2017

Obergefell, Fisher, and the Inversion of Tiers

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ABSTRACT

In striking the ban on same-sex marriage in Obergefell v. Hodges, *the Supreme Court avoided tiers of scrutiny, thus declining to apply rational basis in a non-deferential manner as it had in other cases involving sexual orientation. After signaling its growing discomfort with the deferential* Grutter v. Bollinger *strict scrutiny formulation in the* Fisher I *remand and the* Fisher II *oral argument, the* Fisher v. University of Texas (Fisher II) *majority embraced that very analysis to sustain the Texas affirmative action program. And although the Court claims to apply intermediate scrutiny in gender-based equal protection cases, the cases devolve to de facto applications of strict scrutiny or rational basis, based on whether the Court claims a real-sex difference or an overbroad gender-based generalization.*

The tiers-of-scrutiny doctrine has evolved from two to three formal tiers, yet a closer reading suggests five applied tiers. As a basis for prediction, the tiers are inverted, producing the following counterintuitive sequence: strict scrutiny, rational basis plus, intermediate scrutiny, strict scrutiny lite, and rational basis. The result has been doctrinal confusion, a lack of predictability, and pleas for abandonment or fundamental reform.

This Article's theoretical account explains why tiers of scrutiny should not be jettisoned and why the existing scheme, as applied to race, sexual orientation, and gender, has produced anomalous—perhaps even disingenuous—applications. It further demonstrates how a modest reconceptualization operating within the general framework of existing tiers can greatly simplify applications, avoid the most critical anomalies, and thereby improve doctrinal predictability and coherence.

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TABLE OF CONTENTS

INTRODUCTION

Following oral arguments in *Obergefell v. Hodges*,[1] the dominant media account was that Justice Ruth Bader Ginsburg had eviscerated arguments against same-sex marriage. Observers claimed that Justice Ginsburg had established the absence of plausible arguments that same-sex marriage would undermine opposite-sex marriage, would other than benefit children raised by committed same-sex partners, or would otherwise compromise social mores.[2] Although Justice Kennedy began his questioning with a seemingly ahistorical claim that our current definition of marriage, limited to monogamous opposite-sex unions, had persisted for the ages,[3] he soon reclaimed his earlier voice, linking respect for same-sex unions to the dignity of committed partners.[4] The general impression was a *fait accompli* in which a majority would dismiss same-sex marriage bans with comparable dispatch to that given anti-miscegenation laws in the landmark 1967 decision, *Loving v. Virginia*.[5]

While this account provided same-sex marriage proponents grounds to celebrate, a nagging doubt persisted. Before oral argument, *Obergefell*'s dominant framing sounded in equal protection: were same-sex partners denied access to marriage victims of a constitutionally prohibited distinction? In this framing, the issue was not the merits of same-sex marriage bans; rather, it was how to classify persons denied access to marriage due to sexual orientation and how to assess same-sex marriage bans based on the selected classification.

The elephant in the room—the chosen tier of scrutiny—was largely ignored in oral argument and was further AWOL[6] in media commentary. On the issue of tiers, Justice Anthony Kennedy, whose vote, most predict-

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1 135 S. Ct. 2584 (2015).

2 Scott Lemieux, *Same-Sex Marriage Opponents Sounded Desperate in Court. They Should Be*, THE GUARDIAN (Apr. 28, 2015), http://www.theguardian.com/commentisfree/2015/apr/28/same-sex-marriage-opponents-desperate-supreme-court; Inae Oh, *Ruth Bader Ginsburg Shuts Down Gay-Marriage Challengers*, MOTHER JONES (Apr. 29, 2015), http://www.motherjones.com/mojo/2015/04/ruth-bader-ginsburg-shuts-down-gay-marriage-challengers (focusing on questioning by Justice Ginsburg and including discussion of other Justices).

3 Transcript of Question 1 Oral Argument at 6–7, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14–556) ("This definition has been with us for millennia."); *see also Obergefell*, 135 S. Ct. at 2594 ("The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations."). *But see id.* at 2595 ("The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time."); *id.* at 2621 (Roberts, C.J., dissenting) ("Indeed, from the standpoint of history and tradition, a leap from opposite-sex marriage to same-sex marriage is much greater than one from a two-person union to plural unions, which have deep roots in some cultures around the world."). For a more detailed analysis of *Obergefell*, see *infra* Part III.C.

4 *See* Transcript of Question 1 Oral Argument, *supra* note 3, at 72–73; *see also* U.S. v. Windsor, 133 S. Ct. 2675, 2692 (2013) (discussing the dignity of marriage).

5 388 U.S. 1 (1967). The story behind the case is now told in a feature length motion picture. *See* LOVING (Raindog Films & Big Beach Films 2016).

6 Absent without Leave.

ed, would control the case outcome, appeared to have squeezed himself into a doctrinal box.[7] The choice of tier often controls the fate of equal protection claims. Even when it does not, it influences how the analysis is framed.[8] For Justice Kennedy, the problem seemed less about the outcome than the framing. Although he seemed likely to vote against the constitutionality of same-sex marriage bans, the challenge was avoiding casting aspersions on those who embraced a more traditional view of marriage.

