As we just saw in Chapter 12, Brown v. Board of Education brought a legal conclusion to the “separate but equal” era. But it raised many questions about how the Court would treat other classifications—for example, those based on gender and sexual orientation.

Over time, the Court has established a three-tier framework for determining whether the government has engaged in unconstitutional discrimination. Figure 13-1 depicts this framework. Note that the triggering question in all equal protection cases is whether the government’s law or action creates a classification that denies a right to some people while giving it to others—for example, a law that says only men can apply to become firefighters. In this example, the classification is based on gender.

Ultimately, the government must justify its classification, though as you can see from the boxes at the very bottom of the figure, its task will be harder or easier depending on the type of inequality (see also Table IV-1 in the part opener). For almost all classifications—including those based on age and intelligence—the Court will presume that the law creating the classification is valid as long as it is rationally related to a legitimate state interest. If the classification involves race or national origin, the Court will apply the strict scrutiny test, and if it involves gender, the intermediate (or heightened) scrutiny test. Either way, the government will have a more difficult time justifying its classification; it will have to show that the classification serves a compelling or important government interest.

Some of this you have already seen in the cases involving race discrimination. But because there is only one equal protection clause, you might still be wondering why the contemporary Court has developed three different tests to evaluate claims of discrimination. The genesis seems to lie in the very footnote we discussed in Chapter 5—Footnote Four in United States v. Carolene Products Co. (1938). After noting that the Court would give high deference to the government in economic cases in which classifications were challenged as violations of the due process clause or equal protection clause, the Court dropped a footnote, which read in part:

[We need not] enquire whether similar considerations enter into the review of statutes directed at particular religious, or national or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

These few sentences contain some important ideas. First, certain groups are more likely than others to be the target of discrimination. Perhaps they have been historically subjected to prejudice or animus. Perhaps they bear discrete or immutable characteristics (for example, their skin color), which makes them easier to target for discriminatory treatment. Or perhaps they are insular,
meaning that they do not or cannot disperse within society. All in all, these groups may be politically powerless to generate change through normal democratic channels. Which takes us to the second idea: because of these difficulties and obstacles, courts may not be able to trust legislatures (as they typically would) to draw classifications that reflect legitimate interests rather than a bad motive in the form of prejudice.

Over time, the Court transformed these ideas into the strict scrutiny test. Only by forcing the government to show that its classification is narrowly tailored—necessary—to achieve a compelling interest can the Court be sure that the government’s line does not reflect animus to a group that has, historically, faced discrimination.

Based on the material we just considered on the country’s long history of race discrimination and on the characteristics identified in Footnote Four, you can see legislatures (as they typically would) to draw classifications that reflect legitimate interests rather than a bad motive in the form of prejudice.

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Based on the material we just considered on the country’s long history of race discrimination and on the characteristics identified in Footnote Four, you can see
why the Court applies strict scrutiny to racial classifications. The justices have said that race and national origin are “factors . . . so seldom relevant to the achievement of any legitimate state interest” that they likely “reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”

Other groups have asked the Court to apply strict scrutiny to laws discriminating against them. The justices have resisted, but they also have recognized that society has unfairly disadvantaged at least some other groups even if they do not meet all the factors identified in Footnote Four. Gender classifications fall into this category, not because women are “discrete and insular minorities” but because “statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women [rather than meaningful considerations].” For gender classifications the Court applies intermediate or heightened scrutiny, as Figure 13-1 shows. Under this standard, the Court is not as mistrustful of the government’s motive as it is under strict scrutiny, but it nonetheless requires the government to supply an “important” reason for the classification it has drawn or, more recently, an “exceedingly persuasive justification.”

Later in this chapter we consider strict and heightened scrutiny in more detail. For now, it is important to realize that not all claims of race or gender discrimination will end up in the lower deference categories of strict and intermediate scrutiny. Suppose that the government says that all firefighters must be six feet tall. This seems different than a law that allows only men to become firefighters because it is not drawing a distinction on the face of the law, even though the law itself may still discriminate against women who, on average, are shorter than men. For these kinds of *facially neutral* laws, the Court will look to see if the government intended to discriminate or burden the allegedly targeted group. If it did, the justices will be less likely to defer to the government.

These are the basic steps in an equal protection analysis. In the sections to follow, we flesh out this process by taking a look at rational basis scrutiny, strict scrutiny, and, finally, intermediate scrutiny.

### RATIONAL BASIS SCRUTINY

Many laws create classifications, but not all or even most of the lines they draw violate the equal protection clause.

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2. Ibid.
4. See Justice White’s dissent in *Beazer*. 

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because safety is only marginally related to the classification, we might suspect that the state is out to disadvantage the methadone users.

The fact of it is, though, that if the government claims it is promoting the safety, health, or welfare of its citizens, the Court is unlikely to strike the classification under rational basis analysis. The justices usually accept the state's justification at face value and don't worry too much about whether it has targeted a particular group as long as they do not think the state discriminated out of animus. (If the classification is aimed at a particular race or gender, that's a different matter, as you know.)

This is what happened in Beazer. While acknowledging that the fit between the TA's classification and its justification was not the tightest, the majority did not see anything invidious in the classification. There was nothing to indicate that the TA created the classification out of a pure dislike for methadone users. As the Court put it:

Because [the TA's rule] does not circumscribe a class of persons characterized by some unpopular trait or affiliation, it does not create or reflect any special likelihood of bias on the part of the ruling majority. Under these circumstances, it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole.

Beazer is quite typical of the Court's application of rational basis scrutiny. When the justices are not especially worried about an illegitimate motive on the state's part, they will uphold a classification as long as the fit seems reasonable (even if not perfect) and not arbitrary (if it were, they might think it reflects a bad motive). Seen in this way, some commentators have referred to rational basis review as “democracy enhancing.” By giving high deference to legislatures, the Court is, in essence, saying that in a democracy the people, not the courts, decide.

When a classification seems driven by prejudice, however, the Court may well invalidate it. In other words, rational basis analysis does not always give the state a free pass, as Cleburne v. Cleburne Living Center (1985) illustrates.

Cleburne v. Cleburne Living Center

473 U.S. 432 (1985)


Oral arguments are available at https://www.oyez.org/cases/1984/84-468.

Vote: 9 (Blackmun, Brennan, Burger, Marshall, O'Connor, Powell, Rehnquist, Stevens, White)

OPINION OF THE COURT: White

CONCURRING OPINION: Stevens

OPINION CONCURRING IN JUDGMENT AND DISSenting IN

PART: Marshall

FACTS:

In 1980, Jan Hannah purchased a building at 201 Featherston Street in the city of Cleburne, Texas, with the intent of leasing it to the Cleburne Living Center (CLC). CLC, in turn, planned to operate a group home for thirteen intellectually disabled men and women. The home had four bedrooms and two baths, with a half bath to be added. CLC said it planned to comply with all relevant state and federal regulations; it also said that the house's occupants would be under the constant supervision of CLC's staff.

In response to a request by the city, CLC filed an application for a special permit to operate a group home. The city required special permits for the construction of “[h]ospitals for the insane or feeble-minded, or alcoholics or drug addicts, or penal or correctional institutions.” The city had determined that the proposed group home should be classified as a “hospital for the feeble-minded.”

After holding a public hearing on CLC's application, the city council voted 3–1 to deny a special-use permit. CLC then filed suit in a federal district court, claiming that the zoning ordinance was invalid on its face and as applied because it discriminated against the intellectually disabled in violation of the equal protection clause. The district court concluded that “[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance” and that the city council’s decision “was motivated primarily by the fact that the residents of the home would be persons who are mentally retarded.” Still, in applying rational basis scrutiny, the court upheld the ordinance, claiming that it was rationally related to the city's legitimate interests in “the legal responsibility of CLC and its residents... the safety and fears of residents in the adjoining neighborhood,” and the number of people to be housed in the home.

A U.S. court of appeals disagreed. It held that classifications based on mental retardation should be subjected to intermediate scrutiny because the intellectually
disabled met some of the criteria set out in previous Court decisions for heightened scrutiny. In particular, a “history of ‘unfair and often grotesque mistreatment’ of the retarded” meant that discrimination against them was “likely to reflect deep-seated prejudice.” Also, the intellectually disabled lack political power, and their condition is immutable.

In the first part of his opinion for the Supreme Court, Justice White refused to apply heightened scrutiny to the intellectually disabled. Although he recognized that there has been and will be prejudice against the intellectually disabled, he noted that “they have a reduced ability to cope with and function in the everyday world. . . . They are thus different, immutably so, in relevant respects, and the States’ interest in dealing with and providing for them is plainly a legitimate one.” And yet the Court ruled in favor of the CLC. Why?

ARGUMENTS:

For the petitioner, City of Cleburne, Texas:

- Under the rational basis level of review, the city has legitimate interests in the location and appropriateness of the structure of a facility for the intellectually disabled.
- One concern is that the facility would be across the street from a junior high school and the students might harass the occupants of the Featherston home.
- Another concern is that the home would be located on “a five hundred year flood plain.”

For the respondent, Cleburne Living Center:

- The zoning ordinance violates the equal protection clause, even when measured against the rational basis standard.
- The zoning scheme here is motivated by animus against the intellectually disabled. Permitted uses under the scheme include apartment houses; multiple dwellings; boarding and lodging houses; fraternity houses; dormitories; and hospitals, nursing homes, or homes for convalescents or aged, other than for the insane or feebleminded. May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?

  It is true that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.

The District Court found that the City Council’s insistence on the permit rested on several factors. First, the
Council was concerned with the negative attitude of the majority of property owners located within 200 feet of the Featherston facility, as well as with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”

Second, the Council had two objections to the location of the facility. It was concerned that the facility was across the street from a junior high school, and it feared that the students might harass the occupants of the Featherston home. But the school itself is attended by about 30 mentally retarded students, and denying a permit based on such vague, undifferentiated fears is again permitting some portion of the community to validate what would otherwise be an equal protection violation. The other objection to the home’s location was that it was located “on a five hundred year flood plain.” This concern with the possibility of a flood, however, can hardly be based on a distinction between the Featherston home and, for example, nursing homes, homes for convalescents or the aged, or sanitariums or hospitals, any of which could be located on the Featherston site without obtaining a special use permit. The same may be said of another concern of the Council—doubts about the legal responsibility for actions which the mentally retarded might take. If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

Fourth, the Council was concerned with the size of the home and the number of people that would occupy it. The District Court found, and the Court of Appeals repeated, that “[i]f the potential residents of the Featherston Street home were not mentally retarded, but the home was the same in all other respects, its use would be permitted under the city’s zoning ordinance.” Given this finding, there would be no restrictions on the number of people who could occupy this home as a boarding house, nursing home, family dwelling, fraternity house, or dormitory. The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes. Those who would live in the Featherston home are the type of individuals who, with supporting staff, satisfy federal and state standards for group housing in the community, and there is no dispute that the home would meet the federal square-footage-per-resident requirement for facilities of this type. In the words of the Court of Appeals, “[t]he City never justifies its apparent view that other people can live under such ‘crowded’ conditions when mentally retarded persons cannot.”

In the courts below the city also urged that the ordinance is aimed at avoiding concentration of population and at lessening congestion of the streets. These concerns obviously fail to explain why apartment houses, fraternity and sorority houses, hospitals and the like, may freely locate in the area without a permit. So, too, the expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home such as 201 Featherston for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.

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

The judgment of the Court of Appeals is affirmed insofar as it invalidates the zoning ordinance as applied to the Featherston home. The judgment is otherwise vacated, and the case is remanded.

It is so ordered.

In both Beazer and Cleburne, the Court applied rational basis scrutiny, but only in Cleburne did it find a violation of the equal protection clause. Why the difference? One possibility is that, in contrast to Beazer, the Cleburne Court did not find a plausible fit between the
city’s justifications and the classification in the ordinance. Only if the real motivation was bias against a particular group did the ordinance make sense, but animus or prejudice against a group is an impermissible motive. As the Court famously said, “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”

**STRICK SCRUTINY AND CLAIMS OF RACE DISCRIMINATION**

*Cleburne* is interesting because it demonstrates that the application of rational basis scrutiny does not always lead to deference to whatever classification the government has established; and we shall see the same later in the chapter when we consider *Romer v. Evans*, involving discrimination on the basis of sexual orientation. However, we emphasize once again that *Cleburne* and *Romer* are the exceptions, not the rule. It is not usual for the Court to invalidate classifications that it examines under the rational basis test.

Deference to the government is not the rule, though, when it comes to classifications based on race and national origin. As Figure 13-1 shows, when laws classify on the basis of race, the Court holds the government to a much higher standard. This is true of laws that burden or disadvantage racial minorities, and today it is also true of laws designed to benefit them.

**Racial Classifications That Burden Minorities**

Let’s begin with racial classifications that burden minorities, which is what the Court said about the “separate but equal” doctrine at issue in the cases we discussed in Chapter 12, *Brown v. Board of Education* and *Bolling v. Sharpe*. In the wake of these 1954 cases, parties began to file lawsuits requesting that the courts apply *Brown*’s principles to racially discriminatory state and local policies beyond the public education sphere. In these post-*Brown* disputes, the justices remained faithful to the strict scrutiny test. The Court presumed that racial classifications used to discriminate against African Americans violated the equal protection clause, and states attempting to justify such actions faced a heavy burden of proof. As members of a suspect class, black litigants enjoyed the advantages of this “rigid” scrutiny test, as the Court noted in *Korematsu v. United States* (1944) and again in *Loving v. Virginia* (1967), which we excerpt below. Applying this test made it difficult for the states to withstand the attacks made against discriminatory policies and practices. One by one, the legal barriers between the races fell.

One example of the Warren Court’s approach to racial equality can be seen in the ruling in *Loving*, which concerned that part of life that segregationist forces least wanted to see integrated: marriage. When *Loving* came to the Court, sixteen states, all of them southern or border states, had miscegenation statutes that made interracial marriages unlawful. Other states, including Arizona, California, Colorado, Indiana, and Oregon, had only recently repealed similar laws. The *Loving* case presents an interesting twist on the equality issue: Are blacks and whites treated equally if both are prohibited from marrying outside their respective races?

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**Loving v. Virginia**

888 U.S. 1 (1967)


*Vote: 9 (Black, Brennan, Clark, Douglas, Fortas, Harlan, Stewart, Warren, White)*

**OPINION OF THE COURT: Warren**

**CONCURRING OPINION: Stewart**

**FACTS:**

In June 1958, two Virginia residents, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in Washington, D.C. (see Box 13-1). They returned to Virginia to live, but later that year they were charged with evading the state’s antimiscegenation law by leaving the state to be married with the intent to return. The crime called for a sentence of up to five years in the state penitentiary. The Lovings pleaded guilty to the charge and were each sentenced to one year in jail. The judge suspended the sentences on condition that the Lovings leave Virginia and not return for twenty-five years. In handing down the sentence, the judge said:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.
The Lovings moved to Washington. In 1963, with the help of an American Civil Liberties Union attorney, they initiated a suit to have the sentence set aside on the ground that it violated their rights under the equal protection clause of the Fourteenth Amendment. The Virginia Supreme Court upheld the constitutionality of the law and affirmed the original convictions.

ARGUMENTS:

For the appellants, Richard Perry Loving and Mildred Jeter Loving:

- The law is a relic of slavery and an expression of modern-day racism.
- The law perpetuates a caste system based on race and the inferiority of black persons who are deemed unworthy to marry whites.
- Brown v. Board of Education (1954) should control this case. It violates the Fourteenth Amendment’s equal protection clause to criminalize an otherwise lawful act solely on the basis of race.
- The law also violates the Fourteenth Amendment’s due process clause by denying a basic human right to be free to choose one’s own marriage partner.

For the appellee, Commonwealth of Virginia:

- The debates over proposing and ratifying the Fourteenth Amendment show conclusively that the framers did not intend to ban antimiscegenation laws; a majority of states that supported the amendment continued to have and enforce laws against interracial marriage after ratification.
- Both whites and blacks are equally punished for marrying outside their race. There is no unequal treatment of the races.
- The wisdom of a particular law is to be determined by the legislative branch.
- Marriage regulation is best left to the states’ police powers.

MR. CHIEF JUSTICE WARREN DELIVERED THE OPINION OF THE COURT.

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

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection Clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere “equal application” of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations, we do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. . . . In the case at bar, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justifi- cation which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. . . .

The State finds support for its “equal application” theory in the decision of the Court in Pace v. Alabama (1883). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than
that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated “Pace represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court.” As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.

There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.” Hirabayashi v. United States (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially subject in criminal statutes, be subjected to the “most rigid scrutiny,” Korematsu v. United States (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . . .

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

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State. These convictions must be reversed.

It is so ordered.

Loving illustrates the Court’s rejection of government policies that place minorities at a disadvantage or are based on racial stereotypes.10 These almost never pass muster under strict scrutiny; Korematsu may be the lone exception. Today, cases akin to Korematsu, Brown, and Loving are quite rare because laws that explicitly classify and burden minorities on the basis of race are virtually nonexistent, and, if they did exist, the Court would almost surely invalidate them. Rather, almost all contemporary constitutional race cases come in two varieties. One are laws or programs that draw lines on the basis of race but are designed to benefit, rather than burden, racial and ethnic minorities—the affirmative or diversity programs we mentioned in Chapter 12. We consider these again in the next section. The other are laws written in language that is racially neutral but that may, in their impact, disproportionately disadvantage a particular racial group. What about a law that is passed to accomplish a legitimate government purpose, with no racially discriminatory intent? Is such a law unconstitutional?

Washington v. Davis (1976) presented this question to the Court. At issue was a standard verbal ability, reading, and vocabulary examination that all applicants to the police force in Washington, D.C., were required to take. Unsuccessful black applicants challenged the exam, pointing out that the test had a disproportionately negative effect on black candidates; in fact, four times as many blacks as whites failed. A federal appeals court agreed. It held that the racially disproportionate impact of the examination, standing alone and without regard to proof of discriminatory intent, was sufficient to invalidate it on constitutional grounds. But, in a 7–2 decision, the Supreme Court reversed.

