Id.* at 193–94 (quoting Patsome v. Pennsylvania, 232 U.S. 138, 144 (1914)).

[217] *Id.* at 193.

[218] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[219] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[220] Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 551 U.S. 701, 778 n.27 (2007) (Thomas, J., concurring).

as their letterist counterparts? There is nothing difficult about realizing that a racist and hence arbitrary purpose is afoot. That is why rational review is sufficient to do the distinguishing work.

Perhaps the similarity between letterism and racism seems so apparent to us because we have the benefit of historical hindsight. As time goes on, certain kinds of discrimination may be seen as more arbitrary. This line of reasoning suggests that the necessity of strict scrutiny diminishes as time passes. This is why Suzanne Goldberg argues that strict scrutiny may be a kind of judicial "training vehicle" that is initially important for judges to realize the illegitimacy of racist laws and policies until such scrutiny is no longer necessary.[221] There may be partial truth to this claim. After all, up until the early 1970s, the American Psychiatric Association listed homosexuality as a mental illness.[222] With the passage of time, many of us (though perhaps not all) would consider antigay legislation to be arbitrary, in line with the holdings in *Romer* and *Perry*. Under this logic, perhaps strict scrutiny was useful in order to ensure that judges would take a "second look" at legislation that discriminates against a racial minority.[223] But even if this is true, it hardly seems necessary to continue to deploy it. After all, *Romer* was decided in 1996, and no higher scrutiny was needed then to combat homophobic legislation that may have seemed legitimate only twenty years before. Why, then, is it necessary for racist laws and policies? Even if strict scrutiny is a kind of training or learning curve for judges, that training should now be over. Strict scrutiny would appear less necessary, or even counterproductive, as time goes on.

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[221] Goldberg, *supra* note 14, at 582.

[222] RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 3 (Princeton Univ. Press 1987) (1981).

[223] *See* Yoshino, *supra* note 9, at 1765–66 ("Judges interpreting the Equal Protection Clause have responded to this problem [of critical distance] by asking whether they themselves, rather than simply the legislature, suffer from empathy failure for the group in question. They have done so by crafting a three-prong test that forces judges to take a sober second look at fundamentals of that group's identity. That second look attempts to diminish the possibility that judges will express the same prejudice as the legislature by forcing them to come to terms with the nature of the group. Through that engagement, judges are prompted to interrogate their assumptions about the group in a way that the legislature is not.").

Just as rational review is now sufficient to strike down antigay laws, it ought to be sufficient to invalidate racist ones.

*3. Revisiting* Plessy v. Ferguson. It is crucial to recognize that strict scrutiny is itself a recent constitutional doctrine. Consider that *Plessy v. Ferguson*[224] does not deploy any kind of higher scrutiny. Justice Brown's infamous opinion upholding railway segregation poses the correct constitutional standard: "[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."[225] That is, *Plessy* did not ask whether segregation invokes a suspect class triggering heightened scrutiny. The opinion rightly contended that every exercise of power must be "reasonable" and proffered in "good faith."[226]

While Justice Brown posed the right question, his answer was incorrect. He goes on to say that in "determining the question of reasonableness," the Court must make "reference to the established usages, customs, and traditions of the people. . . . 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 . . . ."[227] But if the customs and traditions of that time were blatantly racist, so too was Justice Brown's reasoning. He finds reasonable the belief that one race is intrinsically inferior or superior to another, but, again, this is simply false. While Cass Sunstein does not connect his analysis to a rational-review analysis, he instructively understands that the

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[224] 163 U.S. 537 (1896).

[225] *Id.* at 550.