The traditional framing of tiers was binary: rational basis review or strict scrutiny. Those who identified a suspect class or fundamental right received the benefit of strict scrutiny, which was almost invariably fatal for the challenged law. Those who did not were left with rational basis review, the default tier, which typically sustained the challenged law. The relatively more recent third tier, intermediate scrutiny, although harder to predict, was largely limited to gender-based distinctions.[9]

Even the three-tier scheme is misleading. A closer inspection suggests five categories that can be expressed in a linear sequence. The left-most position corresponds to the greatest likelihood of sustaining the challenged law, whereas the right-most position corresponds to the greatest likelihood of having the challenged law struck down. Immediately to the right of the relaxed rational basis test is its somewhat more demanding form, "rational basis plus" or "with teeth." Immediately to the left of the stringent strict scrutiny test is its correspondingly more lenient form, "strict scrutiny lite." Intermediate scrutiny falls between the two modified tests, producing the following scheme:

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7 In the aftermath of Donald Trump's presidential victory, it is no longer certain that Justice Kennedy will remain the median jurist. Neil Gorsuch has been confirmed to replace Justice Antonin Scalia, and his appointment is not expected to affect the overall composition of the Court from an ideological perspective. Lisa Marshall Manheim, Opinion, *The Gorsuch Fight Changed the Senate. Will It Change the Court?*, N.Y. TIMES (Apr. 8, 2017), https://www.nytimes.com/2017/04/08/opinion/the-gorsuch-fight-changed-the-senate-will-it-change-the-court.html?_r=0. An appointment that would replace one of the more senior remaining jurists, however, could have the effect of changing that composition in a more predictably conservative direction. Peter Baker, *Picking One Justice, Trump Has Eye on Choosing a Second*, N.Y. TIMES, Jan. 31, 2017, https://www.nytimes.com/2017/01/31/us/politics/trump-supreme-court-neil-gorsuch.html (explaining that Justice Kennedy is "the swing vote who holds the balance of power on the court" and discussing the significant impact President Trump could have on the direction of the Supreme Court if a second seat were to open if Justice Kennedy were to retire); LEE EPSTEIN ET AL., PRESIDENT-ELECT TRUMP AND HIS POSSIBLE JUSTICES (2016), *available at* http://epstein.wustl.edu/research/PossibleTrumpJustices.pdf (considering how President Trump's possible future nominees could shape the Supreme Court).

8 For an analysis of the Court's often creative workarounds the tiers of scrutiny, see *infra* Part I.C.

9 For a more in-depth explanation of the development of the tiers of scrutiny, see *infra* Part I.

TABLE 1

TIERS OF SCRUTINY IN ONE DIMENSION

(1) Rational Basis	(2) Rational Basis Plus	(3) Intermediate	(4) Strict Scrutiny Lite	(5) Strict Scrutiny
Lax Review				Stringent Review

Although this scheme tracks black letter law, with "rational basis plus," a somewhat more demanding form of rational basis review, and "strict scrutiny lite," a somewhat less stringent form of strict scrutiny, it is far less helpful in predicting case outcomes.[10] When the Supreme Court employs rational basis plus, it typically strikes down the challenged law, and when it employs strict scrutiny lite, it typically sustains the challenged law. The anomalies involve two categories. The first is race-based affirmative action, where despite applying strict scrutiny, the Court sustains the challenged law. The second involves animus against politically unpopular groups, where despite applying rational basis, the Court strikes down the challenged law. From a predictive perspective, therefore, the tiers have been inverted, with strict scrutiny lite abutting rational basis and with both of those tests sustaining challenged laws, and with rational basis plus abutting strict scrutiny and with both of those tests striking challenged laws. The anomalous sequence, 14325, is presented in Table 2:

TABLE 2

TIERS OF SCRUTINY RECAST

(1) Rational Basis	(4) Strict Scrutiny Lite	(3) Intermediate	(2) Rational Basis Plus	(5) Strict Scrutiny
More Likely to Sustain				More Likely to Strike

Affirmative action falls within Category 4.[11] Given his past treatment of cases implicating sexual minorities, some commentators anticipated that Justice Kennedy would place same-sex marriage into Category 2, although others argued for Category 3.[12] Justice Kennedy took neither of these approaches and instead largely jettisoned equal protection analysis in favor of

10 For a detailed presentation of the relevant cases, see *infra* Part I.C., and cites therein.

11 *See infra* Part I.C.1.

12 *See infra* Part III.C.

an alternative due process approach.[13] This Article will explain this important doctrinal move, as part of a broader inquiry into the tiers of scrutiny framework. The analysis will also explain how the tiers doctrine has created anomalies associated with affirmative action, same-sex marriage, and gender-based classifications, and how the Court could simplify its applications without abandoning the essential doctrinal framework.

The analytical difficulty that generates this peculiar doctrinal progression involves dimensionality. Dimensions are normative scales of measurement used to evaluate virtually anything that is being compared. Dimensionality studies normative measures and how they interrelate. People routinely evaluate information along analytical dimensions. Some dimensions involve simple binaries—black versus white, male versus female—although as used to sort individuals, such simple schemes sometimes fail.[14] Other scales are more nuanced, for example, continuous gradations of height or weight. People often combine multiple criteria along a single dimension. Larger objects tend to be heavier, allowing us to rank modes of transportation—a scooter, a bicycle, a car—in a sequence that captures both size and weight. Sometimes combined alignments break down. Adding a hot air balloon—larger than a car yet lighter than a scooter—forces the need to split the dimensions of size (scooter, bicycle, car, *then* hot air balloon) and weight (hot air balloon *then* scooter, bicycle, car).[15]

Equal protection implicates important constitutional values that can also be cast along analytical dimensions. These include degrees of invidiousness of challenged classifications or the relative importance of claimed fundamental rights. These evaluative criteria often align neatly with a simple analytical dimension captured by tiers of scrutiny. Some cases, however, like inflated hot air balloons, disrupt our assumptions about common measurement scales. The problem with the tiers of scrutiny scheme is not the absolute number of tiers. With relatively minor adjustments, the formal three-tier scheme works well. Rather, the difficulty is failing to appreciate how the tiers implicate the dimensionality of the laws subject to constitutional challenge.