Writing for the Court, Justice Byron White emphasized that a successful constitutional challenge requires

10Another example is Palmore v. Sidoti (1984).
Richard Loving and Mildred Jeter first met in the early 1950s. She was eleven, and he was seventeen. Both were residents of rural Caroline County, Virginia. Loving was white. Jeter was of African American and Native American heritage. Contrary to the racial customs of that time, they began dating and in 1958 decided to marry. Because interracial marriages were not permitted in Virginia, the young couple drove to Washington, D.C., where such weddings were allowed. By then Richard was twenty-four years old, and Mildred was still a teen.

Following the ceremony, the Lovings returned to Virginia to begin life as a wedded couple, believing that their marriage would be honored. They shared a home with Mildred's parents.

The Lovings' legal problems began one night in July of 1958 when they awoke at 2:00 a.m. with strange men hovering over their bed and flashlights aimed at their faces. It was the county sheriff along with his deputy and two others. They arrested the Lovings for violating the Virginia antimiscegenation statute, and both were jailed. Mildred was five months pregnant.

What prompted the arrest is unknown. They had done nothing to aggravate local authorities or bring attention to themselves. Mildred later speculated, “Somebody had to tell, but I have no idea who it could have been. I guess we had one enemy.”

In 1959, the Lovings appeared in court before Judge Leon M. Bazile. Their charged offense was a felony, punishable by up to five years in prison. Judge Bazile found them guilty and sentenced each to one year in prison. The judge, however, offered to suspend the sentence if the Lovings would leave the state and not return together for a period of twenty-five years.

Avoiding the prison term, Richard and Mildred moved to the District of Columbia. Richard worked in construction and as a mechanic, and Mildred focused on raising the couple’s three children. However, they missed their home and relatives back in Virginia.

Finally, Mildred decided to take action. She wrote a letter to Attorney General Robert Kennedy asking for help. Kennedy recommended that she contact the American Civil Liberties Union. Mildred called the organization’s Washington office, and as a result the Lovings were introduced to Virginia civil rights attorney Bernard Cohen. Not long thereafter, Cohen joined forces with fellow ACLU attorney Philip Hirschkop, and the two lawyers initiated a legal assault against the state law. Cohen and Hirschkop donated their services, and the ACLU picked up other expenses.

The litigation ended on June 12, 1967, when the United States Supreme Court unanimously struck down the Virginia law. The decision came ten days after the Lovings celebrated their ninth wedding anniversary.

Mildred reacted to the news: “I feel free now.”

Tragically, Richard lost his life in June of 1975. As the Lovings were returning home one evening, a drunk driver ran a stop sign and hit the Lovings’ automobile. Richard died at the scene. Mildred suffered cuts to the face and the loss of her right eye.

Mildred Loving passed away of pneumonia on May 2, 2008. Although she was honored by several organizations, she always rejected the notion that she was a hero. Her goals were rather simple and straightforward. As she described, “Richard and I love one another, and we want the right to live in Virginia and raise our children there.”

Classifications That May Benefit Racial Minorities

Beginning in the late 1960s, many political bodies asserted that the Fifth and Fourteenth Amendments demanded more than the elimination of overt discrimination; they also required positive actions taken by government to ensure that equality is achieved and the effects of past discrimination are eliminated. This philosophy gave rise to the controversy over affirmative action.

Affirmative action programs generally take one of two approaches to reducing the effects of past discrimination. The first provides preferences for historically disadvantaged groups (racial and ethnic minorities) in hiring, promotion, and admission to education and training programs. The second, often referred to as minority set-aside programs, requires that a certain proportion of government business be awarded to companies operated by minority owners. These programs, proponents argue, offer viable ways for women and minorities to become full participants in the nation’s economy. Because of past discrimination, many minority businesses lack capital, management experience, and bonding eligibility. They cannot compete successfully with more solid, better-financed firms owned by whites. Consequently, minority set-aside programs propose, for a time, to reserve a percentage of government business and contracts for minority-owned enterprises. Opponents, however, see these policies as nothing more than unconstitutional race discrimination.

Affirmative Action Origins. Affirmative action programs have their roots in presidential orders, issued as early as the 1940s, that expanded government employment opportunities for African Americans. These programs received their most significant boost in 1965, when President Lyndon Johnson issued Executive Order 11246, which instructed the Labor Department to ensure that businesses contracting with the federal government were nondiscriminatory. To meet the requirements, government contractors altered their employment policies and recruited minority workers.

Over the years, these requirements were strengthened and expanded. Failure to comply with the government’s principles of nondiscriminatory employment was grounds for stripping a business or institution of its federal contract or appropriated funds. Moreover, some state and local governments adopted similar programs, many aggressively establishing numerical standards for minority participation. Private businesses also began to adopt programs to increase the numbers of women and minorities in their workforces, especially in positions where their numbers historically had been low.

As a matter of public policy, are these programs desirable? This question has generated a great deal of debate in American society, and inevitably those debates have played out in the Court, where the justices have had to tackle the question of whether diversity programs violate the equal protection clause. The answer, it seemed, would depend on which test the Court used. Under rational basis scrutiny, the programs would likely survive, whereas under strict scrutiny, they would perhaps fail. Thus, much of the legal debate over affirmative action has focused on the appropriate level of scrutiny. Supporters of affirmative action tend to advocate against strict scrutiny. To them, strict scrutiny should be reserved for classifications that burden racial minorities because the entire point of strict scrutiny is to uncover racial animus. When the government, representing the majority, is seeking to advantage racial minorities, the Court need not worry about racial prejudice.

Opponents of affirmative action contend that the Court should apply strict scrutiny. To them it is irrelevant whether the program benefits racial minorities;

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11In his Washington v. Davis opinion, Justice White pointed out that under some federal civil rights statutes, disproportionate impact is enough to trigger a violation of the law. Therefore, it may be easier for civil rights advocates to win suits under congressional statutes than to claim a violation of the Constitution.

12We focus on constitutional challenges to diversity programs, but some of the cases challenge programs under the Civil Rights Act of 1964, specifically Title VII, which states, with respect to private employment, that race, color, religion, sex, and national origin cannot be used to discriminate against any employee. It further holds that “it shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

13Justice Clarence Thomas, however, advances the position that such programs do not benefit but actually harm racial minorities. See, for example, his dissent in Fisher v. University of Texas (2016), excerpted later in the chapter, and in Grutter v. Bollinger (2003).
the only question is whether the program draws a classification on the basis of race. If it does, then it triggers strict scrutiny to ensure that “every person . . . be treated equally by each State regardless of the color of his skin,” as Justice Stewart once wrote. To opponents, the application of strict scrutiny would signal the end of affirmative action because, as we’ve noted before, it is very difficult for government to convince the Court that it has a compelling reason that requires a classification based on race.

But very difficult is not impossible, at least not in the affirmative action context. Proponents have pointed to a number of possible compelling interests. One is that special programs and incentives for people from disadvantaged groups are warranted to eradicate and compensate for the effects of past discrimination. Another is that affirmative action plans do not benefit just one or two groups in society; they may benefit the entire community. Job-related programs may strengthen the country by taking advantage of the talents of all its citizens participating in a diverse political and economic system. And attempts by universities to increase the diversity of their student bodies may yield advantages for all students by preparing them to enter “an increasingly diverse workforce and society,” among other benefits.

The Court Enters the Fray. How would the Court navigate these competing positions? This question was very much on the minds of civil rights groups, scholars, and the public when the justices agreed to hear Regents of the University of California v. Bakke (1978), an equal protection clause challenge to a public university’s policy to admit a specific number of minority applicants.

The justices were deeply divided over this case. Four gave strong support to affirmative action programs, four others had serious reservations about them, and Justice Lewis F. Powell Jr. found himself in the middle. Portions of his opinion announcing the judgment of the Court were supported by one set of four justices, and other parts were joined by an entirely different group of four. As the “swing” vote in this case, Powell was effective able to determine what the Constitution means with respect to affirmative action programs. What did he conclude?

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14See Stewart’s dissenting opinion in Fullilove v. Klutznick (1980). For support of this position, many point to Justice Harlan’s assertion in his Plessy v. Ferguson dissent that the Constitution is “color-blind.”

He applied in 1974 and was again rejected. Because applicants admitted under the special admissions program were, at least statistically, less qualified than he (see Table 13-1), Bakke sued for admission, claiming that the university’s dual admissions program violated the equal protection clause of the Fourteenth Amendment.

The state trial court struck down the special program, declaring that race could not be constitutionally taken into account in deciding who would be admitted, but the court refused to order Bakke’s admission. Both Bakke and the university appealed. The California Supreme Court found the special admissions program unconstitutional, holding that “no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race.” The state supreme court’s order to admit Bakke was stayed pending the university’s appeal to the U.S. Supreme Court.

The stakes were high. For civil rights groups, the case represented a threat to the best way yet devised to eliminate the effects of past discrimination and bring minority students into professional programs. For opponents of affirmative action, it was an opportunity to overturn the growing burden of paying for the sins of the past and return to a system based on merit. Fifty-seven amici curiae briefs were filed by various organizations and interested parties.

ARGUMENTS:
For the petitioner,
Regents of the University of California:
• The legacy of racial discrimination continues to burden the advancement of discrete and insular minorities. One result has been a scarcity of physicians having minority racial and ethnic backgrounds.
• Standard forms of nondiscriminatory admissions policies have proven inadequate to remedy this problem. More aggressive, race-sensitive, remedial programs, like the one challenged here, are necessary.
• Strict scrutiny should not be applied to benign, race-based programs designed to assist historically disadvantaged groups.
• No matter what standard of scrutiny is used, the university’s admissions program is constitutionally valid.

For the respondent, Allan Bakke:
• The special admissions program reserved sixteen of the one hundred entry class places for members of favored racial and ethnic groups. Because of his racial

<table>
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<tr>
<th>Table 13-1 Admissions Data for the Entering Class of the Medical School of the University of California, Davis, 1973 and 1974</th>
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<tr>
<td>Class Entering in 1973</td>
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<tr>
<td>Bakke</td>
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<tr>
<td>SGPA 3.44, OGPA 3.46</td>
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<tr>
<td>Average of regular admittees 3.51, 3.49</td>
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<td>Average of special admittees 2.62, 2.88</td>
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<tr>
<td>Class Entering in 1974</td>
</tr>
<tr>
<td>Bakke</td>
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</tr>
<tr>
<td>Average of regular admittees 3.36, 3.29</td>
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<td></td>
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<tr>
<td>Average of special admittees 2.42, 2.62</td>
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Note: SGPA indicates science grade point average. OGPA indicates overall grade point average.
and ethnic background, Bakke was unable to compete for these positions. This constitutes a quota.

- Fourteenth Amendment rights are personal in nature. The university’s quota system instead imposes a system of group rights.
- There is a well-recognized distinction between affirmative action, which takes positive steps to integrate the races and provide equal opportunity, and rigid quotas.
- The California Supreme Court correctly ruled that racial classifications such as this one must be evaluated according to strict scrutiny.

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. For his part, respondent does not argue that all racial or ethnic classifications are per se invalid. The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage “discrete and insular minorities.” Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of judicial scrutiny accorded a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the “rights established [by the Fourteenth Amendment] are personal rights.”

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a “goal” of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota.

This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” It is settled beyond question that the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal. . . .

Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. . . .

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white “majority,” the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. . . .

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white “majority” cannot be suspect if its purpose can be characterized as “benign.” The clock of our liberties, however, cannot be turned back to 1868. 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. “The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.” . . .

If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that
basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background.

We have held that in "order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with Brown, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of inquiry that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved. It may be assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem.

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.
education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

The atmosphere of “speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in Keyishian v. Board of Regents of the University of the State of New York, 1967 it is not too much to say that the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the “robust exchange of ideas,” petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges—and the courts below have held—that petitioner’s dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university’s admissions program, the question remains whether the program’s racial classification is necessary to promote this interest.

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner’s argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner’s special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.

Nor would the state interest in genuine diversity be served by expanding petitioner’s two-track system into a multitrack program with a prescribed number of places set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner’s two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.

The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program.

In such an admissions program, race or ethnic background may be deemed a “plus” in a particular applicant’s file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent
elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the “mix” both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of accruing racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process. . . . And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases.

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner’s preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. Such rights are not absolute. But when a State’s distribution of benefits or imposition of burdens hinges on ancestry or the color of a person’s skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court’s judgment holding petitioner’s special admissions program invalid under the Fourteenth Amendment must be affirmed.

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court’s judgment as enjoining petitioner from any consideration of the race of any applicant must be reversed.

With respect to respondent’s entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed.

Affirmed in part and reversed in part.

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

Unquestionably we have held that a government practice or statute which restricts “fundamental rights” or which contains “suspect classifications” is to be subjected to “strict scrutiny,” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. But no fundamental right is involved here. Nor do whites, as a class, have any of the “traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” . . .

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

First, race, like, "gender-based classifications, too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." While a carefully tailored statute designed to remedy past discrimination could avoid these vices, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear, and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own.

Second, race, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not per se invalid because it divides classes on the basis of an immutable characteristic, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing" and that advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of an individual.

Because this principle is so deeply rooted it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: The natural consequence of our governing processes [may well be] that the most "discrete and insular" of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination. Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment.

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification, an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program . . .

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

Justice Powell's opinion was a victory for Allan Bakke, who won admission to the medical school at Davis after a long legal battle (see Box 13-2). The justices, however, were sharply divided not only in their views of affirmative action programs but also over the legal grounds on which to rest the Court's ruling.

Four justices—Burger, Stewart, Rehnquist, and Stevens—preferred not to address the constitutional issues in Bakke. Instead, they concluded that the university had violated Bakke's rights under Title VI of the Civil Rights Act of 1964, which states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." By deciding for Bakke on statutory grounds, they argued, they avoided the controversy over the constitutionality of the affirmative action program.

Four justices, led by Brennan, argued that intermediate scrutiny was the appropriate standard to use in "benign" discrimination cases and that the University of California's program was constitutional under that analysis. Four other justices preferred to invalidate the university's admissions policy on statutory grounds. This split left Justice Powell holding the balance of power. His opinion argued that strict scrutiny was the appropriate standard and that although a diverse student body was a compelling state interest, the use of quotas was an impermissible means of achieving that interest. Because Powell's opinion failed to gather majority support, its precedential value was diminished, but over time the conclusions Powell reached became the primary guiding principles in the affirmative action controversy.
After securing his right to attend medical school, Allan Bakke asked the University of California to pay his legal expenses. When the university refused that request, Bakke sued. The California Superior Court ordered the university to compensate Bakke $183,089 to cover the fees of lead attorney Reynold Colvin and his associates. This was only a portion of the $437,295 Bakke had requested.

While the battle over legal fees was being fought, Bakke, at age thirty-eight and more than five years after his initial application for admission, entered the medical school at the University of California at Davis. When he arrived on campus in September 1978, more than one hundred demonstrators were protesting the Supreme Court’s ruling, chanting, “Smash the Bakke decision now!” Bakke quietly entered the medical school building unrecognized by the protesters.

Bakke’s medical school years were generally uneventful. His fellow students paid little attention to the manner in which he had gained acceptance to the school. The fact that Bakke was married and had three children distanced him somewhat from his classmates and many of their activities outside the classroom.

At age forty-two, four years after his admission, Allan Bakke graduated with his doctor of medicine degree. On March 18, 1982, the school held a ceremony during which the postgraduate assignments of the members of the graduating class were announced. One observer described Bakke as receiving the loudest applause of all when it was announced that he had been selected for a prestigious internship at the Mayo Clinic in his native state of Minnesota.

After completing his internship, Bakke continued at the Mayo Clinic for a four-year residency in anesthesiology. He then went into private practice as an anesthesiologist for the Olmsted Medical Group in Rochester, Minnesota. By nature a very quiet and private person, Bakke never discussed his famous lawsuit publicly.

The *Bakke* decision struck down the use of racial quotas and found fault with programs reserved exclusively for minority individuals, but the decision permitted less extreme forms of affirmative action. This aspect of the decision encouraged government agencies as well as private organizations and corporations to develop programs to benefit individuals from historically disadvantaged groups. Such programs gave rise to challenges that they violated the 1964 Civil Rights Act or the Constitution’s equal protection guarantees.

As Table 13-2 shows, in the years immediately following *Bakke*, the Supreme Court was generally sympathetic

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<th>Case</th>
<th>Outcome</th>
<th>Voted to uphold:</th>
<th>Voted to invalidate:</th>
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<td><em>Fullilove v. Klutznick</em> (1980). This case involved a provision of a federal law directing that in federally financed state public works projects, 10 percent of the goods and services had to be procured from minority-owned businesses. A minority-owned business was defined as a company at least 50 percent owned by citizens of the United States who were African American, Spanish-speaking, Asian, Native American, Eskimo, or Aleut.</td>
<td>6–3 to uphold the law</td>
<td>Burger, Powell, and White: The law is constitutional because it is a necessary means of advancing a compelling government interest. It was a narrow and carefully tailored measure to eliminate a particular type of discrimination. Congress had substantial evidence to conclude that traditional procurement practices could perpetuate the effects of prior discrimination and that the elimination of such barriers to minority firms was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments. Blackmun, Brennan, and Marshall: The law is constitutional for the reasons expressed in <em>Bakke</em> supporting the use of quotas as a means to alleviate discrimination.</td>
<td>Rehnquist and Stewart: The Constitution should be hostile to all racial classifications. “On its face, the . . . provision at issue in this case denies the equal protection of the law.” Stevens: The government’s justifications are not compelling. For example, “even if we assume that each of the six racial subclasses has suffered its own special injury at some time in our history, surely it does not necessarily follow that each of those subclasses suffered harm of identical magnitude.”</td>
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<td><em>United States v. Paradise</em> (1987). After finding that the Alabama Department of Public Safety had a very long history of systematically excluding blacks from employment as state troopers in violation of the Fourteenth Amendment, a federal district court issued an order imposing a hiring quota and requiring the department to refrain from engaging in discrimination in its employment practices, including promotions. But when this and several subsequent orders failed to lead to promotions for blacks, the court ordered the department to implement a one-black-for-one-white promotion requirement.</td>
<td>5–4 to uphold the order</td>
<td>Blackmun, Brennan, Marshall, Powell: Even under a strict scrutiny analysis, the one-black-for-one-white promotion requirement is permissible under the equal protection clause. The race-conscious relief ordered by the district court is justified by a compelling governmental interest in eradicating the department’s pervasive, systematic, and obstinate discriminatory exclusion of blacks. Stevens: <em>Swann v. Charlotte-Mecklenburg Bd. of Education</em> provides the appropriate standards for remedial orders in race discrimination cases. Because of the egregious violation of the equal protection clause, the district court had broad and flexible authority to fashion race-conscious relief.</td>
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| **City of Richmond v. J. A. Croson Co.** (1989). In 1983, Richmond’s city council required businesses contracting with the city to award 30 percent of the dollar amount of the contract to minority-owned subcontractors. The minority businesses did not have to be located in Richmond. The purpose of the plan was to correct the effects of past racial discrimination: Richmond’s population was 50 percent black, but less than 1 percent of the city’s construction business had been awarded to minority contractors. | 6–3 to invalidate the plan  
**Voted to invalidate:**  
Burger, Kennedy, O’Connor, White: Strict scrutiny applies, and the city has failed to provide a compelling rationale for the 30 percent requirement; rather, it set an arbitrary threshold. Moreover, if the intent was to combat racial discrimination against Richmond minority contractors, why did the plan allow qualifying contracts to go to out-of-state minority-owned businesses? If the city found black-owned businesses to have been discriminated against, why did the plan include firms owned by Eskimos and Aleuts—groups that were virtually nonexistent in Richmond?  
Stevens: The plan cannot be justified as a remedy for past discrimination. The Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs but requires that race-based governmental decisions be evaluated primarily by analyzing their probable impact on the future.  
Scalia: Strict scrutiny must be applied to all governmental racial classifications. Governments remain free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged.  
**Voted to uphold:**  
Marshall, Brennan, Blackmun: “Richmond’s set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld in *Fullilove v. Klutznick*.” |
| **Metro Broadcasting v. Federal Communications Commission** (1990). In an effort to encourage minority ownership of radio and television stations, the Federal Communications Commission (FCC) adopted two policies. One gave preference to minority applicants for broadcast licenses. The second allowed broadcasters whose qualifications to hold a license had come into question to sell their stations to minority buyers before the FCC formally resolved the matter. | 5-4 to uphold the plan  
**Voted to uphold:**  
Blackmun, Brennan, Marshall, White, Stevens: Intermediate scrutiny applies. The FCC minority ownership policy serves “the important governmental objective of broadcast diversity” and was substantially related to the achievement of that objective. (In voting to uphold the program, the Court was holding federal set-aside and affirmative action programs to an intermediate scrutiny standard, a lower benchmark than the strict scrutiny analysis the justices earlier had applied to state and local programs.)