[226] *Id.* The principle that state power must not be arbitrary has roots in the English common law and natural law. *See* David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 892 (2003) ("[T]he ancient common law . . . protected the traditionally held rights of Englishmen from arbitrary or unchecked government authority."); T.R.S. Allan, *The Rule of Law as the Rule of Reason: Consent and Constitutionalism*, 115 L.Q. REV. 221, 239 (1999) ("The special strength of the common law, as a foundation for constitutional government, lies in its inherent commitment to rationality and equality."); Gregory Kalscheur, *Moral Limits on Morals Legislation: Lessons for U.S. Constitutional Law from the Declaration on Religious Freedom*, 16 S. CAL. INTERDISC. L.J. 1, 15–19 (2006) (identifying natural-law arguments for the illegitimacy of morals legislation).

[227] *Plessy*, 163 U.S at 550–51.

Equal Protection Clause as "not a safeguard [for] traditions; it protects against tradition, no matter how long-standing and deeply rooted."[228] This principle, paired with a rational-review analysis, is sufficient to strike down Jim Crow-like legislation. The problem is not with the standard of reasonableness but its application by the majority in *Plessy*.

This is not some hypothetical: the Court would have decided differently if it had realized that racist beliefs are arbitrary. Justice Harlan's dissent rightly argued that a state acts illegitimately by enacting such a segregation scheme.[229] And to be sure, Justice Harlan did not deploy any kind of heightened scrutiny. Harlan reasoned that "[e]very one knows that [the purpose of the segregation law was] 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."[230] For instance, Harlan correctly noted that "Louisiana did not make discrimination among whites in the matter of accommodation for travellers."[231] By looking at other laws that the state had or had not passed, Harlan honed in on the actual purpose of the segregation statute, simple animus against a group. This was the purpose of Jim Crow and the range of laws encompassing it, including the one later struck down in *Brown*.[232] And Harlan concluded that this was a policy of exclusion without any need for a more searching scrutiny. In fact, Harlan stated that "[e]very one" knows that this was the purpose of the law.[233] This is not some difficult judgment requiring a more careful eye, as Justice Thomas perversely suggested more than one hundred years after *Plessy*.[234]

Justice Harlan's dissent effectively adopted the crucial requirement of good faith that stands at the center of the rational-review standard this Article seeks to resuscitate. After all, the

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[228] Sunstein, *supra* note 9, at 1174.

[229] *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting).

[230] *Id.* at 557.

[231] *Id.*

[232] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[233] *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

[234] Parents Involved in Cmty. Sch. v. Seattle Dist. No. 1, 551 U.S. 701, 778 n.27 (Thomas J., concurring).

Court could always find that a conceivable purpose for a law is legitimate. For instance, consider the letterist scheme outlined in law *(C)*.[235] The state could always provide some ex post justification for this scheme. For instance, it could argue that such a scheme increases economic productivity. The point is that this is not the actual justification for the law. Economic productivity is a sham.

Just as Justice Harlan realized that the actual purpose of the racial segregation scheme in *Plessy* was animus against blacks, so too is the actual purpose of *(C)* based on animus against those with last names beginning with letters S through Z. In particular, the law seeks to achieve some letterist end, just as Louisiana's segregation scheme sought to achieve a racist end. In contrast, consider a teacher's decision to arrange students alphabetically by their last name. Like *(C)*, this kind of policy is also based on the first letter of one's last name. Both policies share that one fact. But it is obvious that the former is not based on knee-jerk prejudice or animus. "Every one" knows that a teacher's decision to arrange students in such a manner is not based on hostility against those with a last name beginning with Y or Z. This kind of judgment does not require strict scrutiny. Jim Crow-like laws were part of a network of policies whose justification rested on animus against blacks. The law upheld in *Plessy* was not an isolated one. It existed alongside numerous other policies that ensured blacks were kept separate, including public-school segregation and antimiscegenation statutes. The existence of such a regime makes clear that a law like *(A)* is indeed based on racist reasons.

Without deploying any kind of higher scrutiny, Justice Harlan went on to reason:

> It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same

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[235] *See supra* Part III.A.*2*.