This Article simplifies the tiers analysis and explains why affirmative action and same-sex marriage are constitutional hot air balloons. The analysis establishes three main points about tiers of scrutiny. First, for historical reasons,[16] equal protection cases involving race implicate two dimensions, thereby also

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13 *Id.*

14 *See, e.g.*, Julie Scelfo, *A University Recognizes a Third Gender: Neutral*, N.Y. TIMES, Feb. 3, 2015, http://www.nytimes.com/2015/02/08/education/edlife/a-university-recognizes-a-third-gender-neutral.html?_r=0 (discussing university response to student who identifies with neither conventional gender and who favors the neutral pronoun, "they").

15 The rankings assume the hot air balloon is aloft. For an introduction of dimensionality and related concepts, see Part II, and cites therein.

16 *See infra* Part II.E.

implicating a third tier of scrutiny or forcing a counterintuitive application of strict scrutiny if such laws are sustained. Second, although the Supreme Court applies intermediate scrutiny to gender classifications, the cases implicate a single dimension, thus allowing for a simpler two-tier scheme. Third, the *Obergefell* Court's reliance on due process as the principal basis for striking same-sex marriage bans, coupled with its avoidance of tiers of scrutiny analysis, reflects a failure to appreciate the case's underlying dimensionality.

This Article proceeds as follows. Part I provides an overview of tiers of scrutiny. In reviewing the existing scheme, this Part considers the doctrinal anomalies and various alternatives suggested by jurists and scholars. Part II presents the dimensionality framework. That Part demonstrates how the traditional two-tier system properly handles an infinite array of classifications assessed along a single dimension, and conversely, how as small a sampling as three cases can implicate multiple dimensions, thereby thwarting a two-tier scheme. Part III relates this analysis to equal protection cases involving race, gender, and sexual orientation. The analysis demonstrates how dimensionality explains the inversion of tiers, and it explains how to simplify outcomes while also improving our understanding of the case law. The Article concludes with a cheat sheet to help translate the Supreme Court's often misleading claims about its choice of tiers into the tiers it actually applies.

I. THE PROBLEM OF TIERS

To assess the sometimes confusing state of the tiers of scrutiny doctrine, we first review the functions that the scheme serves.

A. Those Who Dichotomize . . . and Those Who Don't[17]

Professor Michael Klarman has identified *McLaughlin v. Florida*,[18] involving a ban on interracial cohabitation, as the first Supreme Court case applying strict scrutiny to strike down an invidious race-based classification.[19] The conventional understanding is clear: strict scrutiny is almost always fatal to adverse racial classifications. More recently, the Court has applied this test to laws intended to benefit African Americans. With notable exceptions that include *Grutter v. Bollinger*,[20] which sustained the University of

17 Although often expressed as, "There are two kinds of people in the world, those who dichotomize and those who don't," the actual quotation is: "There may be said to be two classes of people in the world; those who constantly divide the people of the world into two classes, and those who do not." ROBERT C. BENCHLEY, *The Most Popular Book of the Month*, *in* OF ALL THINGS 187 (1921).

18 379 U.S. 184, 196 (1964).

19 *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991). The Supreme Court planted the seed for two levels of scrutiny arguably as early as *The Slaughter-House Cases*, 83 U.S. (16 Wall) 36, 81 (1873), which distinguished claims arising under the Fourteenth Amendment based on race from those implicating other, purely economic, interests.

20 539 U.S. 306, 343–44 (2003).

Michigan Law School affirmative action program, and *Fisher v. University of Texas (Fisher II)*,[21] which sustained the University of Texas affirmative action program, the result has generally been to strike such racial preferences down.[22] As a doctrinal matter, lower federal courts are expected to subject all express racial classifications, whether intended to harm or to help African Americans, to the two-part strict scrutiny test under which they are presumed invalid.

Strict scrutiny demands that the government prove that the chosen classification serves a compelling governmental interest and that the selected means are narrowly tailored to further that interest.[23] The two critical features of this test are, first, that the burden is placed on the government once the claimant identifies the trigger for strict scrutiny, and second, that the test can be overcome if two conditions—a compelling governmental interest and narrow tailoring—are satisfied. In conventional tiers of scrutiny analysis, strict scrutiny is the exception; rational basis is the rule. To apply strict scrutiny, and thus to place the burden on the state to defend its laws, the challenger must put forth a specific justification. Typically, the justificatory trigger takes the form of an illicit classification, with race serving as the paradigmatic example,[24] or a fundamental right, for example, the right to use contraceptives,[25] or to terminate an unwanted pregnancy, at least prior to viability.[26] Absent such a trigger, the presumptive, or baseline, level of

21 136 S. Ct. 2198, 2207 (2016).