(Continued)
### Adarand Constructors, Inc. v. Peña (1995)

At issue was a subcontractor compensation clause in a contract issued by the federal government. The clause called for prime contractors to be paid a bonus if they subcontracted to “disadvantaged business enterprises” (DBEs), small businesses that are minority owned and operated.

**Case Outcome**

- **Voted to invalidate:**
  O’Connor, Rehnquist, Scalia, Kennedy: The Court should have applied strict scrutiny. Its “departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution’s equal protection guarantees extend equally to all citizens. The Court’s application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution.”

- **5–4 to remand the case for reconsideration by the lower court**
  - **Voted to remand (or invalidate):**
    Kennedy, O’Connor, Rehnquist: All classifications based on race are to be assessed under a strict scrutiny test. This holds regardless of whether the classification burdens or benefits particular racial groups or whether local, state, or the federal government devised the plan.
    - Scalia: “The government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”
    - Thomas: “In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.”

- **Voted to uphold:**
  Souter, Ginsburg, Breyer: “In no meaningful respect is the current scheme more objectionable than the one considered in *Fullilove*.”


Under the University of Michigan’s undergraduate admissions procedures, applicants were assigned points based on academic and nonacademic factors. One hundred points were needed to be admitted. To promote a diverse student body, the university gave twenty points automatically to every applicant from the designated underrepresented groups—specifically African Americans, Hispanics, and Native Americans.

**Case Outcome**

- **Voted to invalidate:**
  Breyer, O’Connor, Rehnquist, Scalia, Kennedy, Thomas: “To withstand our strict scrutiny analysis, respondents must demonstrate that the University’s use of race in its current admission program employs ‘narrowly tailored measures that further compelling governmental interests.’ . . . We find that the University’s policy, which automatically distributes 20 points . . . to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.” The program “does not provide the individualized consideration” that Justice Powell thought so important in *Bakke*.

- **Voted to dismiss on standing:**
  Souter, Stevens

- **Voted to uphold:**
  Ginsburg, Souter: “Universities will seek to maintain their minority enrollment” and “may resort to camouflage” to do so. “If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguise.”
In addition to affirmative action programs designed to assist racial minorities, the justices gave support to plans that favored women, especially when the plans were applied to employment situations where females had been historically denied opportunity. These plans tended to receive Supreme Court approval if they were temporary, flexible, and narrowly tailored and did not place undue burdens on opportunities available to males. See, for example, Johnson v. Transportation Agency of Santa Clara County, California (1987).

As to the appropriate standard to apply in these cases and even how to apply it.

After 1987, however, the Court became less sympathetic to affirmative action and minority set-aside programs, as Table 13-2 shows. The first sign of this came in City of Richmond v. J. A. Croson Co. (1989). Applying strict scrutiny, the Supreme Court, with Justice Sandra Day O’Connor writing the majority opinion, held that the Richmond minority set-aside program violated the Constitution. The very next year, in Metro Broadcasting v. Federal Communications Commission (1990), however, the Court approved the FCC’s use of minority preferences. That was because Justice William J. Brennan Jr.’s opinion for the Court held the federal government to an intermediate scrutiny standard—a more lenient standard than strict scrutiny, which it applied to state programs in Richmond.

Would the Court continue to hold the federal government and the states to different standards? This
question became all the more important because by the
time the justices heard the 1995 minority set-aside case
Adarand Constructors, Inc. v. Peña, the Court’s mem-
bership had changed. Justice Brennan’s majority opinion in
Metro Broadcasting was his last after an illustrious career
of thirty-four years on the Court. During that time, he had
been a steadfast defender of liberal principles in constitu-
tional interpretation.

Brennan’s 1990 retirement was followed the next year
by Thurgood Marshall’s. President George H. W. Bush
appointed David Souter to Brennan’s seat and Clarence
Thomas to Marshall’s. The Thomas-for-Marshall change
turned out to be critical for affirmative action cases
because, as Table 13-2 shows, Souter, like Brennan, seemed
to support affirmative action, whereas Thomas, the sec-
ond African American appointed to the Court, opposed
it. With Thomas’s vote, O’Connor was able to solidify
a majority around her view that strict scrutiny applies
regardless of whether the program is federal or state.

Applying Strict Scrutiny. Although Adarand did not
strike down all affirmative action programs, the test of
strict scrutiny seemed so difficult to meet that it cast
considerable doubt on the constitutional viability of all
affirmative action programs. This uncertainty was rein-
forsed when the Court began rejecting plans that took
race into account in constructing legislative districts (see
Chapter 14). Court observers began to speculate that the
justices had turned away from the principles set in Justice
Powell’s opinion in Bakke and had become less open to
minority preference programs of all kinds.

Answers soon came in 2003 when the justices took
two appeals challenging affirmative action policies at
the University of Michigan. One suit, Gratz v. Bollinger,
attacked the university’s undergraduate admissions pol-
icy, and the other, Grutter v. Bollinger, challenged ad-
missions to the university’s law school (see Table 13-2
for the details). In both cases the admissions policies
had been adopted voluntarily rather than in response to a court
order to compensate for past constitutional violations.

Speculation on the outcome of the Court’s delibera-
tions generally conceded that the votes of seven of the
nine justices were all but certain. Justices Stevens, Souter,
Ginsburg, and Breyer had records of consistent support
for the limited use of racial preferences. On the other
side, Chief Justice Rehnquist and Justices Scalia and
Thomas had consistently and vigorously opposed affirma-
tive action. Most observers believed that O’Connor and
Kennedy held the key to the outcome. For affirmative
action to receive constitutional approval, at least one of
these two moderate conservatives would have to vote with
the Court’s liberal bloc.

As it turned out, O’Connor was the pivotal justice.
Although she agreed that strict scrutiny was the appro-
priate test for deciding racial preference cases and that
a diverse student body is a sufficiently compelling state
interest to justify taking race into account, application of
this approach led her (and the Court) to uphold the pro-
gram in Grutter and to invalidate the program in Gratz.
Contrary to the majority’s findings in Gratz, O’Connor
concluded that the law school’s admissions process at issue
in Grutter was based on a flexible, individualized consider-
ation of applications in which race was only one of several
diversity factors taken into account.

Grutter was an important victory for the supporters
of affirmative action, especially in the area of higher edu-
cation. The Court held that educational diversity constitutes
a compelling state interest and that affirmative action pro-
grams, if properly tailored, are constitutionally accept-
able means of achieving the state’s goals. Consistent with
Justice Powell’s opinion in Bakke, which Justice O’Connor
called “a touchstone” for the analysis of diversity pro-
grams, race was a “plus” in the application process. Race
did not automatically determine acceptance or rejection.
As such, it met the majority’s approval. The Court’s ruling
provides constitutionally valid guidelines for affirmative
action programs that other colleges and universities can
use, but only where state laws do not otherwise prohibit
the use of racial and ethnic preferences.

Toward the end of her opinion, Justice O’Connor
wrote, “We expect that 25 years from now, the use of racial
preferences will no longer be necessary to further the
interest approved today.” Commentators have interpreted
this sentence in different ways, but many seemed to think
that it signaled the Court’s departure from affirmative
action cases for the next few decades.

This reading turned out to be incorrect. Just two
years after Justice O’Connor retired and was replaced by
the more conservative Samuel Alito, the Court seemed
to begin backing off from its liberal Grutter decision. That
move came with Parents Involved in Community Schools v.
Seattle School District No. 1 (2007) and its companion case,
As you will recall from our discussion in Chapter 12, in these
cases a five-justice majority struck down the policies of
two public school systems that took race into account in
assigning individual students to specific public schools.
The Court rejected the argument that the school boards
were pursuing academic diversity, finding instead that the
programs promoted racial balancing.

For this reason, all eyes were on the Court when
it accepted Fisher v. University of Texas, another case
challenging university admissions policies. As we explain
below, in the first version of the Fisher case in 2013, the
Court seemed to advance an approach to strict scrutiny that would be even stricter than \textit{Grutter}'s version. But, ultimately, when the case returned to the Court in 2016 (\textit{Fisher II}, excerpted here), the majority upheld the program. Why?

\textbf{Fisher v. University of Texas}

\begin{itemize}
  \item 579 U.S. _____ (2016)
  \item http://caselaw.findlaw.com/us-supreme-court/14-981.html
  \item Oral arguments are available at https://www.oyez.org/cases/2015/14-981.
  \item Vote: 4 (Breyer, Ginsburg, Kennedy, Sotomayor) 3 (Alito, Roberts, Thomas)
  \item OPINION OF THE COURT: Kennedy
  \item DISSENTING OPINIONS: Alito, Thomas
  \item NOT PARTICIPATING: Kagan
\end{itemize}

\textbf{FACTS:}

The University of Texas at Austin has used several different methods for evaluating applications for undergraduate admission. Before 1996, the university considered high school grades and standardized test scores and, to promote diversity, the race of the applicant. When, in 1996, the U.S. Court of Appeals for the Fifth Circuit held that the use of race violated the Fourteenth Amendment’s equal protection clause, the university substituted a “Personal Achievement Index” (PAI) that considered factors such as leadership, work experience, awards, extracurricular activities, community service, and other special considerations. The state legislature further modified the process by enacting a law that gave automatic admission to all students in the top 10 percent of their class in accredited Texas high schools. Because high schools in Texas are often racially segregated, the 10 percent rule brought substantial racial diversity to the university, nearly equaling the effect of the explicit consideration of race used before 1996. In 2004, after the Supreme Court decided \textit{Grutter v. Bollinger} and \textit{Gratz v. Bollinger} (2003), the university again changed its admissions policies by explicitly adding race to the list of “plus” factors to be considered as part of an applicant’s PAI score.

In 2008, 29,501 individuals applied for admission to the university. Of these, 12,843 were accepted and 6,717 enrolled. Among the rejected applicants was Abigail Noel Fisher, who is white. Fisher sued the university, arguing that the consideration of race in the admissions process violated the equal protection clause. The federal district court gave a victory to the university and the Fifth Circuit Court of Appeals affirmed, holding that \textit{Grutter} required the court to give substantial deference to the university with respect to both identifying a compelling interest and determining a narrowly tailored plan to achieve that interest.

Abigail Fisher, accompanied by her attorney Bert Rein, speaks to reporters on October 10, 2012, the day the affirmative action case of \textit{Fisher v. University of Texas} was first orally argued.
In 2013, the U.S. Supreme Court reviewed the Fifth Circuit's decision ("Fisher I"). As in Grutter, the Court applied strict scrutiny and, again as in Grutter, found that diversity was a sufficiently compelling interest. Writing for the majority, Justice Anthony Kennedy then turned to whether the plan the university chose to attain diversity is necessary to that goal. “On this point,” he wrote, “the University receives no deference.” Rather, the university must bear “the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”

The Court did not invalidate the university’s program. But it did send the case back to the lower court so that it could apply Kennedy’s seemingly stricter version of strict scrutiny. After the Fifth Circuit once again upheld the plan, Fisher asked the Supreme Court to reverse the lower court’s decision. Justice Elena Kagan did not participate because she had worked on the case earlier when she served as U.S. solicitor general.

ARGUMENTS:

For the petitioner, Abigail Fisher:

- A university must clearly articulate a compelling interest in educational diversity so that courts can apply strict scrutiny. The University of Texas at Austin (UT) has never been clear about precisely why it needs to use racial preferences.
- A university must have evidence sufficient to show that the reason given for using race is compelling. UT had every opportunity to bring forth evidence to support its use of race, but it has not.
- Even if UT has a compelling interest, it has not shown race-neutral means could achieve it. Specifically, the university failed to show that its preexisting race-neutral admissions program could not achieve the desired level of diversity.

For the respondent, University of Texas at Austin:

- Since 2004, the University of Texas at Austin has made clear that its interest is securing the educational benefits of diversity—the same interest this Court held was compelling in Bakke and Grutter.
- UT’s holistic admissions process values a range of diverse experiences and backgrounds. The special circumstances factor considers many factors in addition to race (e.g., an applicant’s background, school, or neighborhood).
- The record overwhelmingly shows that UT gave serious, good faith consideration to race-neutral alternatives before adopting the policy at issue.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

The Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause.

Fisher I [2013] set forth three controlling principles relevant to assessing the constitutionality of a public university’s affirmative-action program. First, “because racial characteristics so seldom provide a relevant basis for disparate treatment, . . . race may not be considered [by a university] unless the admissions process can withstand strict scrutiny.” Strict scrutiny requires the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.”

Second, Fisher I confirmed that “the decision to pursue the educational benefits that flow from student body diversity . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.” A university cannot impose a fixed quota or otherwise “define diversity as ‘some specified percentage of a particular group merely because of its race or ethnic origin.’” Once, however, a university gives “a reasoned, principled explanation” for its decision, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals.”

Third, Fisher I clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals. A university, Fisher I explained, bears the burden of proving a “nonracial approach” would not promote its interest in the educational benefits of diversity “about as well and at tolerable administrative expense.” Though “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative” or “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,” it does impose “on the university the ultimate burden of demonstrating” that “race-neutral alternatives” that are both “available” and “workable” “do not suffice.” Fisher I set forth these controlling principles, while taking no position on the constitutionality of the admissions
program at issue in this case. The Court held only that the District Court and the Court of Appeals had “confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications.” The Court remanded the case, with instructions to evaluate the record under the correct standard and to determine whether the University had made “a showing that its plan is narrowly tailored to achieve” the educational benefits that flow from diversity. On remand, the Court of Appeals determined that the program conformed with the strict scrutiny mandated by Fisher I.

The University’s program is sui generis. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan. This approach gave rise to an unusual consequence in this case: The component of the University’s admissions policy that had the largest impact on petitioner’s chances of admission was not the school’s consideration of race under its holistic-review process but rather the Top Ten Percent Plan. Because petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible for more than three-fourths of the slots in the incoming freshman class. It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in Grutter.

Despite the Top Ten Percent Plan’s outsized effect on petitioner’s chances of admission, she has not challenged it. For that reason, throughout this litigation, the Top Ten Percent Plan has been taken, somewhat artificially, as a given premise.

In seeking to reverse the judgment of the Court of Appeals, petitioner makes four arguments. First, she argues that the University has not articulated its compelling interest with sufficient clarity. According to petitioner, the University must set forth more precisely the level of minority enrollment that would constitute a “critical mass.” Without a clearer sense of what the University’s ultimate goal is, petitioner argues, a reviewing court cannot assess whether the University’s admissions program is narrowly tailored to that goal.

As this Court has said, enrolling a diverse student body “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” Equally important, “student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society.”

Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals. On the first page of its 2004 “Proposal to Consider Race and Ethnicity in Admissions,” the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the “promotion of cross-racial understanding,” the preparation of a student body “for an increasingly diverse workforce and society,” and the “cultivation of a set of leaders with legitimacy in the eyes of the citizenry.” All of these objectives, as a general matter, mirror the “compelling interest” this Court has approved in its prior cases.

The University has provided in addition a “reasoned, principled explanation” for its decision to pursue these goals. The University’s 39-page proposal was written following a year-long study, which concluded that “[t]he use of race-neutral policies and programs had not been successful” in “provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society.”

Second, petitioner argues that the University has no need to consider race because it had already “achieved critical mass” by 2003 using the Top Ten Percent Plan and race-neutral holistic review. Petitioner is correct that a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals,
However, that, at the time of petitioner’s application, the University could not be faulted on this score. Before changing its policy the University conducted “months of study and deliberation, including retreats, interviews, [and] review of data,” and concluded that “[t]he use of race-neutral policies and programs ha[d] not been successful in achieving” sufficient racial diversity at the University. . . .

The record itself contains significant evidence, both statistical and anecdotal, in support of the University’s position. . . . [T]he demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002. In 1996, for example, 266 African-American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year Grutter was decided, 267 African-American students enrolled—again, 4.1 percent of the incoming class. . . .

In addition to this broad demographic data, the University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation.

This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data. In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of those classes had no Hispanic students, as compared to 10 percent in 1996. Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.