> public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?[236]

Highlighting the arbitrary nature of the law, Harlan considered it similar to ones that would require blacks to walk on one side of the street and whites on the other or that would segregate railway cars on the basis of citizenship status or religion. Likewise, this Article uses the letterist example to spotlight the arbitrary nature of such segregation. Harlan rightly suggested—more than one hundred years ago—that the law at issue in *Plessy* made no sense. The law discriminated against a group for no other or better reason than simply to discriminate.

Admittedly, Justice Harlan went on to say in his dissent that there "is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. . . . I

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[236] *Plessy*, 163 U.S. 557–58 (Harlan, J., dissenting).

allude to the Chinese race."[237] This anti-Asian sentiment was no doubt part of the racist system that we would now deem arbitrary. The fact that Justice Harlan bought into some of it ought not mitigate the significance of the framework he proposes, a framework that does not deploy higher scrutiny. At a minimum, he points to the arbitrary nature of Louisiana's segregation scheme. Tellingly, the Court in *Romer* invoked Justice Harlan's dissent.[238] Taking Justice Harlan's cue, we need simply proclaim that laws like *(A)* fail rational review precisely because they rest on a racist purpose.

The commitment not to act arbitrarily goes even farther back than *Plessy*, with roots in the English common law and natural law.[239] The doctrine of ultra vires[240]—Latin for "beyond the powers"—does not simply identify when a department or agency exceeds its constitutionally prescribed roles. It is also substantive, pointing to a requirement that the rule of law be constrained by a rule of reason. As T.R.S. Allan explains,

> [T]he particular legal orders or official decisions concerned must be justified by reference to publicly-avowed objectives . . . . [T]he rule of law constitutes a bulwark against the deprivation of liberty through exercise of *arbitrary power*. It encompasses principles of procedural fairness and legality, equality and proportionality. Fully articulated, the rule of law amounts to a sophisticated doctrine of constitutionalism, revealing law as the antithesis of arbitrariness or the assertion of will or power.[241]

The commitment that the rule of law requires the state not to act arbitrarily is sufficient to invalidate racist legislation. It informs the sufficiency of rational review.

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[237] *Id.* at 561; *see also* Gabriel J. Chin, *The* Plessy *Myth: Justice Harlan and the Chinese Cases*, 82 IOWA. L. REV. 151, 156 (1996) (noting that Justice Harlan "was a faithful opponent of the constitutional rights of Chinese for much of his career on the Court").

[238] Romer v. Evans, 517 U.S. 620, 623 (1996).

[239] *See supra* note 226.

[240] *See* Jenkins, *supra* note 226, at 893–97 (discussing the ultra vires doctrine).

[241] Allan, *supra* note 226, at 222–23 (emphasis added).

Now, perhaps *Plessy*'s failure to realize that this kind of racial segregation is unreasonable—even arbitrary—explains the doctrinal need for strict scrutiny. Scholars place the origins of strict scrutiny either with *Korematsu* and cases like *McLaughlin* and *Bolling v. Sharpe*,[242] or with earlier free speech cases.[243] None of this scholarly work, however, explains *why* the Court needed strict scrutiny to invalidate racist legislation. An appreciation of where *Plessy* went wrong provides one such explanation. The majority opinion in *Plessy* gutted the constitutional requirement that state power must be reasonable and nonarbitrary by effectively holding that this kind of racial segregation *was* reasonable. Rather than resuscitating the rational-review standard, which this Article argues is sufficient to do the equal protection work, the Court developed a new one with varying tiers of scrutiny. On this historical reading of constitutional jurisprudence, strict scrutiny arose precisely because the *standard* failed in *Plessy*. This should be reason to reinstitute a rational-review standard.

Contrast *Plessy*-type segregation with a more recent example confronted by the Court. In *Johnson v. California*, the Court evaluated a California policy of racially segregating new inmates for a certain period of time.[244] The Court held that this kind of policy ought to receive strict scrutiny.[245] Here too such heightened scrutiny is misplaced. The purported rationale for the policy was to reduce violence by racial prison gangs.[246] To do so, the

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[242] 347 U.S. 497 (1954) (holding 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").