22 This was, for example, true of *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003). For a discussion of cases treating race-based preferences under intermediate scrutiny, see Part I.C.1. Exceptions to this rule have been overturned, see Part I.C.1, or, in the case of *Regents of the University of California v. Bakke*, 438 U.S. 265, 271 (1978), largely incorporated into *Grutter*, 539 U.S. 306 (2003). For a discussion of the case sequence leading to *Fisher II*, see Part II.F.2.a.

23 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[Suspect] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").

24 *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.") (citations omitted).

25 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (finding that married and unmarried couples must have the same right to use contraceptives); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that a law that outright prohibits, rather than regulates, the use of contraceptives was unconstitutional).

26 Roe v. Wade, 410 U.S. 113 (1973). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court downgraded abortion from a fundamental right to a liberty interest, and in *Gonzales v. Carhart*, 550 U.S. 124 (2007), it sustained a late-term, partial-birth abortion ban that did not include a maternal-health exception. In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Supreme Court applied a more stringent version of the undue burden test to strike down two provisions of a Texas law that limited access to abortions by requiring physician-admitting privileges at local hospitals and by restricting abortions to facilities upgraded to match those of a surgical center, the combined effect of which placed women of reproductive age, in many instances, several hundred miles away from the nearest abortion facility. These cases exemplify drawing a line along the dimension of weak-to-strong abortion rights, separating procedures, or access to facilities, that are or are not protected. *See infra* Part III.

scrutiny—rational basis—applies.

Unlike strict scrutiny, rational basis leaves the burden of proof on the challenger, who, to have a law struck down, must demonstrate the absence of a legitimate governmental interest or of means that rationally further that interest.[27] Under traditional rational basis review, or the straight-face test, nearly any purpose counts as legitimate provided that one can articulate it without physically belying sincerity. As demonstrated below, this is no longer literally true,[28] although it is most obviously so in the Court's unerring acceptance of creative defenses to special interest legislation masqueraded as furthering the public interest.[29]

The basic two-tiered scheme—strict scrutiny and rational basis scrutiny—is most easily understood as operating in two sequential stages. Imagine two bins atop an otherwise empty desk, one marked "presumptively bad laws" and the other marked "presumptively good laws." Stage one is the initial rough sort, meaning the placement of cases into their respective bins. When a justificatory trigger is present, place the case in the bin marked presumptively bad laws. This means that strict scrutiny applies and that the challenged law is far more likely than not to be struck down. Alternatively, absent a justificatory trigger, place the case in the bin marked presumptively good laws. This means that rational basis scrutiny applies and that the challenged law is far more likely than not to be sustained.

Although preliminary, stage one is profoundly important. Many constitutional cases involve disputed factual characterizations that produce a kind of analytical gray zone. When this occurs, whoever bears the burden of proof—the state trying to defend its law against strict scrutiny or the challenger trying to invalidate a law under rational basis review—will lose, rendering the initial sort decisive.

To illustrate, imagine that a state legislature reapportions its congressional districts following a decennial census. The legislators know that doing so will affect the racial composition of its districts, for example concentrating African-American voters within minority-majority districts or, conversely, dispersing them across multiple majority-white districts, thus risking defeat of a

27 *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("[U]nless . . . it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.").

28 *See infra* Part I.C.2.

29 *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (sustaining under rational basis scrutiny a law requiring optometrists or ophthalmologists to write prescriptions before opticians could fit new lenses onto old frames despite apparent motivation to benefit favored healthcare professionals); United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938) (sustaining under rational basis scrutiny a ban on filled milk as an adulterated product despite its availability as a safe dairy alternative between fresh milk deliveries prior to commonplace refrigeration in rural communities, thereby benefitting the fresh milk industry).

representative from the minority demographic group.[30] Further assume, however, that the actual redistricting goals are two-fold: first, to protect a nonminority functional incumbent, meaning a sitting representative serving a district that will no longer exist in its present form following reapportionment, and second, to avoid violating the non-retrogression principle under the Voting Rights Act of 1965 ("VRA").[31] If the government must prove that the prohibited factor, race, did not control its redistricting, it will lose because it relied on multiple considerations, and it is impossible to disprove controlling reliance on the single factor of race. Conversely, if the challenger must disprove that the legislature was predominantly motivated by the non-racial factor of protecting a functional incumbent, she will lose for the same reason. When the legislature is motivated by several factors, a subset of which are impermissible, whoever bears the burden of proof—meaning whoever is called upon to prove the negative—will fail. In such cases, the rough sort, meaning the initial bin placement, controls the outcome.

Stage two involves fine sorting. This means going through each bin—the presumptive goods and the presumptive bads—to locate mistakes. Mistakes take the form of cases whose early sort proved misleading as to the eventual outcome. For those cases initially consigned to the strict scrutiny pile (presumptive bads), the challenged law will still survive if the state can prove that it was enacted to advance a compelling governmental interest and that the means chosen were narrowly tailored to further that interest. Conversely, for cases consigned to the rational basis pile (presumptive goods), the challenger will still prevail if she can demonstrate the absence of a legitimate governmental interest or of means that rationally further that interest. The strict scrutiny test is conjunctive: the state must prove both a compelling governmental interest and narrow tailoring for the law to survive. And the rational basis test is disjunctive: the challenger need only prove the absence of either a legitimate governmental interest or of means rationally in furtherance of that interest, to have the law struck down.