Third, petitioner argues that considering race was not necessary because such consideration has had only a “minimal impact” in advancing the [University’s] compelling interest. Again, the record does not support this assertion. In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University’s freshman class.

In any event, it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.

Petitioner’s final argument is that “there are numerous other available race-neutral means of achieving” the University’s compelling interest. A review of the record reveals, however, that, at the time of petitioner’s application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought. For example, petitioner suggests that the University could intensify its outreach efforts to African-American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Perhaps more significantly, in the wake of Hopwood, the University spent seven years attempting to achieve its compelling interest using race-neutral holistic review. None of these efforts succeeded, and petitioner fails to offer any meaningful way in which the University could have improved upon them at the time of her application. . . .

Petitioner’s final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University’s students through a percentage plan. As an initial matter, petitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. . . .

Even if, as a matter of raw numbers, minority enrollment would increase under such a regime, petitioner would be hard-pressed to find convincing support for the proposition that college admissions would be improved if they were a function of class rank alone. That approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students. A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.
In short, none of petitioner’s suggested alternatives—nor other proposals considered or discussed in the course of this litigation—have been shown to be “available” and “workable” means through which the University could have met its educational goals, as it understood and defined them in 2008. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.

A university is in large part defined by those intangible “qualities which are incapable of objective measurement but which make for greatness.” Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.

In striking this sensitive balance, public universities, like the States themselves, can serve as “laboratories for experimentation.” The University of Texas at Austin has a special opportunity to learn and to teach. The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.

The Court’s affirmation of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University’s ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

I write separately to reaffirm that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.” “The Constitution abhors classifications based on race . . . because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.” That constitutional imperative does not change in the face of a “faddish theor[y]” that racial discrimination may produce “educational benefits.” The Court was wrong to hold otherwise in Grutter v. Bollinger. I would overrule Grutter and reverse the Fifth Circuit’s judgment.

Something strange has happened since our prior decision in this case (Fisher I). In that decision, we held that strict scrutiny requires the University of Texas at Austin (UT or University) to show that its use of race and ethnicity in making admissions decisions serve compelling interests and that its plan is narrowly tailored to achieve those ends. Rejecting the argument that we should defer to UT’s judgment on those matters, we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied. On remand, UT failed to do what our prior decision demanded. The University has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking “the educational benefits of diversity” is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference, which we emphatically rejected in our prior decision. Today, however, the Court inexplicably grants that request.

To the extent that UT has ever moved beyond a plea for deference and identified the relevant interests in more specific terms, its efforts have been shifting, unpersuasive, and, at times, less than candid. When it adopted its race-based plan, UT said that the plan was needed to promote classroom diversity. It pointed to a study showing that African-American, Hispanic, and Asian-American students were underrepresented in many classes. But UT has never shown that its race-conscious plan actually ameliorates this situation. The University presents no evidence that its admissions officers, in administering the “holistic” component of its plan, make any effort to determine whether an African-American, Hispanic, or Asian-American student is likely to enroll in classes in which minority students are underrepresented. And although UT’s records should permit it to determine without much
difficulty whether holistic admittees are any more likely than students admitted through the Top Ten Percent Law to enroll in the classes lacking racial or ethnic diversity, UT either has not crunched those numbers or has not revealed what they show. Nor has UT explained why the underrepresentation of Asian-American students in many classes justifies its plan, which discriminates against those students.

At times, UT has claimed that its plan is needed to achieve a “critical mass” of African-American and Hispanic students, but it has never explained what this term means. According to UT, a critical mass is neither some absolute number of African-American or Hispanic students nor the percentage of African-Americans or Hispanics in the general population of the State. The term remains undefined, but UT tells us that it will let the courts know when the desired end has been achieved. This is a plea for deference—indeed, for blind deference—the very thing that the Court rejected in Fisher I.

UT has also claimed at times that the race-based component of its plan is needed because the Top Ten Percent Plan admits the wrong kind of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominantly African-American or Hispanic. As UT put it in its brief in Fisher I, the race-based component of its admissions plan is needed to admit “[t]he African-American or Hispanic child of successful professionals in Dallas.”

After making this argument in its first trip to this Court, UT apparently had second thoughts, and in the latest round of briefing UT has attempted to disavow ever having made the argument. But it did, and the argument turns affirmative action on its head. Affirmative-action programs were created to help disadvantaged students.

Although UT now disowns the argument that the Top Ten Percent Plan results in the admission of the wrong kind of African-American and Hispanic students, the Fifth Circuit majority bought a version of that claim. As the panel majority put it, the Top Ten African-American and Hispanic admittees cannot match the holistic African-American and Hispanic admittees when it comes to “records of personal achievement,” “a variety of perspectives” and “life experiences,” and “unique skills.” All in all, according to the panel majority, the Top Ten Percent students cannot “enrich the diversity of the student body” in the same way as the holistic admittees.

The Fifth Circuit reached this conclusion with little direct evidence regarding the characteristics of the Top Ten Percent and holistic admittees. Instead, the assumption behind the Fifth Circuit’s reasoning is that most of the African-American and Hispanic students admitted under the race-neutral component of UT’s plan were able to rank in the top decile of their high school classes only because they did not have to compete against white and Asian-American students. This insulting stereotype is not supported by the record. African-American and Hispanic students admitted under the Top Ten Percent Plan receive higher college grades than the African-American and Hispanic students admitted under the race-conscious program.

It should not have been necessary for us to grant review a second time in this case, and I have no greater desire than the majority to see the case drag on. But that need not happen. When UT decided to adopt its race-conscious plan, it had every reason to know that its plan would have to satisfy strict scrutiny and that this meant that it would be its burden to show that the plan was narrowly tailored to serve compelling interests. UT has failed to make that showing. By all rights, judgment should be entered in favor of petitioner.

But if the majority is determined to give UT yet another chance, we should reverse and send this case back to the District Court. What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong. . . .

It is important to understand what is and what is not at stake in this case. What is not at stake is whether UT or any other university may adopt an admissions plan that results in a student body with a broad representation of students from all racial and ethnic groups. UT previously had a race-neutral plan that it claimed had “effectively compensated for the loss of affirmative action,” and UT could have taken other steps that would have increased the diversity of its admitted students without taking race or ethnic background into account.

What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve “the educational benefits of diversity,” without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives. Even though UT has never provided any coherent explanation for its asserted need to discriminate on the basis of race, and even though UT’s position relies on a series of unsupported and noxious racial assumptions, the majority concludes that UT has met its heavy burden. This conclusion is remarkable—and remarkably wrong.
Because UT has failed to satisfy strict scrutiny, I respectfully dissent.

For now, a slim majority of justices agree that universities can maintain affirmative action programs if they demonstrate that their programs withstand strict scrutiny. That, of course, may change as the Court's membership changes—especially if Justice Kennedy, the now-key vote in this area of the law, were to leave.

HEIGHTENED SCRUTINY
AND CLAIMS OF GENDER DISCRIMINATION

Before Brown v. Board of Education, groups and individuals challenging practices as racially discriminatory had a major obstacle to overcome: Plessy v. Ferguson. Lawsuits based on claims of sex discrimination were also handicapped, and for even longer periods of time. Indeed, before the 1970s, the few sex discrimination cases that reached the Supreme Court often ended in decisions that reinforced traditional views of sex roles. In Bradwell v. Illinois (1873), for example, the Court heard a challenge to an action by the Illinois Supreme Court denying Myra Bradwell a license to practice law solely because of her sex. The Court, with only Chief Justice Salmon P. Chase dissenting, upheld the state action. Justice Joseph P. Bradley's concurring opinion, which Justices Noah Swayne and Stephen Field joined, illustrates the attitude of the legal community toward women. Bradley said that he gave his "heartiest concurrence" to contemporary society's "multiplication of avenues for women's advancement." But, he added, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life." This condition, according to Bradley, was the product of divine ordinance. Two years later, in Minor v. Happersett (1875), the Court upheld Missouri's denial of voting rights to women, a precedent in effect until ratification of the Nineteenth Amendment in 1920.

Similar decisions came early in the twentieth century. The majority opinion in the 1908 case of Muller v. Oregon, in which the Court upheld a maximum-work-hours law that covered only women, echoed Justice Bradley's view of women.17 Writing for the Court, Justice David J. Brewer noted:

17At the time of their implementation, statutes such as the one at issue in Muller were seen as a progressive step to protect women in the workforce. Today, this kind of law, based as it is on an assumption of the inferiority of women, is considered paternalistic.

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon her body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race.

As late as 1948, the Court upheld the right of the state to ban women from certain occupations. In Goseart v. Cleary, decided that year, the justices declared valid a Michigan law that barred a woman from becoming a bartender unless she was a member of the bar owner's
immediate family. In explaining the ruling, Justice Felix Frankfurter wrote,

The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic.

In a comparatively modern case, Hoyt v. Florida (1961), the justices upheld a Florida law that automatically exempted women from jury duty unless they asked to serve.

While the Court continued to articulate a traditional view of women, the growing strength of the women's movement in the 1960s prompted legislatures to act. Congress passed a number of federal statutes extending equal rights to women, among them the Equal Pay Act of 1963, which requires equal pay for equal work, and the 1964 Civil Rights Act, which forbids discrimination based on sex in the area of employment (see Box 13-3). Many states passed similar laws to eliminate discriminatory conditions in the marketplace and in state legal codes. In addition to these legislative actions, in 1972 Congress proposed an amendment to the Constitution. Known as the Equal Rights Amendment (ERA), it declared, “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” Although the amendment ultimately failed to attain the required number of states, the very fact that Congress proposed it (and later extended the deadline for ratification) indicated changing views toward women.

Level of Scrutiny

While continuing to press for the ERA, women's rights organizations also turned to the courts for redress of their grievances. Like the advocates for African Americans, many in the women's movement believed that the due process and equal protection clauses held the potential for ensuring women's rights, and they began organizing to assert their claims in court.

One of the first such cases to reach the Supreme Court was Reed v. Reed (1971). In this case, the justices considered the validity of an Idaho inheritance statute that used sex classifications, which ACLU attorneys, including Ruth Bader Ginsburg, challenged as a violation of the equal protection clause of the Fourteenth Amendment. It was clear from the outset that the same requirements that had developed in race relations cases would apply here: the statute's challenger would have to demonstrate both invidious discrimination and state action before a violation could be found. What was not so clear was the standard of scrutiny the justices would use. In the race discrimination cases, the Court had declared strict scrutiny the appropriate standard. Racial minorities were considered a suspect class, and, therefore, classifications based on race were presumed to be unconstitutional. The state had a heavy burden of proof if it wished to show that a law based on race was the least restrictive means to achieve a compelling state interest. Much of the success enjoyed by civil rights groups was due to this favorable legal status. Ginsburg and other advocates of equal rights for women hoped the Court would adopt the same standard for sex discrimination claims. Did the justices go along?

Reed v. Reed

404 U.S. 71 (1971)
Vote: 7 (Blackmun, Brennan, Burger, Douglas, Marshall, Stewart, White)

OPINION OF THE COURT: Burger

FACTS:

Richard Reed was Sally and Cecil Reed's adopted son. He died in 1967 at the age of sixteen in Ada County, Idaho, leaving no will. The Reeds, who had divorced several years before Richard's death, became involved in a legal dispute over who should administer his estate. The child's property was negligible, consisting of a few personal items and a small savings account. The total value was less than $1,000. The probate court judge appointed Cecil Reed administrator of the estate, in accordance with Idaho law. Section 15-312 of the Idaho Code stipulated that when a person died intestate (without a will), an administrator would be appointed according to a list of priority relationships. First priority went to a surviving spouse, second priority to children, third to parents, and so forth. Section 15-314 of the statute stated that in the case of competing petitions from otherwise qualified individuals of the same priority relationship, “males must be preferred to females.”

Sally Reed challenged the law as a violation of the equal protection clause of the Fourteenth Amendment. The state district court agreed with her argument, but the Idaho Supreme Court reversed. With assistance of Ginsburg and other ACLU lawyers, Sally Reed and her attorney, Allen Derr, took the case to the U.S. Supreme Court. There they asked the justices to adopt a strict
Scrubappr approach to sex discrimination cases, but they also suggested that the law was unconstitutional even under a less rigorous standard.

ARGUMENTS:

For the appellant, Sally M. Reed:

- The Idaho statute subordinating women to men without regard to individual capacity creates a suspect classification requiring close judicial scrutiny.
- The suspect class designation is appropriate because women, like African Americans, have suffered long-standing discrimination, because sex is an easily identifiable and immutable characteristic, and because women are sparsely represented in political offices.
- Biological differences have nothing to do with the ability to be an effective administrator of an estate.
- The law is based on administrative convenience only. There is no substantial relationship between the law and any permissible government interest.

For the appellee, Cecil R. Reed:

- The statute was enacted to reduce the time, trouble, and expense of probating small estates as well as to eliminate costly contests over who should administer such estates. This case demonstrates the need for administrative efficiency. Richard’s estate has an estimated value of only $745.
- The argument that the discrimination against women is comparable to the enslavement of African Americans is not valid.
- The legislators who enacted this statute recognized that on average men had higher education levels and more experience in financial affairs than women, making it rational to prefer men over women in settling small estates.

MR. CHIEF JUSTICE BURGER
DELIVERED THE OPINION OF THE COURT.

Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by §15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment’s command that no State deny the equal protection of the laws to any person within its jurisdiction.

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under §15-312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by §15-312. In such situations, §15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons...
placed by a statute into different classes on the basis of
criteria wholly unrelated to the objective of that statute. A
classification “must be reasonable, not arbitrary, and must
rest upon some ground of difference having a fair and sub-
stantial relation to the object of the legislation, so that all
persons similarly circumstanced shall be treated alike.”
The question presented by this case, then, is whether a
difference in the sex of competing applicants for letters
of administration bears a rational relationship to a state
objective that is sought to be advanced by the operation of
§§15-312 and 15-314.

In upholding the latter section, the Idaho Supreme
Court concluded that its objective was to eliminate one
area of controversy when two or more persons, equally
titled under §15-312, seek letters of administration and
thereby present the probate court “with the issue of which
one should be named.” The court also concluded that where
such persons are not of the same sex, the elimination of
females from consideration “is neither an illogical nor arbi-
trary method devised by the legislature to resolve an issue
that would otherwise require a hearing as to the relative
merits . . . of the two or more petitioning relatives . . . .”

BOX 13-3
Major Congressional Action On Women’s Rights

1960s
Title VII of the Civil Rights Act of 1964 makes it unlawful
for an employer “to refuse to hire . . . any individual . . .
because of such individual’s race, color, religion, sex, or
national origin” except where “religion, sex, or national
origin” is a bona fide occupational qualification neces-
sary to the normal operation of that particular business.
Equal Pay Act of 1963 requires employers to pay
men and women performing equal work equal salaries.

1970s
Equal Rights Amendment (ERA) sent to the states for rat-
ification in 1972. This amendment would have declared,
“Equality of rights under the law shall not be denied or
abridged by the United States or by any State on account
of sex.”
Expansion of Title VII’s ban on employment dis-
crimination to cover employees of state and local
governments.
Title IX of the education amendments (passed in
1972) states, “No person in the United States shall, on
the basis of sex, be excluded from participation in, be
denied benefits of, or be subjected to discrimination
under any educational program or activity receiving
Federal financial assistance.”
Pregnancy Discrimination Act of 1978 forbids
employment discrimination on grounds of pregnancy.

1980s
Civil Rights Restoration Act of 1988 extends Title IX
coverage to all operations of state or local units and to
private organizations if federal aid is given to the enter-
prises as a whole or if the enterprises are “principally
engaged” in providing education, housing, health care,
parks, or social services.
An attempt in Congress to repropose the ERA falls
short of the two-thirds requirement.

1990s
Civil Rights Act of 1991 reaffirms and expands protec-
tions against discrimination in employment.
The Family and Medical Leave Act of 1993 allows
individuals who work for employers with fifty or more
employees to take up to twelve weeks of unpaid leave
to stay home with a new baby or sick parent, child, or
spouse or to recover from an illness.
Violence Against Women Act, initially passed in
1994 and subsequently modified, provides law enforce-
ment assistance and authorizes federal support for
social programs designed to combat domestic violence.

Sources:
Leslie Friedman Goldstein, The Constitutional Rights of Women (Madison: University of Wisconsin Press, 1988); Susan Gluck
Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether §15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

We note finally that if §15-314 is viewed merely as a modifying appendage to §15-312 and aimed at the same objective, its constitutionality is not thereby saved. The objective of §15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. The judgment of the Idaho Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

The Court's unanimous decision in Reed applied two important principles to sex discrimination. First, the Court refused to accept Idaho's defense of its statute. The state had contended that it was inefficient to hold full court hearings on the relative merits of competing candidates to administer estates, especially small estates. Imposing arbitrary criteria saved court time and avoided intrafamily squabbles. The Supreme Court held that administrative convenience is no justification for violating the Constitution. Second, defenders of the Idaho law argued that the arbitrary favoring of males over females made sense because, in most cases, the male will have had more education and experience in financial matters than the competing female. In rejecting this argument, the justices said that laws containing overbroad, sex-based assumptions violate the equal protection clause.

The Reed case also signaled that the justices were receptive to sex discrimination claims and would not hesitate to strike down state laws that imposed arbitrary sex classifications. This turn of events was certainly good news for women's rights advocates, but the standard used in the case was not. Chief Justice Burger invoked the rational basis test (rather than strict scrutiny), holding that laws based on gender classifications must be reasonable and have a rational relationship to a state objective. The Idaho law was sufficiently arbitrary to fail the rational basis test, but other laws and policies might well survive it.

Two years later the controversy over the appropriate standard of scrutiny for sex discrimination cases once again reached the justices. In Frontiero v. Richardson (1973), an Air Force lieutenant claimed that the military's benefits policy discriminated on the basis of sex in violation of the Fifth Amendment's due process clause. Her argument rested on the fact that husbands of female officers were not eligible for benefits without proof that the husband was financially dependent on his wife. However, male officers did not face the same obstacle. Their wives were presumed to be financially dependent and were automatically entitled to benefits. The Air Force argued that its policy was rational because the husbands of female officers usually had careers of their own and did not rely on their wives' income, whereas most spouses of male officers did receive a majority of their financial support from their husbands.

With only Justice William H. Rehnquist dissenting, the Court struck down the benefits eligibility rules. Following Reed v. Reed, the justices concluded that the military regulations were impermissibly based on overbroad, gender-based assumptions and could not be justified on the basis of administrative convenience.