[243] *See, e.g.*, Greg Robinson & Toni Robinson, Korematsu *and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29, 29 (2005) (stating that *Bolling* "definitively established its doctrine of 'strict scrutiny' "); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355–56 (2006) (discussing the origin of strict scrutiny as First Amendment cases); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1067 (1978) (discussing strict scrutiny and the suspect classification doctrine). For a critical assessment of these approaches, see Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270–73 (2007) (charting an alternate history of strict scrutiny).

[244] 543 U.S. 499, 502 (2005).

[245] *Id.* at 509.

[246] *Id.* at 502.

California Department of Corrections (CDC) sought to evaluate new inmates before deciding on their ultimate placement and roommates.[247] The CDC identified five main racially segregated gangs: "Mexican Mafia, Nuestra Familia, Black Guerilla Family, Aryan Brotherhood, and Nazi Low Riders."[248] There is no difficulty in realizing that this kind of policy is not based on claims of racial inferiority, but rather on actual neutral goals of reducing violence. This is why, for example, the CDC "further subdivides prisoners within each racial group. Thus, Japanese–Americans are housed separately from Chinese–Americans, and northern California Hispanics are separated from southern California Hispanics."[249]

This is not like the discrimination in *Plessy*. "Every one knows" that California's segregation scheme did not rest on racist reasons.[250] Similarly, it is clear that while *(C)* rests on a letterist

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[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Cf.* Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) (arguing that "every one knows" that Louisiana's segregation scheme was racist in purpose). Policies like racial profiling may represent more difficult cases. *See, e.g.*, Jill Gaulding, Note, *Race, Sex, and Genetic Discrimination in Insurance: What's Fair?*, 80 CORNELL L. REV. 1646 *passim* (1995) (arguing that in certain circumstances race may be a legitimate proxy for setting insurance rates); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 753 (1991) (arguing that discrimination does not always stem from "prejudice or irrationality"). While these may be hard cases for a rational-review analysis, such an analysis can still do the necessary equality work. It is important to distinguish between the irrationality and the immorality of racial profiling. *See* DAVID BOONIN, SHOULD RACE MATTER? UNUSUAL ANSWERS TO THE USUAL QUESTIONS 327 (2011) (noting that some racial profiling may be rational yet immoral). There are two arguments one can make to suggest that racial profiling may be irrational and therefore fail rational review. First, the court can consider whether the law deploys other "nonspurious proxies." If not, it may suggest that hostility or animus is afoot. *See* FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 148 (2003) ("To pick out only one from a large array of nonspurious proxies for material qualifications strongly suggests that the employer has a goal other than that of using efficient proxies in making employment decisions, for if that were the case than [sic] some of the other proxies would have been employed as well."). Second, it is not at all clear that racial profiling is rational, even if racial minorities are more likely than others to commit certain crimes. Bernard Harcourt argues that in order for racial profiling to be rational, law enforcement's extra scrutiny of racial minorities must not thereby increase crimes committed by those who are not receiving such scrutiny. Otherwise, a policy of racial profiling would actually turn out to increase crime. BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 2–3 (2007).

and hence illegitimate purpose, a school teacher's decision to arrange student seating by last name does not. Once we hone in on a law's actual purpose, there is nothing tricky about distinguishing between a policy of exclusion based on animus and the policy deployed by California prison authorities.[251] Nonetheless, legal scholars have generally been reluctant to abandon the conventional tiers-of-scrutiny approach.[252]