B. Running with the Red Queen

> "Well, in *our* country," said Alice, still panting a little, "you'd generally get to somewhere else—if you ran very fast for a long time as we've been doing."
>
> "A slow sort of country!" said the Queen. "Now, *here*, you see, it takes all the running *you* can do, to keep in the same place. If you want to get somewhere

30 *Cf.* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 447 (2006) (holding that the redrawing of lines in District 23 to dilute the influence of Latino voters violated the Voting Rights Act).

31 42 U.S.C. § 1973c (2012). For a hypothetical based on *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which limited the force of the preclearance provision under this Act, see text accompanying notes 34–38.

else, you must run at least twice as fast as that!"[32]

The two-stage sorting system raises an obvious question: if stage-one sorting results from factors that correlate to either good or bad laws, why bother with stage two? Laws are enacted as part of a continuous dynamic process and with knowledge of the very rules used to classify them. Law making is therefore a Red Queen game in which the judiciary devises rules in response to problematic laws; legislators enact responsive laws furthering similar objectives while evading detection under existing rules; the judiciary refines its rules to locate and strike the refined problematic laws; and so on.[33]

Consider, for example, a revised apportionment hypothetical inspired by *Shelby County v. Holder*.[34] In *Shelby County*, the Court invalidated the ongoing application of § 4 of the VRA, which set out the formula for applying the preclearance provision in § 5 to covered jurisdictions.[35] Chief Justice Roberts, writing for the majority, reasoned that since the law's original enactment, southern states had a better record of minority voter turnout than their northern counterparts.[36] Justice Ginsburg argued in dissent that the observed improvement followed the continuous evolution of legal responses to constantly changing discriminatory practices. She explained: "Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place."[37]

To illustrate Justice Ginsburg's intuition, imagine that an early legislature elected by voters with abhorrent views concerning race produced voting districts relying on express racial criteria to make electing a black candidate implausible. After expressly identifying particular neighborhoods as black or white, the legislature imposed a blanket rule preventing qualified voters in black neighborhoods from forming a majority within any single district. Now assume that in a proper constitutional challenge, the Supreme Court construes the Fourteenth Amendment Equal Protection Clause to invalidate this scheme. The Court holds that a state cannot rely on express racial criteria to apportion voting districts so as to undermine minority-voter efforts to elect a representative of their own race. The ruling signals that express racial classifications that undermine the interests of African-American voters will be placed in the presumptive bad bin, to which strict scrutiny applies, and will almost certainly be struck down.

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32 LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 42 (Macmillan Company 1928) (1871).

33 For a discussion of Red Queen games in evolutionary biology, see generally MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE (1993).

34 133 S. Ct. 2612 (2013).

35 *Id.* at 2631.

36 *Id.* at 2625–26.

37 *Id.* at 2633 (Ginsburg, J., dissenting).

Assume that the state legislature remains undeterred. To accomplish its objective, it relies on demographic criteria that meaningfully correlate to race—zip codes, income data, party registration, and proximity to identified community organizations or churches—with the same effect of dividing black voters as minorities across predominantly white voting districts. Because this regime is nominally race neutral, it would be sorted initially into the presumptive good bin. To avoid the end run around its prior rule, the Court might hold that despite the initial sorting, when a law's purpose and effect is to prevent minority voters from electing as their representative a member of their own race, it fails rational basis scrutiny. Going forward, the Court might declare that race cases meeting its newly minted "purpose-and-effects test" will be subject to strict scrutiny, and thus sorted into the presumptive bad bin. The game, of course, will continue.[38] The legislature might, for example, expressly articulate or otherwise signal a primary purpose of protecting the functional incumbency of a non-minority representative, thus claiming to justify a similar scheme in spite of, rather than because of, any adverse consequence to African-American voters.

Fine sorting allows the judiciary to search beyond its initial classification (express use of race is presumptively bad), or even its later more refined initial sorting (racially neutral laws with the purpose and effect of adversely affecting African Americans are presumptively bad). Neutral classifications can mask illicit purposes. Conversely, non-neutral laws can be coupled with benign motivations. The Court's two-part test helps to locate laws that would readily slip past its inevitably overbroad initial sort, winding up in a pile for which the presumptive outcome should not control.

C. Getting Beyond the Basic Tiers

The Supreme Court has decided several prominent cases in a manner that thwarts the basic two-tier scheme. Most notably, it has used strict scrutiny to sustain express racial preferences in higher education; before *Obergefell*, it used rational basis scrutiny to strike down laws implicating the rights of sexual minorities; and it has employed a third tier, most notably in the context of gender, or sex-based, classifications. We now consider these doctrinal maneuvers.

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38 For another illustration, see *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014). In *Schuette*, the Supreme Court sustained a Michigan referendum ending racial preferences in state institutions of higher learning against an equal protection challenge based on the political participation doctrine. The debate over the merits of the doctrine between Justice Scalia, concurring in the judgment, and Justice Sotomayor, dissenting, reflected a Red Queen Game, with Justice Scalia lamenting the apparent evolving standards on which the doctrine rests, *see id.* at 1641–42, and with Justice Sotomayor maintaining that the evolving standards reflect an ongoing game of judicial decisions invalidating strategies undermining racial progress, revised strategies that circumvent those rulings, updated judicial responses, and so on, *see id.* at 1652, 1654–59.