Although there was overwhelming agreement on the case outcome, the justices remained far apart on the question of the appropriate level of scrutiny to apply. Four justices argued that sex should be elevated to a suspect class, and four remained wedded to the rational basis test. Justice Potter Stewart held the deciding vote, but he failed to make his preferences known. In one line, Stewart indicated that he found the Air Force regulation unconstitutional without saying what standard he applied.

Absent a Court majority in Frontiero voting to change the prevailing test, sex discrimination remained governed by the rational basis approach. Three years later, however, the Court finally resolved the standards issue. In Craig v. Boren (1976), the justices adopted an entirely new standard of scrutiny for sex discrimination cases. As you may recall, this test, known as intermediate or heightened scrutiny, requires that laws that classify on the basis of sex be substantially related to an important government objective (see Figure 13-1). It appealed especially to justices in the center of the Court who were not happy with either the
conservative rational basis test or the liberal suspect class test. Observe how Brennan, writing for the Court, justifies the new test as being consistent with Reed and how he treats the use of social science evidence. Also read carefully Rehnquist’s dissenting opinion rejecting the new test, especially as beneficially applied to men.

Craig v. Boren
429 U.S. 190 (1976)
Vote: 7 (Blackmun, Brennan, Marshall, Powell, Stevens, Stewart, White) 2 (Burger, Rehnquist)
OPINION OF THE COURT: Brennan
CONCURRING OPINIONS: Powell, Stevens
OPINION CONCURRING IN JUDGMENT: Stewart
OPINION CONCURRING IN PART: Blackmun
DISSENTING OPINIONS: Burger, Rehnquist

FACTS:
In 1972, Oklahoma enacted a statute setting the age of legal majority for both males and females at eighteen. Before then, females reached legal age at eighteen and males at twenty-one.¹⁸ The equalization statute, however, contained one exception. Males could not purchase beer, even with the low 3.2 percent alcohol level, until they reached twenty-one; females could buy beer at eighteen. The state differentiated between the sexes in response to statistical evidence indicating a greater tendency for males ages eighteen to twenty-one to be involved in alcohol-related traffic accidents, including fatalities.

Viewing the Oklahoma law as a form of sex discrimination, Mark Walker, a twenty-year-old Oklahoma State University student who wanted to buy beer, and Carolyn Whitener, the owner of the Honk-N-Holler convenience store, who wanted to sell it, brought suit in federal trial court challenging the law on equal protection grounds. While the case slowly progressed, Walker turned twenty-one and was no longer subject to the state restrictions on purchasing alcohol. To protect against the case being declared moot, eighteen-year-old Curtis Craig replaced his friend Walker as the lead party.

¹⁸For more on this case, see Lee Epstein and Jack Knight, The Choices Justices Make (Washington, DC: CQ Press, 1998).
Craig and Whitener argued that the Oklahoma law should be evaluated on the basis of strict scrutiny. The state disagreed. It urged the trial court to apply the rational basis test. Under that test, the law was clearly constitutional, the state claimed, because statistics demonstrated that, compared to women, men in the eighteen-to-twenty age category “drive more, drink more, and commit more alcohol-related offenses.”

While acknowledging that the U.S. Supreme Court decisions were murky, a three-judge district court ruled that the rational basis test was the appropriate standard to apply. In doing so the judges concluded that the statistical evidence supporting the differences in male and female drinking and driving behavior was sufficient to justify the state’s sex-based alcohol policy. Craig and Whitener appealed to the U.S. Supreme Court.

The state continued to advocate for the continued use of the rational basis test, and Craig and Whitener for strict scrutiny. Craig and Whitener also opened the door to a compromise. Their brief cited a passage written by Justice Harry Blackmun in *Stanton v. Stanton* (1975), another dispute over sex differences and legal maturation. In deciding that case (and also avoiding the level-of-scrutiny issue), Blackmun wrote for the majority, “We therefore conclude that under any test—compelling state interest, or rational basis, or something in between—[the statute] does not survive an equal protection attack” (emphasis added). This suggested that the justices might be open to a compromise, some level of scrutiny between rational basis and strict scrutiny. An amicus curiae brief, written on behalf of the ACLU by Ruth Bader Ginsburg, also emphasized the possibility of an “in between” solution to the level-of-scrutiny standoff.

ARGUMENTS:

For the appellants, Curtis Craig and Carolyn Whitener:

- Based on recent decisions such as *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), and *Stanton v. Stanton* (1975), the Oklahoma statute unconstitutionally discriminates on the basis of sex.
- It is time to elevate sex discrimination to suspect-class status.
- The statistics provided by the state regarding alcohol-related offenses committed in the eighteen-to-twenty-one-year-old age group are flawed and invalid.
- The law is irrational in that it only prohibits sales to minor males by licensed vendors of 3.2 percent beer. It does not bar minor males from securing the beverage from an older male relative or even a younger female friend.

For the appellees, David Boren, Governor of Oklahoma, et al.:

- The lower court correctly used the rational basis test in deciding this case.
- The Twenty-first Amendment gives the states wide latitude in regulating alcohol.
- The statistics clearly show that males under twenty-one are responsible for a disproportionately large share of alcohol-related offenses.
- The state’s interest in preventing slaughter and property damage on the highways is sufficient to justify the statute.

**MR. JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.**

Analysis may appropriately begin with the reminder that *Reed v. Reed*, (1971) emphasized that statutory classifications that distinguish between males and females are subject to scrutiny under the Equal Protection Clause. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed*, the objectives of “reducing the workload on probate courts” and “avoiding intrafamily controversy” were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents’ estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. . . .

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

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

The District Court recognized that Reed v. Reed was controlling. In applying the teachings of that case, the court found the requisite important governmental objective in the traffic-safety goal proffered by the Oklahoma Attorney General. It then concluded that the statistics introduced by the appellees established that the gender-based distinction was substantially related to achievement of that goal.

. . . . Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees’ statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. First, an analysis of arrest statistics for 1973 demonstrated that 18-20-year-old male arrests for “driving under the influence” and “drunkenness” substantially exceeded female arrests for that same age period. Similarly, youths aged 17-21 were found to be overrepresented among those killed or injured in traffic accidents, with males again numerically exceeding females in this regard. Third, a random roadside survey in Oklahoma City revealed that young males were more inclined to drive and drink beer than were their female counterparts. Fourth, Federal Bureau of Investigation nationwide statistics exhibited a notable increase in arrests for “driving under the influence.” Finally, statistical evidence gathered in other jurisdictions, particularly Minnesota and Michigan, was offered to corroborate Oklahoma’s experience by indicating the pervasiveness of youthful participation in motor vehicle accidents following the imbibing of alcohol. . . .

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18-20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form
the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous “fit.” Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious methodological problems, the surveys do not adequately justify the salient features of Oklahoma’s gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be “nonintoxicating.” Moreover, many of the studies, while graphically documenting the unfortunate increase in driving while under the influence of alcohol, make no effort to relate their findings to age-sex differentials as involved here. Indeed, the only survey that explicitly centered its attention upon young drivers and their use of beer—albeit apparently not of the diluted 3.2% variety—reached results that hardly can be viewed as impressive in justifying either a gender or age classification.

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

We hold, therefore, that under Reed, Oklahoma’s 3.2% beer statute invidiously discriminates against males 18–20 years of age.

**MR. JUSTICE REHNQUIST, dissenting.**

The Court’s disposition of this case is objectionable on two grounds. First is its conclusion that men challenging a gender-based statute which treats them less favorably than women may invoke a more stringent standard of judicial review than pertains to most other types of classifications. Second is the Court’s enunciation of this standard, without citation to any source, as being that “classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives” (emphasis added). The only redeeming feature of the Court’s opinion, to my mind, is that it apparently signals a retreat by those who joined the plurality opinion in *Frontiero v. Richardson* (1973) from their view that sex is a “suspect” classification for purposes of equal protection analysis. I think the Oklahoma statute challenged here need pass only the “rational basis” equal protection analysis expounded in cases such as *McGowan v. Maryland* (1961) and *Williamson v. Lee Optical Co.* (1965), and I believe that it is constitutional under that analysis.

In *Frontiero v. Richardson*, the opinion for the plurality sets forth the reasons of four Justices for concluding that sex should be regarded as a suspect classification for purposes of equal protection analysis. These reasons center on our Nation’s “long and unfortunate history of sex discrimination,” which has been reflected in a whole range of restrictions on the legal rights of women, not the least of which have concerned the ownership of property and participation in the electoral process. Noting that the pervasive and persistent nature of the discrimination experienced by women is in part the result of their ready identifiability, the plurality rested its invocation of strict scrutiny largely upon the fact that “statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”

Subsequent to *Frontiero*, the Court has declined to hold that sex is a suspect class, and no such holding is imported by the Court’s resolution of this case. However, the Court’s application here of an elevated or “intermediate” level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard.

Most obviously unavailable to support any kind of special scrutiny in this case, is a history or pattern of past
discrimination, such as was relied on by the plurality in
*Frontiero* to support its invocation of strict scrutiny. There
is no suggestion in the Court’s opinion that males in this
age group are in any way peculiarly disadvantaged, sub-
ject to systematic discriminatory treatment, or otherwise
in need of special solicitude from the courts.

The Court does not discuss the nature of the right
involved, and there is no reason to believe that it sees
the purchase of 3.2% beer as implicating any important
interest, let alone one that is “fundamental” in the con-
stitutional sense of invoking strict scrutiny. Indeed, the
Court’s accurate observation that the statute affects the
selling but not the drinking of 3.2% beer further empha-
sizes the limited effect that it has on even those persons
in the age group involved. There is, in sum, nothing about
the statutory classification involved here to suggest that
it affects an interest, or works against a group, which can
claim under the Equal Protection Clause that it is entitled
to special judicial protection.

It is true that a number of our opinions contain broadly
phrased dicta implying that the same test should be
applied to all classifications based on sex, whether affect-
ing females or males. However, before today, no decision of
this Court has applied an elevated level of scrutiny to invali-
date a statutory discrimination harmful to males, except
where the statute impaired an important personal interest
protected by the Constitution. There being no such interest
here, and there being no plausible argument that this is a
discrimination against females, the Court’s reliance on our
previous sex-discrimination cases is ill-founded. It treats
gender classification as a talisman which—without regard
to the rights involved or the persons affected—calls into
effect a heavier burden of judicial review.

The Court’s conclusion that a law which treats males
less favorably than females “must serve important gov-
ernmental objectives and must be substantially related to
achievement of those objectives” apparently comes out of
thin air. The Equal Protection Clause contains no such lan-
guage, and none of our previous cases adopt that standard.
I would think we have had enough difficulty with the two
standards of review which our cases have recognized—the
norm of “rational basis,” and the “compelling state inter-
est” required where a “suspect classification” is involved—
so as to counsel weightily against the insertion of still
another “standard” between those two. How is this Court
to divine what objectives are important? How is it to deter-
mine whether a particular law is “substantially” related to
the achievement of such objective, rather than related in

some other way to its achievement? Both of the phrases
used are so diaphanous and elastic as to invite subjective
judicial preferences or prejudices relating to particular
types of legislation, masquerading as judgments whether
such legislation is directed at “important” objectives or,
whether the relationship to those objectives is “substan-
tial” enough.

I would have thought that if this Court were to leave
anything to decision by the popularly elected branches of
the Government, where no constitutional claim other than
that of equal protection is invoked, it would be the deci-
sion as to what governmental objectives to be achieved by
law are “important,” and which are not. As for the second
part of the Court’s new test, the Judicial Branch is prob-
ably in no worse position than the Legislative or Executive
Branches to determine if there is any rational relationship
between a classification and the purpose which it might be
thought to serve. But the introduction of the adverb “sub-
stantially” requires courts to make subjective judgments
as to operational effects, for which neither their expertise
nor their access to data fits them. And even if we man-
age to avoid both confusion and the mirroring of our own
preferences in the development of this new doctrine, the
thousands of judges in other courts who must interpret the
Equal Protection Clause may not be so fortunate.

The Court’s ruling in *Craig v. Boren* had little impact
on the parties to the case (see Box 13-4), but the decision
fundamentally changed sex discrimination law. The inter-
mediate scrutiny test—requiring that laws that classify on
the basis of sex be substantially related to an important
government objective—was adopted by a narrow margin.
Nevertheless, *Craig v. Boren* established the elevated level
of scrutiny standard that has been used in sex discrimina-
tion cases ever since. The battle between strict scrutiny
advocates and rational basis proponents ended with nei-
ther side able to claim a total victory.

### The Court’s Application of Intermediate Scrutiny

Unlike the rational basis test and the suspect class stan-
dard, intermediate scrutiny presumes neither the con-
stitutional validity nor the constitutional invalidity of
a challenged statute. It should not be surprising, there-
fore, that when applying this standard the Court some-
times voids sex-based classifications and occasionally
upholds them. In the following pages, we consider cases
that show these different results. Are there common
On January 12, 1976, the Supreme Court announced that it had accepted the case of Craig v. Boren for full consideration later that year. The news naturally excited Mark Walker, the former Oklahoma State University student who initiated the legal action after becoming upset that a twenty-year-old male could be drafted and sent to war but could not buy a beer in Oklahoma. He eagerly awaited the oral arguments scheduled for October.

Tragically, however, Walker did not live to see the arguments or experience victory when the Supreme Court issued a ruling in his favor. On May 8, 1976, Mark Walker died in an auto accident. He was driving outside Stillwater when in the opposite lane one car was struck by another, causing the first vehicle to cross the median and crash head-on into the car driven by Walker.

Carolyn Whitener, the beer vendor who joined Walker’s lawsuit challenging the constitutionality of the Oklahoma law, was owner of the Honk-N-Holler convenience store on Sixth and Knoeblock Streets in Stillwater. At one time, together with her husband, she owned eleven such stores. Later the Whiteners sold the stores and went into the computer equipment business. Because of her role in the Craig case, Whitener was inducted into the Oklahoma Women’s Hall of Fame in 2009 for her contributions to sexual equality.

Curtis Craig, Mark Walker’s college friend who became the lead litigant when Walker turned twenty-one and was no longer affected by the challenged law, graduated with a B.S. degree from Oklahoma State University. He later received his law degree from the University of Tulsa. Craig subsequently had a long career as vice president and general counsel for the Tulsa-based Explorer Pipeline Company.

David Boren, who defended the state law against the constitutional challenge, was governor of Oklahoma from 1975 to 1979. In 1978, he won election to the U.S. Senate; he was reelected in 1984 and again in 1990, when he captured 83 percent of the vote. He stepped down from his Senate seat in 1994 to assume the presidency of the University of Oklahoma, a position he held until his retirement on June 30, 2018.

views on laws that classify according to sex. She started her majority opinion by reiterating the Court’s approach to sex discrimination:

We begin our analysis aided by several firmly established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Reed v. Reed (1971). That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review. Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an “exceedingly persuasive justification” for the classification. The burden is met only by showing at least that the classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or “protect” members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.

O’Connor then firmly asserted that the Mississippi program was repugnant to the Fourteenth Amendment because of its presumptions of the inferiority of women:

Rather than compensate for discriminatory barriers faced by women, MUW’s policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job. By assuring that Mississippi allows more openings in its state-supported nursing schools to women than it does to men, MUW’s admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. Thus, we conclude that, although the State recited a “benign, compensatory purpose,” it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.

The dissenting justices, through an opinion by Justice Powell, took issue with O’Connor’s analysis. They suggested that the majority imposed an unwise uniformity and deprived women of educational choices and alternatives:

The Court’s opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women’s college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.

Despite these words, the Mississippi University for Women decision seemed to settle the matter of government-operated single-sex schools—they violate the Constitution. By the time of the decision, most single-sex public colleges, including the U.S. military academies, had initiated coeducational admissions policies. However, state schools in Virginia (Virginia Military Institute, or VMI) and South Carolina (The Citadel) resolutely resisted compliance with the decision. Both VMI and The Citadel had long traditions of offering a military-style education to all-male student bodies. When female applicants sued the schools claiming a violation of the Constitution and federal law, the institutions responded with a spirited legal defense of their traditions. They asserted that their military nature
distinguished them from other colleges and universities and that introducing coeducational instruction would require changes that would alter the nature of the schools. When the case involving VMI reached the Supreme Court, the Clinton Justice Department asked the Court to abandon the use of intermediate scrutiny and adopt the suspect class test as the appropriate standard for use in sex discrimination cases.

**United States v. Virginia**

518 U.S. 515 (1996)


Vote: 7 (Breyer, Ginsburg, Kennedy, O'Connor, Rehnquist, Souter, Stevens)

1 (Scalia)

**OPINION OF THE COURT:** Ginsburg

**CONCURRING OPINION:** Rehnquist

**DISSENTING OPINION:** Scalia

**NOT PARTICIPATING:** Thomas

**FACTS:**

Virginia Military Institute, founded in 1839, was the only one among Virginia’s fifteen state-supported institutions of higher learning with a single-sex admissions policy. VMI’s distinctive mission was to produce “citizen-soldiers”—men prepared to take leadership positions in military and civilian life. VMI trained its 1,300 cadets through an “adversative” model of education that emphasized physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values. The cadets lived in spartan barracks where surveillance was constant and privacy nonexistent. They were required to wear military uniforms, eat together in the mess hall, and participate in military drills. The school imposed a hierarchical class system, with freshmen, known as “rats,” accorded the lowest status.

In 1990, in response to a letter of complaint from a female high school student, the United States sued the Commonwealth of Virginia and VMI, alleging that VMI’s men-only admissions policy violated the equal protection clause of the Fourteenth Amendment. The district court ruled in favor of the state, concluding that single-sex education yielded substantial benefits and that having a single-sex institution added diversity of opportunity to the range of educational options offered by Virginia. The court of appeals reversed, holding that the state could not justify offering a unique educational opportunity to men but not to women.

In response, the state created the Virginia Women's Institute for Leadership (VWIL) to operate as a parallel program for women. VWIL was located on the campus of Mary Baldwin College, a private women's college a short distance from the VMI campus. This new state-supported program was designed to provide an education that would train female “citizen-soldiers” to take leadership positions in American society, but many acknowledged that the funding, facilities, and academic programs at VWIL were inferior to the resources at VMI.