*4. The Cost of Strict Scrutiny on Remedial Legislation.* Such a high bar jeopardizes much-needed remedial race-based programs. Strict scrutiny first arose for laws based on the belief that race biologically or intrinsically tracks a kind of status or hierarchy.[253] Subsequently, the Court began to apply strict scrutiny to remedial laws, including affirmative action, minority set-asides, and racial integration. Of crucial importance, strict scrutiny has doomed the vast majority of laws that aim to ameliorate the status of racial minorities. Again, the "overwhelming majority" of race-conscious laws struck down by federal courts between 1990 and 2003 sought to ameliorate the status of racial minorities.[254] This is a devastating cost to legislatures that seek to remedy racial inequality. It is no exaggeration, as one scholar famously quip, that strict scrutiny is " 'strict' in theory and fatal in fact."[255] But had the Court avoided such scrutiny in the first instance, we would not be burdened with it now. Again, if laws like the one struck down in *McLaughlin* rest on beliefs that are arbitrary or even silly, there is no need to invoke heightened scrutiny. Rational review, then, need not be "minimal scrutiny in theory and

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[251] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 453–54 (1985) (Stevens, J., concurring) ("It would be utterly irrational to limit the [right to vote] on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. . . . We do not need to apply a special standard, or to apply 'strict scrutiny,' or even 'heightened scrutiny,' to decide such cases."); *see also* Goldberg, *supra* note 14, at 518–25 (citing language from opinions by Justices Marshall, Stevens, Powell, and Rehnquist, expressing discomfort with the conventional tiers of scrutiny).

[252] *But see generally* Goldberg, *supra* note 14 (rejecting the tiered system for a single, unified standard of rational review).

[253] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (invalidating law that prohibited cohabitation by unmarried interracial couples).

[254] Winkler, *supra* note 15, at 834.

[255] Gunther, *supra* note 8, at 8.

virtually none in fact."[256] Properly understood, it can do the equality work.

Strict scrutiny lumps policies of exclusion with polices of inclusion, suggesting that they are difficult to distinguish. This permits detractors to conflate laws like *(B)* with laws like *(A)*. We run the risk of inviting this kind of tactic—permitting others to align racism with affirmative action—when we rationalize racism. Even opponents of affirmative action, then, must concede that, unlike *(A)*, laws like *(B)* do make sense. Such laws do not rest on the belief that race biologically tracks a kind of status or hierarchy. Such laws do not rest on mere animus or disapproval of a racial group. We may disagree about whether laws like *(B)* are in the best interests of society or even racial minorities, and this Article does not weigh in on whether legislatures *ought* to adopt policies of inclusion. Such questions of public policy are rightly left to the relevant democratic body to decide.

However, and this is the decisive constitutional move, all must agree that policies like affirmative action are not based on arbitrary reasons. As Iris Marion Young argues, discrimination may be permitted or even required if it "serves the purpose of undermining the oppression of a group."[257] Such laws, unlike their racist counterparts, do have a legitimate purpose. Whereas Jim Crow laws rested on arbitrary beliefs—discriminating against a group simply to discriminate against it—current policies favoring racial minorities do not. In fact, the Court has even held that diversity constitutes a compelling purpose for race-based affirmative action policies.[258]

Even Justice Thomas does not suggest that Michigan's policy was based on hostility against whites—or any racial group, for that matter.[259] In fact, none of the dissenters in *Grutter* claimed that affirmative action is based on the kind of knee-jerk prejudice or animus that underlies Jim Crow-like laws. Rather, their point

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[256] *Id.*

[257] IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 197 (1990).

[258] Grutter v. Bollinger, 519 U.S. 306, 325 (2003).

[259] *See id.* at 355 (Thomas, J., concurring in part and dissenting in part) (recognizing "educational benefits" as Michigan's "allegedly compelling state interest" (emphasis omitted)).

was just that such remedial policies do not pass strict scrutiny. Strict scrutiny stands to doom affirmative action; without it, even the most conservative justices on the Court must concede that affirmative action is constitutional. Michigan's policy did not rest on the kind of hostility that motivated the Colorado amendment in *Romer* or Jim Crow-like laws.