1. Strict in Theory but Not Fatal (or Feeble?) in Fact

Although the Supreme Court applies strict scrutiny to any law that draws an express racial classification, whether intended to harm or to benefit minorities, this is a fairly recent doctrinal development. In the landmark 1978 case, *Regents of the University of California v. Bakke*,[39] Justice Powell issued the controlling opinion, the relevant parts of which no one else joined. Justice Powell argued for strict scrutiny in race-based affirmative action cases, but concluded that the interest in diversity in higher education was compelling.[40] He further determined, however, that the medical school's reliance on a racial quota—setting aside sixteen out of one hundred seats for specified minorities—failed narrow tailoring.[41] Justice Brennan, writing separately, argued that benign race-based classifications should be subject to intermediate scrutiny, rather than strict scrutiny. Under conventional intermediate scrutiny, a challenged law will survive provided that there is an important governmental interest and that the selected means substantially further that interest.[42] Writing separately, Justice Stevens construed Title VI of the Civil Rights Act of 1964 to ban the use of race in admissions.[43] The combined opinions rendered Justice Powell's opinion controlling under the narrowest grounds rule.[44]

Two years later, in *Fullilove v. Klutznick*, Justice Burger wrote a controlling plurality opinion applying intermediate scrutiny to sustain a federal program benefitting contractors who formed, or who employed, a minority-business enterprise ("MBE"). [45] In the 1989 case, *City of Richmond v. J.A. Croson Co.*,[46] Justice O'Connor distinguished *Fullilove*, applying strict scrutiny to strike down a structurally parallel program benefitting minority businesses contracting for work performed for the City of Richmond, Virginia. Justice O'Connor observed that whereas the Fourteenth Amendment empowered Congress to regulate matters affecting race, the same amendment

39 438 U.S. 265 (1978).

40 *Id.* at 314.

41 *Id.* at 320.

42 *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part). In more recent gender-based cases, the Supreme Court has vacillated on who bears the burden of proof and on how the test is constructed. For a discussion of later doctrinal tweaks to intermediate scrutiny, see *infra* Part III.B.

43 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

44 The narrowest grounds doctrine selects that opinion consistent with the outcome that has the least impact on the law. Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that when "no single rationale enjoys the assent of five Justices," the Court's holding is "'that position taken by those Members who concurred in the judgments on the narrowest grounds'") (citation omitted); *see also* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 130–33 (2000) (analyzing *Bakke* under the *Marks* narrowest grounds doctrine).

45 448 U.S. 448, 454, 491 (1980).

46 488 U.S. 469, 511 (1989).

stripped such power from state and local governments.[47] One year later, in *Metro Broadcasting, Inc. v. FCC*,[48] Justice Brennan, for the first time, commanded majority support in applying intermediate scrutiny to sustain a racial preference for the issuance of broadcast licenses as applied to a challenge pursuant to the equal protection component of the Fifth Amendment Due Process Clause.[49]

Justice Brennan's victory was short-lived. In the landmark 1995 decision, *Adarand Constructors v. Pena*,[50] Justice O'Connor, writing for a majority, struck down a federal MBE set-aside program under strict scrutiny, thus overturning *Metro Broadcasting*.[51] Rejecting a broader position expressed in Justice Scalia's concurrence that would ban virtually all use of race, Justice O'Connor, writing a majority opinion that Justice Scalia nonetheless joined,[52] reiterated her earlier refutation of Justice Thurgood Marshall's claim that "strict in theory [is] fatal in fact."[53] Up to and including *Adarand*, Justice O'Connor had never voted to sustain a benign use of race,[54] raising the question as to what motivated Justice O'Connor to insist that as applied to race, strict scrutiny is somehow not fatal. As was borne out eight years later, the critical remaining case involved affirmative action in higher education.[55] In what Justice Scalia described as the "split double header"[56]—*Grutter v. Bollinger*[57] and *Gratz v. Bollinger*[58]—the simmering dispute over race-based affirmative action between Justice O'Connor and Justice Scalia suddenly boiled.

In *Grutter*, Justice O'Connor essentially afforded Justice Powell's controlling *Bakke* analysis majority-opinion status.[59] Although *Gratz* held that the

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47 *Id.* at 490–91.

48 497 U.S. 547, 564–66 (1990).

49 *See id.* at 564–65 ("We hold that benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.").

50 515 U.S. 200 (1995).

51 *Id.* at 227.

52 For a discussion of Justice Scalia's apparently reluctant strategy in joining the majority opinion, see Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 334–35 (2000).

53 *Compare* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (arguing that strict scrutiny is "strict in theory, but fatal in fact"), *with Adarand*, 515 U.S. at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

54 Michael Klarman, *Are Landmark Court Decisions All That Important?*, CHRON. HIGHER EDUC.: CHRON. REV. (Aug. 8, 2003), http://chronicle.com/article/Are-Landmark-Court-Decisions/7437 ("Before *Grutter*, [Justice O'Connor] had never voted to sustain a race-based affirmative-action plan, though she had explicitly noted that such policies might be acceptable under certain stringent conditions.").

55 *See id.* ("*Grutter* reveals that O'Connor probably changed her mind about affirmative action over the past two decades.").

56 Grutter v. Bollinger, 539 U.S. 306, 348 (2003) (Scalia, J., dissenting).

57 539 U.S. 306 (2003).

58 539 U.S. 244 (2003).

59 *Grutter*, 539 U.S. at 323.