Once VWIL was established, Virginia returned to the district court for judicial approval of the continuation of the all-male VMI admissions policy. The district court supported the state’s position, and the court of appeals generally affirmed by a divided vote. The United States and Virginia asked the U.S. Supreme Court to review various aspects of the case. The United States argued that VWIL was an insufficient remedy to compensate for VMI’s violation of the equal protection clause. The state countered that removing the single-sex nature of VMI would destroy the institution. Justice Clarence Thomas, whose son, Jamal, was attending VMI when the Court heard this appeal, did not participate in the decision.

**ARGUMENTS:**

*For the petitioner, United States:*

- **Mississippi University for Women v. Hogan** (1982) held that a state violates the equal protection clause of the Fourteenth Amendment when it denies admission to an institution of higher education on the basis of sex unless it has an “exceedingly persuasive justification” for doing so.

- Sex discrimination should be evaluated by a strict scrutiny standard.

- Establishing the women-only leadership program at Mary Baldwin College is an unsatisfactory and unconstitutional response. Eliminating the males-only admissions policy is the only adequate remedy.

- The state has failed to prove that admitting women to VMI would destroy the educational mission of the institution.

*For the respondent, Commonwealth of Virginia:*

- A primarily coeducational state higher education system with single-sex alternatives for both men and women does not violate the equal protection clause. Single-sex educational settings provide benefits to some students that cannot be attained in a coeducational environment.
• Coeducation at VMI would destroy important elements of its adversative system, thereby eliminating diversity while offering no educational opportunity to women that is not already available elsewhere.

• The VWIL program fully remedies any constitutional violation that may have existed as a result of VMI’s single-sex admissions policy. Differences between VWIL and VMI are pedagogically justified and not based on archaic stereotypes.

• Intermediate scrutiny is now an established standard for use in sex discrimination cases and should not be abandoned.

JUSTICE GINSBURG DELIVERED THE OPINION OF THE COURT.

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

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. See Loving v. Virginia (1967). Physical differences between men and women, however, are enduring: “[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.” Ballard v. United States (1946).

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. . . . Such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Measuring the record in this case against the review standard just described, we conclude that Virginia has shown no “exceedingly persuasive justification” for excluding all women from the citizen-soldier training afforded by VMI. We therefore affirm the Fourth Circuit’s initial judgment, which held that Virginia had violated the Fourteenth Amendment’s Equal Protection Clause. Because the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, i.e., it does not provide equal opportunity, we reverse the Fourth Circuit’s final judgment in this case.

The Fourth Circuit initially held that Virginia had advanced no state policy by which it could justify, under equal protection principles, its determination “to afford VMI’s unique type of program to men and not to women.” Virginia challenges that “liability” ruling and asserts two justifications in defense of VMI’s exclusion of women. First, the Commonwealth contends, “single-sex education provides important educational benefits” and the option of single-sex education contributes to “diversity in educational approaches.” Second, the Commonwealth argues, “the unique VMI method of character development and leadership training,” the school’s adversative approach, would have to be modified were VMI to admit women. We consider these two justifications in turn.

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

Mississippi Univ. for Women v. Hogan (1982)) is immediately in point. There the State asserted, in justification of its exclusion of men from a nursing school, that it was engaging in “educational affirmative action” by “compensat[ing] for discrimination against women.” Undertaking a “searching analysis,” the Court found no close resemblance between “the alleged objective” and “the actual purpose underlying the discriminatory classification.” Pursuing a similar inquiry here, we reach the same conclusion. . . .

We find no persuasive evidence in this record that VMI’s male-only admission policy “is in furtherance of a state policy of ‘diversity.’” No such policy, the Fourth Circuit observed, can be discerned from the movement of all other public colleges and universities in Virginia away from single-sex education. That court also questioned “how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions.” A purpose genuinely
to advance an array of educational options, as the Court of Appeals recognized, is not served by VMI’s historic and constant plan—a plan to “afford[d] a unique educational benefit only to males.” However “liberally” this plan serves the State’s sons, it makes no provision whatever for her daughters. That is not equal protection.

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

The District Court forecast from expert witness testimony, and the Court of Appeals accepted, that coeducation would materially affect “at least these three aspects of VMI’s program—physical training, the absence of privacy, and the adversative approach.” And it is uncontested that women’s admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that “the VMI methodology could be used to educate women.” The District Court even allowed that some women may prefer it to the methodology a women’s college might pursue. “[S]ome women, at least, would want to attend [VMI] if they had the opportunity,” the District Court recognized, and “some women,” the expert testimony established, “are capable of all of the individual activities required of VMI cadets.” The parties, furthermore, agree that “some women can meet the physical standards [VMI] now impose[s] on men.” In sum, as the Court of Appeals stated, “neither the goal of producing citizen soldiers,” VMI’s raison d’être, “nor VMI’s implementing methodology is inherently unsuitable to women” . . .

The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again since this Court’s turning point decision in Reed v. Reed (1971), we have cautioned reviewing courts to take a “hard look” at generalizations or “tendencies” of the kind pressed by Virginia, and relied upon by the District Court. State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on “fixed notions concerning the roles and abilities of males and females.” Mississippi Univ. for Women; J.E.B. v. Alabama ex rel. T.B. (1994), . . .

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

In the second phase of the litigation, Virginia presented its remedial plan—maintain VMI as a male-only college and create VWIL as a separate program for women. . . .

A remedial decree, this Court has said, must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in “the position they would have occupied in the absence of [discrimination].” See Milliken v. Bradley (1977). The constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men. A proper remedy for an unconstitutional exclusion, we have explained, aims to “eliminate [so far as possible] the discriminatory effects of the past” and to “bar like discrimination in the future.” Louisiana v. United States (1965).

Virginia chose not to eliminate, but to leave untouched, VMI’s exclusionary policy. For women only, however, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities. Having violated the Constitution’s equal protection requirement, Virginia was obliged to show that its remedial proposal “directly address[ed] and relate[d] to” the violation, i.e., the equal protection denied to women ready, willing, and able to benefit from educational opportunities of the kind VMI offers. Virginia described VWIL as a “parallel program,” and asserted that VWIL shares VMI’s mission of producing “citizen-soldiers” and VMI’s goals of providing “education, military training, mental and physical discipline, character . . . and leadership development.” If the VWIL program could not “eliminate the discriminatory effects of the past,” could it at least “bar like discrimination in the future”? A comparison of the programs said to be “parallel” informs our answer. . . .

VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. . . .

VWIL students participate in ROTC and a “largely ceremonial” Virginia Corps of Cadets, but Virginia deliberately
did not make VWIL a military institute. The VWIL House is not a military-style residence and VWIL students need not live together throughout the 4-year program, eat meals together, or wear uniforms during the school day. VWIL students thus do not experience the “barracks” life “crucial to the VMI experience,” the spartan living arrangements designed to foster an “egalitarian ethic.” “[T]he most important aspects of the VMI educational experience occur in the barracks,” the District Court found, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their “leadership training” in seminars, externships, and speaker series, and encounters lacking the “[p]hysical rigor, mental stress, . . . minute regulation of behavior, and indoctrination in desirable values” made hallmarks of VMI’s citizen-soldier training.

In myriad respects other than military training, VWIL does not qualify as VMI’s equal. VWIL’s student body, faculty, course offerings, and facilities hardly match VMI’s. Nor can the VWIL graduate anticipate the benefits associated with VMI’s 157-year history, the school’s prestige, and its influential alumni network.

Mary Baldwin College, whose degree VWIL students will gain, enrolls first-year women with an average combined SAT score about 100 points lower than the average score for VMI freshmen. The Mary Baldwin faculty holds “significantly fewer Ph.D.’s,” and receives substantially lower salaries than the faculty at VMI.

Mary Baldwin does not offer a VWIL student the range of curricular choices available to a VMI cadet.

Although Virginia has represented that it will provide equal financial support for in-state VWIL students and VMI cadets, and the VMI Foundation has agreed to endow VWIL with $5.4625 million, the difference between the two schools’ financial reserves is pronounced. Mary Baldwin’s endowment, currently about $19 million, will gain an additional $35 million based on future commitments; VMI’s current endowment, $131 million—the largest per-student endowment in the Nation—will gain $220 million.

The VWIL student does not graduate with the advantage of a VMI degree. Her diploma does not unite her with the precedents of this Court, and ignores the history of Virginia, in sum, while maintaining VMI for men only, has failed to provide any “comparable single-gender women’s institution.” Instead, the Commonwealth has created a VWIL program fairly appraised as a “pale shadow” of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence.

. . . [W]e rule here that Virginia has not shown substantial equality in the separate educational opportunities the State supports at VWIL and VMI.

. . . Women seeking and fit for a VMI-quality education cannot be offered anything less, under the State’s obligation to afford them genuinely equal protection.

For the reasons stated, the initial judgment of the Court of Appeals is affirmed, the final judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Reversed and remanded.

CHIEF JUSTICE REHNQUIST, concurring in judgment.

Two decades ago in Craig v. Boren (1976), we announced that “[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” We have adhered to that standard of scrutiny ever since. While the majority adheres to this test today, it also says that the State must demonstrate an “exceedingly persuasive justification” to support a gender-based classification. It is unfortunate that the Court thereby introduces an element of uncertainty respecting the appropriate test.

While terms like “important governmental objective” and “substantially related” are hardly models of precision, they have more content and specificity than does the phrase “exceedingly persuasive justification.” That phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself. To avoid introducing potential confusion, I would have adhered more closely to our traditional, “firmly established” standard that a gender-based classification “must bear a close and substantial relationship to important governmental objectives.”

JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of
our people. As to facts: it explicitly rejects the finding that there exist “gender-based developmental differences” supporting Virginia’s restriction of the “adversative” method to only a men’s institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution’s character. As to precedent: it drastically revises our established standards for reviewing sex-based classifications. And as to history: it counts for nothing the long tradition, enduring down to the present, of men’s military colleges supported by both States and the Federal Government.

Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. So to counterbalance the Court’s criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the countermajoritarian preferences of the society’s law-trained elite) into our Basic Law. Today it enshrines the notion that no substantial educational value is to be served by an all-men’s military academy—so that the decision by the people of Virginia to maintain such an institution denies equal protection to women who cannot attend that institution but can attend others. Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.

To reject the Court’s disposition today, however, it is not necessary to accept my view that the Court’s made-up tests cannot displace long-standing national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as JUSTICE O’CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies “between th[e] extremes of rational basis review and
strict scrutiny.” Clark v. Jeter (1988). We have denominated this standard “intermediate scrutiny” and under it have inquired whether the statutory classification is “substantially related to an important governmental objective.” . . .

Although the Court in two places recites the test as stated in [Mississippi University for Women v.] Hogan [1982], which asks whether the State has demonstrated “that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives,” the Court never answers the question presented in anything resembling that form. When it engages in analysis, the Court instead prefers the phrase “exceedingly persuasive justification” from Hogan. The Court’s nine invocations of that phrase and even its fanciful description of that imponderable as “the core instruction” of the Court’s decisions in J.E.B. v. Alabama ex rel. T.B. (1994) and Hogan would be unobjectionable if the Court acknowledged that whether a “justification” is “exceedingly persuasive” must be assessed by asking “[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.” Instead, however, the Court proceeds to interpret “exceedingly persuasive justification” in a fashion that contradicts the reasoning of Hogan and our other precedents. . . .

Justice Brandeis said it is “one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann (1938) (dissenting opinion). But it is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members’ personal view of what would make a “more perfect Union,” (a criterion only slightly more restrictive than a “more perfect world”), can impose its own favored social and economic dispositions nationwide. As today’s disposition, and others, this single Term, show, this places it beyond the power of a “single courageous State,” not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. See, e.g., Romer v. Evans (1995). The sphere of self-government reserved to the people of the Republic is progressively narrowed.

Although the Court struck down VMI’s single-sex admissions policy, the justices still did not adopt the strict scrutiny standard for sex discrimination cases. Officially, they remained wedded to the intermediate scrutiny standard. Both the concurring and dissenting opinions criticized the majority for injecting the “exceedingly persuasive justification” element into the intermediate scrutiny test, even though the requirement was not new. Justice Stewart had used it in Personnel Administrator of Massachusetts v. Feeney (1979), as had Justice Marshall in Kirchberg v. Feenstra (1981) and Justice O’Connor in Mississippi University for Women v. Hogan. In the VMI case, however, Ginsburg made a more pointed effort to cement this element into the Court’s sex discrimination jurisprudence. And she may well have succeeded. In Sessions, Attorney General v. Morales-Santana (2017), involving a gender-based distinction in the Immigration and Nationality Act, Justice Ginsburg’s majority opinion reiterated the now-standard test (that the challenged classification serves important governmental objectives and it is substantially related to the achievement of those objectives). But Ginsburg also mentioned several times that the government must supply an “exceedingly persuasive justification” when laws differentiate on the basis of gender. In this case, the government had not supplied one, and the Court struck down the classification, as it had in United States v. Virginia. But this time not one justice challenged Ginsburg’s use of the “exceedingly persuasive justification” language.

United States v. Virginia also serves as an example of the obstacles those who must implement Supreme Court rulings may face. The case was a bitter defeat for VMI and The Citadel, which had spent millions of dollars defending their all-male policies and now had to spend additional funds to accommodate women. Nor did the first women cadets have an easy time. Of the four women who initially enrolled in The Citadel, two dropped out after alleging that they were assaulted, hazed, and sexually harassed. Several male cadets accused of the hazing resigned, and others were disciplined.

Both schools acted to remedy the problems of assimilating women into their environments. Some progress has been made, yet today less than 12 percent of these institutions’ matriculated students are women. The events surrounding the transition of these previously all-male
colleges to coeducational institutions clearly show the limitations of formal Court decisions. Simply because the justices render a decision does not mean that barriers between the sexes—just like those between the races—will fall overnight.

**Gender-Based Classifications the Court Has Upheld.** The cases in the previous section suggest that the Court, in applying the heightened scrutiny standard, has been unwilling to tolerate government actions that are based on outdated stereotypes. On the whole, that is true. Data show that in the years since Reed, the justices have ruled in favor of the sex discrimination claim in more than half their cases.

There is at least one category of litigation, however, in which the Court has been less willing to strike down sex-based laws: cases involving physical differences between men and women.21 In contrast to the “easy” cases you just read, these are “difficult” because they are based on actual differences rather than on outdated stereotypes. The difficult cases raise a fundamental problem for the Court, which is that in all discrimination cases (regardless of what standard of scrutiny courts impose), claims of unequal treatment must be based only on comparisons of persons “similarly situated.” For some purposes, men and women are not similarly situated because of the real and immutable physical differences between them. The most obvious of these differences lies in the role each sex plays in human reproduction. Only women can become pregnant, and the Constitution does not require that such an essential difference be ignored in the law.

To illustrate, consider Michael M. v. Superior Court of Sonoma County (1981). This case had its origins in June 1978, when Michael M., a seventeen-year-old boy, and two friends approached Sharon, who was sixteen, and her sister at a bus stop. It was around midnight and both Michael and Sharon had been drinking. During the course of their encounter, Michael and Sharon split off from the others. First they went into some bushes, where they hugged and kissed. Later, after Sharon’s sister had left, Sharon and Michael walked to a nearby park, laid down on a bench, and continued kissing. Michael tried to convince Sharon to remove her clothes and have sexual relations. When Sharon refused, Michael hit her in the face. Then, in Sharon’s words, “I let him do what he wanted to do.”

Michael M. was charged with a violation of Section 261.5 of the California penal code, which prohibits “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.” This statutory rape law makes males alone criminally liable for the act of sexual intercourse. Michael M. moved to have the criminal prosecution dropped on the grounds that Section 261.5 invidiously discriminates on the basis of sex and therefore violates the equal protection clause.

The Supreme Court upheld the law. Writing for the plurality, Justice Rehnquist explained why penalizing men but not women was constitutionally permissible. The sexes are not always similarly situated, he wrote, and the Constitution does not require that things that are different in fact to be treated as if they were the same. The state can recognize in its policies that only women can become pregnant. Furthermore, the state has a strong interest in preventing illegitimate pregnancies among teenage girls. The state’s law is substantially related to this interest. A state, therefore, may attack the problem of teenage pregnancy directly by prohibiting a male from having sexual intercourse with a minor female.

In some cases the justices have also permitted nonproductive physical differences to be taken into account. A good example is the military draft case Rostker v. Goldberg (1981). Because historically wars have centered on physical combat, males have had the primary responsibility and opportunity to serve in the armed forces. Physical differences between men and women led to this custom, which has been reinforced by the way society views sex roles.

The federal legislation challenged in this case continued the policy of distinguishing men and women with respect to military service. The case also involved Congress’s constitutional power to raise and regulate the armed forces. Traditionally, when the legislature has acted under this authority, the Court has accorded it great deference.

Rostker involved an attack on the federal Selective Service Act. The law authorizes the president of the United States to require every male citizen and resident alien between the ages of eighteen and twenty-six to register for the draft. In 1971 a lawsuit was filed challenging the constitutionality of the law. The suit became dormant, however, when the draft registration requirement was suspended in 1975. Circumstances changed in 1980 with the Soviet invasion of Afghanistan. To ensure military preparedness, President Jimmy Carter reactivated the registration program. At the same time, he asked Congress to amend the law to require females as well as males to register. Congress refused and appropriated only enough money to administer the registration of males.

The long-dormant suit was reactivated. On July 18, 1980, just three days before registration was to begin, a federal district court declared the law unconstitutional because its single-sex provisions violated the due process clause of the Fifth Amendment. Bernard Rostker, the

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director of the Selective Service, appealed the decision to the Supreme Court.

The justices upheld the registration law. Writing for a six-justice majority, Justice Rehnquist explained that the exclusion of women from the draft was not a product of traditional female stereotypes. Rather, the question was studied and debated extensively in Congress. In the end, the legislature concluded that the purpose of the draft was to raise combat troops. Since women were not eligible for direct combat duty, there was little reason to include them in the draft process. The Court deferred to the judgment of Congress. If women were not to be used in combat, they were not similarly circumstanced with men with respect to raising combat troops. The male-only registration program therefore was substantially related to the important government interest in raising soldiers for combat duty. Intermediate scrutiny requirements were satisfied.