Rather, remedial policies respond to the historical effects of an arbitrary, irrational practice. They do not represent a bare desire to harm a group but rather a desire to remedy inequality. Contrast *(B)* with *(D)*. Given that we have not enacted letterist legislation (we do not have a history of letterism), it seems silly to suddenly pass laws aiming to help S–Zs. But in a hypothetical world of letterism, individuals with last names beginning with S to Z would indeed find themselves similarly disadvantaged. And it is the presence of such disadvantage that makes remedial legislation like *(B)* rational. Once we appreciate this, we realize that a standard of rational review is sufficient to invalidate laws like *(A)* while permitting laws like *(B)*. We rightly distinguish racist legislation from its affirmative-action counterpart without the need for strict scrutiny.

### B. STRICT SCRUTINY MAY BE NECESSARY FOR FACIALLY NEUTRAL LAWS THAT HAVE A DISPARATE IMPACT ON RACIAL MINORITIES

In every example discussed above, the law facially invoked race: Jim Crow, race-based affirmative action, and racial segregation in prisons. *(A)* and *(B)* explicitly mention race. In these cases, where the law is facially discriminatory on the basis of race, strict scrutiny turns out to be too strict. A rational-review analysis is sufficient either to correct democratic defects or to smoke out nefarious purposes. Determining that conscious or overt racism is afoot does not require a searching examination. Distinguishing between *(A)* and *(B)* is rather straightforward.

However, strict scrutiny may be necessary where the law does *not* facially invoke race but has a disparate impact on racial minorities. These are the hard cases where strict scrutiny may be useful. After all, unconscious racism is unconscious precisely

because it is not easy to see or spot. We are unaware of it. As Charles Lawrence III puts it,

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.
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> . . . To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.[260]

A law that results from this process, one that may appear neutral or just a part of our culture, could turn out to be racist. If that is the case, the Court needs a more searching examination to be sure, to ferret out if a racist reason is indeed present.

But the Court does not do so.[261] Strict scrutiny, then, turns out not to be strict enough. Racially disparate impact alone is not sufficient to trigger higher scrutiny.[262] The Court has "not

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[260] Lawrence, *supra* note 13, at 322; *see also supra* note 13.

[261] Title VII of the Civil Rights Act of 1964 defines racial discrimination as including racially disparate impact. 42 U.S.C. § 200e-2(k)1)(A)(i) (2006); *see* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (interpreting Title VII as creating a cause of action to challenge employment criteria that disparately affect different racial groups). My analysis concerns the constitutional definition of racial discrimination. For an argument that laws, like Title VII, that define discrimination in terms of disparate impact are in tension with equal protection, see generally Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494 (2003).

[262] *E.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976). *Davis* upheld a police-officer test on equal protection grounds even though a disproportionate number of black applicants failed the test. *Id.* at 248.

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."[263] Rather, the standard for imposing strict scrutiny requires "that the decisionmaker . . . 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."[264] Undoubtedly, this is a high bar. It means that a law is not discriminatory—and so higher scrutiny does not apply—even if a polity *knew* that it would have a racially disparate effect. To trigger more exacting scrutiny, the Court requires that the purpose of the law explicitly be to discriminate on the basis of race. Effectively, only laws like *(A)* and *(C)* would satisfy such a stringent test to receive strict scrutiny.

For instance, consider the sentencing guidelines, disparate treatment of crack versus powder cocaine.[265] In *United States v. Clary* the Eighth Circuit upheld federal sentencing guidelines that provided radically different sentences for crack cocaine possession versus powder cocaine.[266] Possession of fifty grams or more of crack cocaine received a ten-year minimum sentence, while possession of over *5,000* grams of powder cocaine received the same sentence—a 100:1 ratio.[267] While the guidelines did not mention race, the impact on racial minorities, in particular blacks, was uncontestable:

> 98.2 percent of defendants convicted of crack cocaine charges in the Eastern District of Missouri between the years 1988 and 1992 were African American.