University of Michigan could not use a race-based point system for its undergraduate admissions with a substantial specified allocation for minority applicants,[60] *Grutter* held that the law school could give added weight to race as part of a holistic admissions process that treated each applicant individually.[61] The Court maintained this distinction despite data demonstrating near-perfect precision in the ratio of minority-to-non-minority applicants, on the one hand, and the ratio of admitted minority-to-non-minority students, on the other.[62] Even though the university point system appeared to formalize the functional algorithm operating within the law school admissions process on a smaller scale through the constant monitoring of daily admissions reports, Justice O'Connor, like Justice Powell before her, insisted that the form the affirmative action process took mattered as much as, if not more than, the substantive results obtained.

The more recent volley with the multi-staged University of Texas affirmative action program reveals the Court's ongoing struggle with the Powell-O'Connor doctrinal formulation, which Justice Kennedy eventually adopted as his own. In *Fisher v. University of Texas at Austin (Fisher I)*,[63] the Supreme Court, with Justice Kennedy writing, remanded a challenge to the University of Texas affirmative action program, in which the United States Court of Appeals for the Fifth Circuit had applied the *Grutter* formulation to uphold a combined top-ten-percent plan with a holistic race-based affirmative action overlay. The second phase was designed to ensure a critical mass of minority students that included some who, although graduating below the automatic admission threshold, came from more competitive high schools and had higher test scores.[64] Although in *Fisher I*, he described the Fifth Circuit's approach as having rendered strict scrutiny "feeble,"[65] writing for the majority in *Fisher v. University of Texas at Austin (Fisher II)*,[66] Justice Kennedy then affirmed the Fifth Circuit, which on remand had reinstated its earlier ruling. In doing so, Justice Kennedy applied a version of strict scrutiny that contravened his earlier call for a less deferential approach.

The combined cases demonstrate three points. First, in the context of benign race-based preferences, the Court has abandoned intermediate scrutiny in favor of strict scrutiny. Second, in the specific context of race-

60 *Gratz*, 539 U.S. at 270.

61 *Grutter*, 539 U.S. at 334.

62 *Id.* at 383 (Rehnquist, J., dissenting) ("But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'") (alteration in original).

63 133 S. Ct. 2411, 2415 (2013). For a more detailed analysis of *Fisher I*, see *infra* Part II.F.2.b.

64 *Id*. at 2416.

65 *Id.* at 2421.

66 136 S. Ct. 2198 (2016).

based affirmative action in state institutions of higher learning, strict in theory is not fatal in fact, and the Supreme Court has struggled to ensure that this does not render it feeble in fact. And third, wherever the non-fatal-non-feeble test lies, it is not intermediate scrutiny (Category 3).

2. Rational in Theory but Strict in Fact

Just as the Court has salvaged race-based affirmative action while nominally applying strict scrutiny, so too, leading into *Obergefell*, it had invalidated laws adversely affecting sexual minorities while nominally applying rational basis scrutiny.[67] Recall that absent a justificatory trigger for strict scrutiny, the Court applies rational basis scrutiny, under which it typically sustains the challenged law.[68] The line of cases testing this intuition involves claims of animus against politically unpopular groups. In *USDA v. Moreno*, the Court struck down the denial of benefits under the Food Stamp Act of 1964, which banned households with unrelated cohabitants from eligibility.[69] The case involved sympathetic plaintiffs, including the mother of a hearing-impaired girl who had moved in with another woman on public assistance to provide mutual financial support while the girl attended a specialized school.[70]

Justice Brennan, writing for the majority, struck down this eligibility provision on the ground that it was premised on an animus against "'hippies' and 'hippie communes.'"[71] Justice Brennan held that it is never rational to exhibit an animus against a politically unpopular group.[72] Then-Associate Justice Rehnquist dissented, arguing that the law satisfied conventional rational basis scrutiny by reducing the likelihood that cohabitants have come together for the purpose of receiving public benefits, thereby reducing fraud.[73]

Although Justice Brennan rejoined that the statute contained separate anti-fraud provisions,[74] under ordinary rational basis review, that would not have mattered. The test requires no more than one legitimate governmental interest and means that rationally further that interest. A set of cumulative anti-fraud provisions within an elaborate public-welfare scheme would satisfy that test. The only way to hold that the cohabitation provision was motivated by animus—an obviously illegitimate purpose—was to read out an other-

67 *See infra* Part III.C.

68 *See supra* notes 22–25 and accompanying text.

69 413 U.S. 528, 529 (1973).

70 *Id.* at 532.

71 *Id.* at 534.

72 *Id.* ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.").

73 *Id.* at 546 (Rehnquist, J., dissenting) ("This unit provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps.").

74 *Id.* at 536–37 (majority opinion).

wise legitimate justification.[75] But that is not standard rational basis review.

The Court extended its *Moreno* analysis in *City of Cleburne v. Cleburne Living Center*.[76] In that case, a city denied a special-use permit that would have allowed an investor to convert a building into a home for adults with intellectual disabilities.[77] The Court rejected several justifications for the denial,[78] and it concluded instead that it was based on an illicit animus against such persons, which, once more, was not a permissible basis in support of the law.[79] Again, however, this is not conventional rational basis review.

However problematic normatively, it is not irrational to imagine that the permit denial resulted from community concerns that, if approved, the plan would reduce property values. Preserving property values is not merely rational; it is a central function of local government. And this justification does not necessarily turn on animus. A group of residents could readily argue that although they wish that others in their community, or potential purchasers, shared their unbiased views so that the proposed use would not adversely affect local property values, the unfortunate contrary reality explains their opposition.