Much has changed with respect to the role of women in the military since the Rostker decision was handed down. Women now represent 15–20 percent of all U.S. military forces, a far cry from the years before 1967, when the number of women was capped at 2 percent of the total. The percentage of women serving in reserve and National Guard units is even higher. Women now fly combat missions, serve as military police, and drive convoy protection vehicles. They qualify for all positions in the armed services—including all front-line combat roles. Women have constituted about 12 percent of the troops serving in the recent conflicts in Afghanistan and Iraq and have accounted for approximately 2 percent of the war-related fatalities. Given these changes, do you think the ruling in Rostker would be the same if the case were heard today?

DISCRIMINATION BASED ON SEXUAL ORIENTATION

Along with issues of race and gender, discrimination based on sexual orientation has been a subject of public controversy and legal dispute over the past several decades. Until the Supreme Court struck it down in United States v. Windsor (2013), a section of the 1996 Defense of Marriage Act denied federal recognition of same-sex marriages even for couples living in states that recognized such unions. That same federal statute permitted the states to refuse to recognize same-sex marriages legally performed in other states. Also in 1996, Congress refused to extend the remedies of the 1964 Civil Rights Act that would have prohibited job discrimination based on sexual orientation. These actions reflected public opinion at the time. In 1996, nearly two-thirds of Americans thought that sexual relations between two adults of the same sex was always or almost always wrong,22 and only 27 percent believed that same-sex marriages should be recognized as valid.23

What about the Supreme Court? For years the justices avoided the issue in spite of efforts by gay rights groups to promote the expansion of legal protections for homosexuals. When the Court finally did decide a gay rights case, Bowers v. Hardwick (1986), it upheld laws against sodomy, as we mentioned in Chapter 9.

In the years since Bowers, though, the Court has grown increasingly hostile to laws that classify or otherwise burden on the basis of sexual orientation. Table 13-3 highlights this point by identifying the major gay rights disputes, beginning with Bowers and ending with Obergefell v. Hodges (2015), in which the Court invalidated state bans on same-sex marriage. Recall from Chapter 9, though, that in Obergefell (as well as in Lawrence and even Windsor), Justice Kennedy rested his majority opinion primarily on the due process clause, not on the equal protection clause.

As a result (and despite the importance of Obergefell), Romer v. Evans remains the Court’s most significant interpretation of the equal protection clause as it applies to classifications based on sexual orientation. Note that the Court applied rational basis scrutiny to determine whether Colorado’s constitutional amendment amounted to unconstitutional discrimination, just as it did in Cleburne. And, as in Cleburne, the majority invalidated the classification. Why?

Romer v. Evans

517 U.S. 620 (1996)
Vote: 6 (Breyer, Ginsburg, Kennedy, O’Connor, Souter, Stevens)
3 (Rehnquist, Scalia, Thomas)

OPINION OF THE COURT: Kennedy
Dissenting Opinion: Scalia

FACTS:

This case involved a challenge to an amendment to the Colorado state constitution, which had been adopted by statewide initiative. The initiative arose in response to

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<th>Case</th>
<th>Outcome</th>
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<td><em>Bowers v. Hardwick</em> (1986). Georgia law that prohibited oral or anal sex challenged on the grounds that it violated the fundamental right to privacy embraced by the Fourteenth Amendment’s due process clause.</td>
<td>5 (Burger, O’Connor, Powell, Rehnquist, White) to 4 (Blackmun, Brennan, Marshall, Stevens) to uphold the law. The majority held that consensual homosexual sodomy is not a fundamental right under the Fourteenth Amendment due process clause. Applying rational basis, the majority found that the state has a legitimate interest in morality.</td>
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<td><em>Romer v. Evans</em> (1996). Amendment to the Colorado state constitution that limited cities from enacting antidiscrimination ordinances based on sexual orientation challenged as violating the Fourteenth Amendment’s equal protection clause.</td>
<td>6 (Breyer, Ginsburg, Kennedy, O’Connor, Souter, Stevens) to 3 (Rehnquist, Scalia, Thomas) to invalidate the amendment. The majority, applying rational basis scrutiny, found no legitimate justification for singling out sexual orientation for political disability and so inferred animus as a motivating factor.</td>
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<td><em>Lawrence v. Texas</em> (2003). Texas law that made it a crime for two persons of the same sex to engage in sodomy challenged as a violation of the due process and equal protection clauses.</td>
<td>6 (Breyer, Ginsburg, Kennedy, O’Connor, Souter, Stevens) to 3 (Rehnquist, Scalia, Thomas) to invalidate the law. In overruling <em>Bowers</em>, the majority found that the state’s moral justification for the law was insufficient to overcome the individual’s protected liberty interest in privacy and dignity.</td>
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<td><em>Hollingsworth v. Perry</em> (2013). Amendment to the California constitution banning same-sex marriages challenged as a violation of due process and equal protection clauses.</td>
<td>5 (Breyer, Ginsburg, Kagan, Roberts, Scalia) to 4 (Alito, Kennedy, Sotomayor, Thomas) to invalidate the law because the government had not supported it with any legitimate reason.</td>
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<td><em>United States v. Windsor</em> (2013). Federal Defense of Marriage Act (DOMA), which defined marriage as a legally recognized relationship between one man and one woman for purposes of the more than one thousand federal laws that address marital or spousal status, challenged as a violation of the Fifth Amendment due process clause.</td>
<td>5 (Breyer, Ginsburg, Kagan, Kennedy, Sotomayor) to 4 (Alito, Roberts, Scalia, Thomas) to strike the law because the government had not supported it with any legitimate reason.</td>
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<td><em>Obergefell v. Hodges</em> (2015). Ohio’s ban on same-sex marriage challenged as violating the equal protection and due process clauses of the Fourteenth Amendment.</td>
<td>5 (Breyer, Ginsburg, Kagan, Kennedy, Sotomayor) to 4 (Alito, Roberts, Scalia, Thomas) to invalidate the law, primarily as a denial of the dignity, personal choice, and autonomy interests protected by the due process clause.</td>
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<td><em>Pavan v. Smith</em> (2017). Arkansas law mandating that when a married woman gives birth, her husband must be listed as the second parent on the child’s birth certificate (even if he’s not the child’s genetic parent because the child was conceived by artificial insemination) interpreted by the state supreme court not to apply to married same-sex couples. Challenged as a violation of the Fourteenth Amendment.</td>
<td>Per curiam. 6 (Breyer, Ginsburg, Kagan, Kennedy, Sotomayor, Roberts) to 3 (Alito, Gorsuch, Thomas) to reverse the state supreme court “because [the] differential treatment infringes Obergefell’s commitment to provide same-sex couples ‘the constellation of benefits that the States have linked to marriage.’”</td>
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*Note:* The majority opinion writer is in boldface.
local laws passed by communities such as Boulder, Aspen, and Denver making sexual orientation an impermissible ground upon which to discriminate. In effect, the local laws gave sexual orientation the same status as race, sex, and other protected categories. To reverse this trend and remove the possibility of future legislation, a sufficient number of citizens signed a petition to place a proposed constitutional amendment on the ballot for the November 1992 elections. Known as Amendment 2, it passed with the support of 53.4 percent of those voting. The amendment stated:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Almost immediately Richard G. Evans, a gay employee in the office of the mayor of Denver, other citizens, and several Colorado local governments sued Governor Roy Romer and the state of Colorado, claiming that the new amendment was in violation of the Fourteenth Amendment’s equal protection clause. The amendment, they contended, prohibited gays from using the political process to secure legal protections against discrimination. The Colorado Supreme Court, 6–1, struck down the amendment, and the state appealed to the U.S. Supreme Court.

**ARGUMENTS:**

*For the petitioners, Roy Romer, Governor, and the State of Colorado:*

- Federal courts have uniformly rejected the claim that sexual orientation is a suspect or semi-suspect classification. Therefore, rational basis is the appropriate test to use. Thus, Amendment 2 carries a strong presumption of constitutionality.
- Amendment 2 does not infringe on the right to vote or on any other right of political participation. Opponents of Amendment 2 are free to use the same political mechanisms for its repeal (the constitutional amendment process) that amendment supporters used to secure its adoption.
- Amendment 2 advances legitimate state interests (e.g., uniformity of state civil rights laws, promotion of religious liberty, promotion of associational freedoms).
- A state may provide more protections than are required by the U.S. Constitution but may also rescind those extra protections without violating the Constitution.

*For the respondents, Richard G. Evans, et al.:*

- A state law that singles out gay people and intentionally denies them all effective opportunity to seek relief from discrimination through the political process requires heightened scrutiny.
- Amendment 2 prohibits gay people from seeking any relief from any level of government for any claim of discrimination against them.
- The right to equal political access belongs to all the people, not just to members of groups that courts have declared to be a suspect class.
- Amendment 2 advances no legitimate purpose, but can only be explained by antipathy toward a particular group.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

One century ago, the first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson* (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution. . . .

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. . . .

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. Sustaining the interim injunction and remanding the case for further proceedings, the State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment.
because it infringed the fundamental right of gays and lesbians to participate in the political process. . . . On
remand, the State advanced various arguments in an effort
to show that Amendment 2 was narrowly tailored to serve
compelling interests, but the trial court found none suf-
cient. It enjoined enforcement of Amendment 2, and the
Supreme Court of Colorado, in a second opinion, affirmed
the ruling. We granted certiorari and now affirm the judg-
ment, but on a rationale different from that adopted by the
State Supreme Court.

The State’s principal argument in defense of
Amendment 2 is that it puts gays and lesbians in the same
position as all other persons. So, the State says, the mea-
sure does no more than deny homosexuals special rights.
This reading of the amendment’s language is implausible.
We rely not upon our own interpretation of the amend-
ment but upon the authoritative construction of Colorado’s
Supreme Court. The state court, deeming it unnecessary to
determine the full extent of the amendment’s reach, found
it invalid even on a modest reading of its implications. The
critical discussion of the amendment, set out . . . [by the
Colorado Supreme Court], is as follows:

The immediate objective of Amendment 2 is, at a mini-
mum, to repeal existing statutes, regulations, ordinances,
and policies of state and local entities that barred discrimi-
nation based on sexual orientation. . . .

The “ultimate effect” of Amendment 2 is to prohibit
any governmental entity from adopting similar or more
protective statutes, regulations, ordinances, or policies in
the future unless the state constitution is first amended to
permit such measures.

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

The change that Amendment 2 works in the legal sta-
tus of gays and lesbians in the private sphere is far-reach-
ing, both on its own terms and when considered in light of
the structure and operation of modern anti-discrimination
laws. That structure is well illustrated by contemporary
statutes and ordinances prohibiting discrimination by pro-
viders of public accommodations. . . .

Amendment 2 bars homosexuals from securing pro-
tection against the injuries that these public-accommoda-
tions laws address. That in itself is a severe consequence,
but there is more. Amendment 2, in addition, nullifies spe-
cific legal protections for this targeted class in all transac-
tions in housing, sale of real estate, insurance, health and
welfare services, private education, and employment.

Not confined to the private sphere, Amendment 2 also
operates to repeal and forbid all laws or policies providing
specific protection for gays or lesbians from discrimina-
tion by every level of Colorado government. . . . The reach
of these measures and the prohibition against their future
reenactment demonstrates that Amendment 2 has the
same force and effect in Colorado’s governmental sector
as it does elsewhere and that it applies to policies as well
as ordinary legislation.

Amendment 2’s reach may not be limited to specific
laws passed for the benefit of gays and lesbians. It is a
fair, if not necessary, inference from the broad language
of the amendment that it deprives gays and lesbians even
of the protection of general laws and policies that pro-
hibit arbitrary discrimination in governmental and private
settings. . . .

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

The Fourteenth Amendment’s promise that no per-
son shall be denied the equal protection of the laws must
coeexist with the practical necessity that most legislation
classifies for one purpose or another, with resulting disad-
vantage to various groups or persons. We have attempted
to reconcile the principle with the reality by stating that,
if a law neither burdens a fundamental right nor targets a
suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See, e.g., *Heller v. Doe* (1993).

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

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority. In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. . . .

. . . . [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

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

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

*It is so ordered.*

**JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.**

The Court has mistaken a Kulturkampf [a cultural conflict between religious and civil authorities] for a fit of spite. The constitutional amendment before us here is not the manifestation of a “‘bare . . . desire to harm’” homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise
those mores through use of the laws. That objective, and the means chosen to achieve it, are not only unimpeachable under any constitutional doctrine hitherto pronounced (hence the opinion's heavy reliance upon principles of righteousness rather than judicial holdings); they have been specifically approved by the Congress of the United States and by this Court.

In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see Bowers v. Hardwick, and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias. Whether it is or not is precisely the cultural debate that gave rise to the Colorado constitutional amendment (and to the preferential laws against which the amendment was directed).

Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions. This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that "animosity" toward homosexuality is evil. I vigorously dissent. . .

. . . [T]he principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged "equal protection" violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness. . .

. . . The Court's opinion contains grim, disapproving hints that Coloradans have been guilty of "animus" or "animosity" toward homosexuality, as though that has been established as UnAmerican. Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct. Surely that is the only sort of "animas" at issue here: moral disapproval of homosexual conduct. . .

But though Coloradans are, as I say, entitled to be hostile toward homosexual conduct, the fact is that the degree of hostility reflected by Amendment 2 is the smallest conceivable. The Court's portrayal of Coloradans as a society fallen victim to pointless, hate-filled "gay-bashing" is so false as to be comical. Colorado not only is one of the 25 States that have repealed their antisodomy laws, but was among the first to do so. But the society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often, abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens. . .

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member-schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals. This law-school view of what "prejudices" must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, and which took the pains to exclude them specifically from the Americans With Disabilities Act of 1990.

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

The majority's opinion is a strong statement against laws that single out homosexuals for discriminatory

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The fact that people could be imprisoned for failure to pay debts—a contrast with today’s more lenient treatment under the bankruptcy laws—reflects that period’s hard-line approach to economic failure. Even a sitting Supreme Court justice, James Wilson, was imprisoned in 1796 because of a failure to satisfy his creditors. In *City of New York v. Miln* (1837), the Court supported the power of the state to take “precautionary measures against the moral pestilence of paupers.”

As American society has evolved, the plight of the poor has become a major public policy concern. Although opinions differ widely on the proper role of government in addressing poverty, housing, and health care, the U.S. political system has developed social programs that would have been inconceivable to leaders during the nation’s formative years. Moreover, economic disadvantage, at least according to the Supreme Court, is no longer a justification for denying a person full political and social rights. We have already seen, for example, that the Court has extended certain rights, such as government-provided attorneys, to indigent criminal defendants. It has also ruled on government policies discriminating against the poor, including welfare programs that require individuals to live in a particular state for a specified amount of time before receiving benefits.

When the Court examines such policies, what standard of review does it use? The level of scrutiny varies depending on the nature of the right in question. If the classification burdens a “fundamental” right, the justices apply strict scrutiny; if not, they invoke the rational basis standard.

*Shapiro v. Thompson* (1969) nicely illustrates the point. This case involved the kind of law we just mentioned: some states required applicants to live in the state for one year in order to obtain welfare benefits. The states argued that the residency requirement was necessary for fiscal reasons. They claimed that those who require welfare assistance when they first move to a state are likely to become continuing burdens. If a state can deter such people from moving there by denying them welfare benefits during the first year, the state can continue to provide aid to longtime residents.

Writing for the Court, Justice Brennan disagreed. He concluded that the “states do not use and have no need to use the one-year requirement for the governmental purposes suggested. Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional.” But he went on to say that

> [t]he traditional criteria do not apply in these cases. Since the classification here touches on

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**DISCRIMINATION BASED ON ECONOMIC STATUS**

As with matters of race, gender, and sexual orientation, society’s views on economic status have changed. In the early days of our nation, wealth was considered a reflection of individual worth. The poor were thought to be less deserving. The free enterprise philosophy that emphasized personal economic responsibility discouraged public policies designed to help the less fortunate. The fact that people could be imprisoned for failure to

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the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest. Under this standard, the waiting-period requirement clearly violates the Equal Protection Clause.

In other words, a rational basis standard normally would be appropriate in cases involving classifications based on wealth, but when a fundamental right also is involved—here, the right to interstate travel—the standard is elevated. In *Saenz v. Roe* (1999), the Court reaffirmed *Shapiro v. Thompson* by striking down a California law that imposed similar economic disadvantages on new residents who moved into the state. The Court invoked the same logic in *Harper v. Virginia State Board of Elections* (1966), in which it struck down poll taxes as infringing on the fundamental right to vote.

When a fundamental right is not involved, however, the justices have tended to stick with the rational basis standard. An example is *San Antonio Independent School District v. Rodriguez* (1973), a case of enormous importance. First, it involved the right of children to receive a public education, the surest way for the disadvantaged to improve their prospects for economic and social advancement. Second, it questioned the constitutionality of the way Texas funded public schools. Education is the most expensive of all state programs, and any change in the method of distributing these funds can have a tremendous impact. Third, the Texas system challenged here was similar to schemes used by most states in determining the allocation of education dollars. Whatever the Court decided, this case was going to be significant economically and socially.

At its heart was the contention that the Texas system for funding schools discriminated against the poor. It was undeniable that children who lived in wealthy school districts had access to a higher quality education than children in poor districts. But did this difference violate the Constitution? In large measure, the answer depended on which equal protection standard was used. Under strict scrutiny the Texas funding system almost certainly would fail. But before strict scrutiny can be applied, as we now know, one of two requirements has to be met. Either the poor, like African Americans in the race discrimination cases, would have to be declared a suspect class, or the right to an education would have to be declared a fundamental right. If the Court failed to support one of these positions, the rational basis test would control, and the state plan likely would stand. As you read Justice Powell’s decision, think about his reasoning and conclusions on these two points.

Demetrio Rodriguez and other Mexican American parents challenged the Texas public school financing system as discriminatory on the basis of economic status, but in 1973 the Supreme Court ruled against them.

*San Antonio Independent School District v. Rodriguez*

411 U.S. 1 (1973)


Vote: 5 (Blackmun, Burger, Powell, Rehnquist, Stewart)

4 (Brennan, Douglas, Marshall, White)

**OPINION OF THE COURT:** Powell

**CONCURRING OPINION:** Stewart

**DISSENTING OPINIONS:** Brennan, Marshall, White

**FACTS:**

Demetrio Rodriguez and other Mexican American parents whose children attended the public schools of the Edgewood Independent School District in San Antonio, Texas, were concerned about the quality of the local schools. The Edgewood district was about 90 percent Mexican American and quite poor. Efforts to improve the children’s schools were unsuccessful due to insufficient funding. Because the state formula for distributing education funds resulted in low levels of financial support for
economically depressed districts, the parents filed suit to declare the state funding system in violation of the equal protection clause. The funding program guaranteed each child in the state a minimum basic education by appropriating funds to local school districts through a complex formula designed to take into account economic variations across school districts. Local districts levied property taxes to meet their assigned contributions to the state program, but they also could use the property taxing power to obtain additional funds for the schools within their own districts.