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[263] *Id.* at 239.

[264] Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law that automatically preferred veterans over nonveterans even though it had a disproportionate impact on women).

[265] *See generally* David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995) (criticizing the Court's grounds for triggering strict scrutiny in light of the sentencing distinction between crack and cocaine).

[266] 34 F.3d 709, 714 (8th Cir. 1994); *see also* McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (holding Georgia's death-penalty system constitutional even though the penalty was imposed on black defendants and killers of white victims more often than on white defendants and killers of black victims).

[267] *Clary*, 34 F.3d at 710 n.1 (citing 21 U.S.C. § 841(b)(A)(iii) (2006)).

> Nationally, 92.6 percent of those convicted of crack cocaine charges were African American, as opposed to 4.7 percent who were white. With respect to powder cocaine, the percentages were largely reversed.[268]

Still, the court refused to impose strict scrutiny, dismissing the district court's contention that unconscious racism was afoot.[269] But it is precisely in such cases where strict scrutiny would be valuable. It would permit the Court to take a searching look to uncover either if a racist purpose is afoot or if the democratic process failed to represent the interests equally. If we take the "why" of strict scrutiny seriously, the Court's approach is not strict enough.[270]

## IV. CONCLUSION

At the center of this Article is the unstated concern, made famous by Alexander Bickel, that the Court has the potential to be "counter-majoritarian."[271] This is the nature of judicial review, which invariably entails striking down democratically enacted legislation. Liberal democracy requires a balance between liberal rights and equality on one hand and democracy on the other. Judicial review is the mechanism by which we strike this balance. The tiers-of-scrutiny approach is one crucial tool the Court uses in fulfilling its function of reviewing legislation. This Article argues that the principles underlying this approach are inconsistent. The

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[268] *Id.* at 711 (citations omitted).

[269] *Id.* at 713–14. Only recently did Congress pass legislation mitigating this disparity, which lasted over twenty years. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372, 2372 (2010) (codified as amended at 21 U.S.C. § 841(b)(1) (Supp. IV 2011)) (reducing disparity from 100:1 to 18:1).

[270] This Article is not concerned with what alternate standard, if any, the Court ought to adopt in light of the possible presence of unconscious racism. For a discussion of such standards, see Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 559–60 (1977) (arguing for an interpretation of disparate impact that could rightfully trigger strict scrutiny in certain cases); *see also* Hellman, *supra* note 14, at 2 (suggesting that equal protection is about the "meaning or expressive content of the law or policy at issue"); Lawrence, *supra* note 13, at 355–56 (arguing that "cultural meaning" is crucial in understanding equal protection).

[271] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (Yale Univ. Press 2d ed. 1986) (1962).

Court collapses AD and AS by confusing suspect classification with class, which, in turn, jeopardizes remedial race-conscious policies. It permits the Court to strike down a wide variety of democratically enacted laws and policies. As an empirical matter, this exacerbates the countermajoritarian difficulty because imposing strict scrutiny, rather than rational review, for laws that facially discriminate on the basis of race means that more democratically enacted laws will be struck down. This is why strict scrutiny turns out to be too strict. When laws facially discriminate on the basis of race—where overt racism may be present—a rational-review analysis is sufficient to do the equality work. Such a standard rightly permits democracy to fight racial inequality by passing laws like affirmative action, while preventing it from passing racist laws. The Court's need for strict scrutiny in these cases is unnecessary and counterproductive.

But this does not mean that the Court ought to uphold all such legislation under the Equal Protection Clause. When facially neutral laws have a disproportionate impact on racial groups, a heightened standard of review may be useful. It is precisely in cases of possible unconscious or implicit racism where a more searching examination may be necessary. But the Court refuses to impose strict scrutiny in such cases. This Article suggests we must revisit the tiers-of-scrutiny approach in light of our commitments to equality, judicial review, and democracy.