The Edgewood district had an assessed property value per pupil of $5,960, the lowest in the San Antonio area. It taxed its residents at a rate of $1.05 per $100 in assessed valuation, the area's highest rate. This local tax yielded $26 per pupil above the contributions that had to be made to the state for the 1967–1968 school year. Funds from the state added $222 per pupil, and federal programs contributed $108. These sources combined for a total of $356 per pupil for the year. In the nearby Alamo Heights district, property values amounted to $49,000 per pupil, which was taxed at a rate of $0.85 per $100 of assessed valuation. These property taxes yielded $333 additional available revenues per pupil. Combined with $225 from state funds and $36 from federal sources, Alamo Heights enjoyed a total funding level of $594 per pupil.

The suit filed by Rodriguez and the other parents was based on these disparities. Although the residents of Edgewood taxed themselves at a much higher rate, the yield from local taxes in Alamo Heights was almost thirteen times greater. To achieve equal property tax dollars with Alamo Heights, Edgewood would have had to raise its tax rate to $13 per $100 in assessed valuation, but state law placed a $1.50 ceiling on such taxes. There was no way for the Edgewood parents to achieve funding equality.

A three-judge federal court agreed with the Rodriguez suit, finding that the Texas funding program invidiously discriminated against children on the basis of economic status. According to the federal court, the poor were a suspect class, and education was a fundamental right. The state appealed to the Supreme Court. Twenty-five states filed amicus curiae briefs supporting the Texas funding system. Groups such as the NAACP, the ACLU, and the American Education Association filed briefs backing Rodriguez.

**ARGUMENTS:**

**For the appellant, San Antonio Independent School District:**

- The appellees' argument is based on an invalid assumption that the amount of expenditures per pupil is an accurate measure of educational quality.

- Rights are fundamental if they are rooted in some provision of the Constitution or have been declared so by the Supreme Court. Education does not fall into either category.

- The Supreme Court has never declared economic status a suspect classification.

- The state's financing system is rational. It provides for a basic education for all children, and it allows local districts to use their own funds to supplement educational budgets as they see fit.

**For the appellees, Demetrio Rodriguez, et al.:**

- The state has made education a function of the wealth of the school district in which the child lives. The state itself drew the district boundary lines.

- Education is a prerequisite for fully participating in the nation's political, social, and cultural life. It is the most effective path to socioeconomic advancement. Education, therefore, is a fundamental right.

- The Texas system discriminates against those living in poor districts—primarily minorities and the economically disadvantaged. These individuals cannot escape the educational system by moving to a wealthy district or sending their children to private schools. The poor should be considered a suspect class.

- The Texas financing system should be evaluated using strict scrutiny.

Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a “heavy burden of justification,” that the State must demonstrate that its educational system has been structured with “precision,” and is “tailored” narrowly to serve legitimate objectives and that it has selected the “less drastic means” for effectuating its objectives, the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that “[n]o one
familiar with the Texas system would contend that it has yet achieved perfection.” Apart from its concession that educational financing in Texas has “defects” and “imperfections,” the State defends the system’s rationality with vigor and disputes the District Court’s finding that it lacks a “reasonable basis.”

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. . . .

... [F]or the several reasons that follow, we find neither the suspect-classification nor the fundamental-interest analysis persuasive.

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged “poor” cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State’s laws and the justification for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below. . . .

... First, in support of their charge that the system discriminates against the “poor,” appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that . . . the poor were clustered around commercial and industrial areas in those same areas that provide the most attractive sources of property tax income for school districts. Whether a similar pattern would be discovered in Texas is not known, but there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecuniosity—are concentrated in the poorest districts.

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees’ argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. . . .

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of “poor” people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms. . . .

However described, it is clear that appellees’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides
an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State’s system impermissibly interferes with the exercise of a “fundamental” right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years. ... Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that “the grave significance of education both to the individual and to our society” cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. ... It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is “fundamental” is not to be found in comparisons of relative societal significance. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State’s social and economic legislation. It is appellees’ contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The “marketplace of ideas” is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge. ...

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual’s rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. ... We have carefully considered each of the arguments supportive of the District Court’s finding that education is a fundamental right or liberty and have found those arguments unpersuasive. ...

In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State. The power to tax local property for educational purposes has been recognized in Texas at least since 1883. When the growth of commercial and industrial centers and accompanying shifts in population began to create disparities in local resources, Texas undertook a program calling for a considerable investment of state funds. ... While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district’s schools at the local level. ... The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means ... the freedom to devote more money to the education of one’s children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State
relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Appellees do not question the propriety of Texas' dedication to local control of education. To the contrary, they attack the school-financing system precisely because, in their view, it does not provide the same level of local control and fiscal flexibility in all districts. Appellees suggest that local control could be preserved and promoted under other financing systems that resulted in more equality in educational expenditures. While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of "some inequality" in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system. . . .

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. Texas has acknowledged its shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. . . .

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.


Reversed.

MR. JUSTICE MARSHALL . . . dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." I must therefore respectfully dissent. . . .

. . . I must . . . voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate

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the appropriate standard of review—strict scrutiny or mere rationality. But this Court’s decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court’s recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which “concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.”

I therefore cannot accept the majority’s labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. . . . But it will not do to suggest that the “answer” to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest “is a right . . . explicitly or implicitly guaranteed by the Constitution.”

I would like to know where the Constitution guarantees the right to procreate, Skinner v. Oklahoma (1942), or the right to vote in state elections, e.g., Reynolds v. Sims (1964), or the right to an appeal from a criminal conviction, e.g., Griffin v. Illinois (1955). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection. . . .

The decision in Rodriguez was a blow to civil rights advocates. It had a substantial impact on education by validating financing systems that perpetuated inequity. Many states, however, reacted by adjusting their financing schemes to reduce funding disparities, and some state supreme courts even found unequal funding systems to be in violation of state constitutional provisions.

In terms of constitutional development, the ruling introduced problems for future litigation. The Court expressly held that the poor were not a suspect class. Unlike other groups that were granted such status, such as African Americans and noncitizens, the poor were neither an easily identified group nor politically powerless; as a group they did not have a significant history of overt discrimination. The decision not to elevate the poor to suspect class status meant that a rational basis test would be used in economic discrimination cases in which a fundamental right was not at issue. This test provides the government with an advantage in demonstrating that challenged laws are valid.

In addition, the Court in Rodriguez held that education, unlike the right to interstate travel, was not a fundamental right under the Constitution. This holding also created potential problems for future cases. Advocates of the poor have concentrated their efforts on education because of its crucial role in human development. By not according it fundamental right status, the Court decreased the chances of successful legal action on behalf of the disadvantaged.

**DISCRIMINATION AGAINST ALIENS**

The intense debate over the nation’s immigration policy has highlighted questions about the rights of noncitizens. Under the law, these individuals are classified as “aliens,” a legal term referring to any individual residing in the United States who is a citizen of another nation.

The Supreme Court generally has sympathized with the rights of noncitizens, a position consistent with the country’s relatively generous immigration and naturalization policies. Although aliens legally in the United States do not enjoy the full range of rights and liberties granted to American citizens, they are entitled to certain protections under the Constitution. The Court has a history of striking down state laws that unnecessarily discriminate against aliens. As early as Yick Wo v. Hopkins (1886), the justices held that a resident alien was entitled to equal protection guarantees. Since then, the Court has nullified laws that prohibit resident aliens from obtaining civil service employment, receiving financial aid for college, becoming members of the bar, or even getting fishing
licensure.\textsuperscript{24} In fact, in \textit{Graham v. Richardson} (1971), a challenge to the denial of public assistance to an alien, the Court accorded suspect class status to noncitizens, explaining:

[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a “discrete and insular” minority \ldots for whom such heightened judicial solicitude is appropriate.

This position is based on the recognition that aliens who lawfully reside in the United States are politically powerless because they can neither vote nor hold office. Yet they pay taxes, support the economy, serve in the military, and contribute to society in other ways, and, if they otherwise qualify for government benefits or opportunities, they should not be denied them on the basis of noncitizenship alone.

Has the Court been faithful to \textit{Graham}? The answer is mixed, or, as Justice Powell once put it, “The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unavering line.”\textsuperscript{25} In some instances, such as \textit{Nyquist v. Mauget} (1977), which involved a New York policy that barred certain resident aliens from receiving state financial assistance for higher education, the justices reiterated the lesson of \textit{Graham} and held that state classifications based on alienage are “inherently suspect and subject to close judicial scrutiny.” At the opposite end of the spectrum is \textit{Foley v. Connolly} (1978), in which a divided Court concluded that the Constitution is not violated when a state denies an alien a job in law enforcement. The justices held that it is not necessary to apply strict scrutiny when a government can demonstrate that citizenship bears a rational relationship to the job.

Cases such as \textit{Graham}, \textit{Nyquist}, and \textit{Foley} have a common characteristic: all deal with disputes brought by aliens who legally resided in the United States. Illegal or undocumented aliens present an entirely different issue. Should illegal aliens be entitled to the same benefits and social services enjoyed by citizens and resident aliens? To what extent does the Constitution protect undocumented aliens from discriminatory treatment? In \textit{Plyler v. Doe} (1982), the justices confronted these controversial questions.

\textbf{Plyler v. Doe}

\begin{itemize}
\item \textit{457 U.S. 202} (1982)
\item Oral arguments are available at https://www.ojzb.org/cases/1981/50-1538.
\item Vote: 5 (Blackmun, Brennan, Marshall, Powell, Stevens)
\item 4 (Burger, O’Connor, Rehnquist, White)
\end{itemize}

\textbf{OPINION OF THE COURT: Brennan}

\textbf{CONCURRING OPINIONS: Blackmun, Marshall, Powell}

\textbf{DISSSENTING OPINION: Burger}

\textbf{FACTS:}

In May 1975 the Texas legislature revised its laws to withhold from local school districts any state funds for the education of children who were not legal U.S. residents. The law also allowed local school districts to deny enrollment to any student who was an undocumented alien under Section 21.031 of the Texas Education Code. In September 1977 a suit was filed against James Plyler, superintendent of the Tyler Texas Independent School District, on behalf of school-age children of Mexican origin who lived in Smith County, Texas. Because they could not prove their legal status, these children had been denied admission to school.

The state argued that the increase in undocumented aliens and the children’s educational deficiencies had placed a tremendous burden on public schools in Texas. Providing free education for these children depleted the schools’ resources and detracted from the quality of education available to citizens and legal residents. The trial court, however, was not convinced by these arguments, concluding instead that the state law violated the equal protection clause of the Fourteenth Amendment. The judgment was affirmed by the appeals court, and the state asked the Supreme Court to reverse.

\textbf{ARGUMENTS:}

\textit{For the appellants, James Plyler;}

\textit{Superintendent of the Tyler Independent School District, and the State of Texas:}

\begin{itemize}
\item Education is not a fundamental right (\textit{San Antonio Independent School District v. Rodriguez}). The Court should proceed using the rational basis test.
\item The statute prevents the state’s resources from being used to educate undocumented populations from
\end{itemize}


\textsuperscript{25}\textit{Ambach v. Norwick} (1979).
Mexico and other countries. These children often require expensive special services.

- The statute also advances the state interest in discouraging illegal immigration.

For the appellees, J. and R. Doe, et al.:

- The plain meaning of the equal protection clause and its history compel the conclusion that the Fourteenth Amendment applies to undocumented children.
- Unlike San Antonio v. Rodriguez, where children were denied an equal education, the children here, all minorities and poor, are denied any public education at all. This justifies using a strict scrutiny standard.
- The state is punishing innocent children for the illegal acts of their parents.
- The statute cannot be justified as a means of discouraging illegal immigration.

Justice Brennan Delivered the Opinion of the Court.

The Equal Protection Clause directs that “all persons similarly circumstanced shall be treated alike.” . . . But so too, “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” . . . The initial discretion to determine what is “different” and what is “the same” resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. 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 that disadvantage a “suspect class,” or that impair upon the exercise of a “fundamental right.” With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State. . . .

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denying the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its benefits from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.” . . . Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice. . . .

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But [section] 21,031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which
children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of section 21.031.

Public education is not a “right” granted to individuals by the Constitution. San Antonio Independent School Dist. v. Rodriguez (1973). But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” . . .

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, “education prepares individuals to be self-reliant and self-sufficient participants in society.” . . .

These well-settled principles allow us to determine the proper level of deference to be afforded 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a “constitutional irrelevancy.” Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population . . . . But more is involved in these cases than the abstract question whether 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

It is the State’s principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children vel non [or not] establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. . . . Indeed, in the State’s view, Congress’ apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State’s prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State’s authority to deprive these children of an education. . . .

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation . . . . But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen . . . . In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain. . . .

. . . Better is the rule and the principle that we have accepted in the present case, that the States have no authority to enact legislation that discriminates against “undocumented” aliens or against aliens who entered the United States unlawfully, these children are subject to deportation . . . .

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing
their labor to the local economy and tax money to the state. . . . The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education. Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that “[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,” at least when compared with the alternative of prohibiting the employment of illegal aliens. . . .

Second, while it is apparent that a State may “not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools,” . . . appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State’s ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State. . . . And, after reviewing the State’s school financing mechanism, the District Court . . . concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. . . . Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of education cost and need, however, undocumented children are “basically indistinguishable” from legally resident alien children. . . .

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is affirmed.

JUSTICE MARSHALL, concurring.

While I join the Court opinion, I do so without in any way retracting from my opinion in San Antonio Independent School District v. Rodriguez (1973) (dissenting opinion). I continue to believe that an individual’s interest in education is fundamental, and that this view is amply supported “by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.”

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O’CONNOR join, dissenting.

Were it our business to set the Nation’s social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children—including illegal aliens—of an elementary education. I fully agree that it would be folly—and wrong—to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as “Platonic Guardians” nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, “wisdom,” or “common sense,” . . . . We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policymaking role as the Court does today. . . .

The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. . . . Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated
powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today’s cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes.

Congress, “vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens,” ... bears primary responsibility for addressing the problems occasioned by the millions of illegal aliens flooding across our southern border. Similarly, it is for Congress, and not this Court, to assess the “social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.” ... While the “specter of a permanent caste” of illegal Mexican residents of the United States is indeed a disturbing one, ... it is but one segment of a larger problem, which is for the political branches to solve. I find it difficult to believe that Congress would long tolerate such a self-destructive result—that it would fail to deport these illegal alien families or to provide for the education of their children. Yet instead of allowing the political processes to run their course—albeit with some delay—the Court seeks to do Congress’ job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the Judiciary.

The solution to this seemingly intractable problem is to defer to the political processes, unpalatable as that may be to some.

How the Court will treat future claims of discrimination against aliens remains to be seen. What is beyond dispute is the inevitable growth of lawsuits claiming unfair treatment based on alien status. The American people have become increasingly divided over immigration; and the nation’s political leaders have yet to agree on a satisfactory immigration policy. Moreover, the government has been unable to control the flow of undocumented aliens into the United States, a condition that results in additional burdens placed on the states for education, health care, housing, and other government services. The expenses associated with providing such programs have prompted calls to curb state benefits for individuals unlawfully residing in the United States. Several states, led by Arizona and Alabama, have reacted by passing legislation aimed at discouraging illegal immigration and imposing punitive policies on undocumented aliens. Controversial policies promoted by the Trump administration have further compounded the already bitter conflicts over immigration.

These state and federal actions have spawned significant lawsuits challenging their constitutionality. Furthermore, rising negative sentiment toward aliens from nations associated with terrorism has produced conditions that are likely to result in additional discrimination disputes.

THE FUTURE OF DISCRIMINATION LAW

The continuing debates we have considered in this chapter—especially over affirmative action and classifications based on sexual orientation—support this point: discrimination issues continue to evolve, as they have since the Fourteenth Amendment was ratified in 1868. Many discrimination disputes involve new variations on old themes. Questions continue to arise regarding equitable treatment of the poor with respect to education and other government services. And we are a long way from resolving all of the questions surrounding illegal immigration.

Other issues are new, brought to the courts by groups that have only recently reached a critical stage in their numbers and organizational strength. Some groups, once silent, are now poised to make their demands. The disabled are increasingly politicized and have pushed for reforms from both the legislative and judicial branches. As members of the post–World War II baby boom generation enter their senior years, the number of age discrimination complaints is likely to soar. Claims of discrimination based on physical disability, mental handicap, and diseases such as cancer, AIDS, alcoholism, and drug addiction have become common and promise to escalate in number.

The evolution of discrimination law is further affected by the ideological positions of the men and women who occupy the federal judiciary. During a single term, a president can use the judicial appointment power to change significantly the ideological makeup of the lower federal courts. A president who serves two terms almost always has the opportunity to appoint more than half of the sitting federal judges. As the White House moves from the control of one political party to another, the federal judiciary may shift from being liberal to conservative, or vice versa, on discrimination and other controversial issues. At the Supreme Court level, votes on important discrimination cases are often very close. In the area of affirmative action, for example, the most important decisions (Bakke, Adarand, Grutter; and, more recently, Fisher) were decided by a single vote. The pattern of retirements from and appointments to the Court therefore takes on special significance. In this ideologically charged environment, it is inevitable that a nomination to the nation’s highest court will become the centerpiece of an intense partisan battle.
ANOTATED READINGS


A large number of other works provide in-depth studies of landmark Supreme Court decisions. Among them are Howard Ball, The Bakke Case: Race, Education, and Affirmative Action (Lawrence: University Press of Kansas, 2000); Paul A. Sracic, San Antonio v. Rodriguez and the Pursuit of Equal Education: The Debate over Discrimination and School Funding (Lawrence: University Press of Kansas, 2006); and Philippa Strum, Women in the Barracks: The VMI Case and Equal Rights (Lawrence: University Press of Kansas, 2002). See also readings listed at the end of Chapter 9.