To be sure, such arguments were rightly rejected in the context of restrictive covenants excluding, typically, African Americans and Jews. Defending such laws on the ground that blatant racial or religious restrictive covenants preserve land values is no longer a credible legal position. But rather than helping the *Cleburne* majority, this merely underscores the analytical difficulty. State-supported restrictions based on race or religion trigger strict scrutiny.[80] Even an arguably rational, albeit disturbing, justification related to property values as the basis for racial or religious exclusions thankfully will not suffice. Instead, the state would have to offer a compelling justification plus narrow tailoring. Preserving the value of real estate through racial or religious bigotry easily fails this stringent test.

Despite these analytical difficulties, explaining the Court's reliance on ra-

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75 *Accord* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 952 (2004) ("[I]n those few cases in which the Supreme Court has concluded that legislation subject to minimal scrutiny lacks a legitimate purpose, it has generally eschewed the search for any conceivable hypothetical purpose and focused on what the Court views as the government's actual purpose.").

76 473 U.S. 432 (1985).

77 *Id.* at 436–37. The once-common term "mental retardation" has been replaced with "intellectual disability." *See* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (updating terminology in federal statutes).

78 The expressed concerns included: negative attitudes of property owners to the project, fears of elderly residents, concerns that students at the neighboring junior high school might harass residents, and location on a 500-year flood plain. *City of Cleburne*, 473 U.S. at 448–49.

79 *Id.* at 450.

80 The Supreme Court relied upon a bootstraping analysis, which deemed judicial enforecement of private covenants state action, to render these devices constitutionally impermissible in *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948).

tional basis scrutiny in this context is not difficult. In other contexts, for example, driving or being held responsible for contractual obligations, distinguishing those with intellectual disabilities from the general adult population makes sense, as does the inclusion of cumulative anti-fraud provisions in a welfare law. The animus analysis has the feature of a one-time ticket, invalidating each of the laws in question without calling the presumptive validity of future laws, for example, those affecting persons with intellectual disabilities or those imposing welfare-access restrictions, into question more generally.

The cases involving sexual minorities, discussed below, modify this analysis in two important ways. First, the idea of a one-time ticket plays out differently in the context of a body of case law that was largely designed to help forge a path toward finding a constitutional right, here to same-sex marriage.[81] Second, applying rational basis scrutiny while striking down a challenged law results in casting aspersions on those who disagree, or what Robert Nagel has called judicial "name-calling,"[82] a feature that appears to have contributed to Justice Kennedy's decision to rest *Obergefell* on an alternative ground.

In *Romer v. Evans*, the state of Colorado enacted Amendment 2 through a statewide initiative.[83] The Amendment prohibited sexual orientation, or other sexual-minority status, from inclusion in state or local antidiscrimination laws.[84] Prior to that Amendment, various localities had amended their antidiscrimination laws, which typically included categories such as race, religion, and gender, to also include sexual orientation or other minority-sexual status.[85] Justice Kennedy, writing for the *Romer* Court, struck down Amendment 2, relying principally on the *Moreno* and *Cleburne* animus rationales.[86]

In dissent, Justice Scalia maintained that because it was permissible to criminalize same-sex intimacy—*Romer* was issued before *Lawrence v. Texas* overruled *Bowers v. Hardwick*—it was also permissible to deny special benefits to individuals with a "self-avowed tendency or desire" to engage in such intimacies.[87] Justice Scalia further advanced a process-driven justification, claiming it was not irrational in a multilevel democracy to take an issue about which gays and lesbians had scored local victories in municipal lawmaking processes, and ratchet upward the decision-making level statewide

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81 Maxwell L. Stearns, *Private-Rights Adjudication and the Normative Foundations of Durable Constitutional Precedent*, *in* PRECEDENT IN THE UNITED STATES SUPREME COURT 77 (Christopher J. Peters ed., 2013); Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on* Hollingsworth *and* Windsor, 65 ALA. L. REV. 349 (2013) [hereinafter *Grains of Sand*].

82 ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE 124, 126 (1994) (positing that a "sinister description of 'the proponents'" proved relevant, perhaps necessary, to support the claim that the challenged law lacked a rational basis). *See infra* Part III.C.

83 517 U.S. 620, 623 (1996).

84 *Id.* at 624.

85 *Id.* at 623–24.

86 *Id.* at 631–32.

87 *Romer*, 517 U.S. at 642 (Scalia, J., dissenting).

for ultimate resolution.[88]

In his *Romer* dissent, Justice Scalia relied in part on *Bowers*, a case that *Lawrence* later overruled, to defend as rational the systematic exclusion of minority sexual orientation from the list of protected statuses under state and local antidiscrimination laws.[89] After *Romer*, *Lawrence* struck down a Texas consensual sodomy statute that, unlike the Georgia statute sustained in *Bowers*, specifically targeted same-sex intimacy.[90] Justice Kennedy once again wrote the majority opinion, and, as in *Romer*, he declined to apply strict scrutiny.[91] Although Justice Kennedy's choice of selected tier is imprecise, the more plausible reading supports rational basis.[92] The *Lawrence* Court thus further supported the doctrinal anomaly that rational in theory can be strict, or even fatal, in fact.

The relationship between *Romer*, an equal protection case, and *Lawrence*, a due process case, is especially important in light of the decision to rest *Obergefell* primarily on due process grounds. In *Lawrence*, Justice Kennedy reasoned that the historical analysis in the *Bowers* majority opinion was deeply flawed, and that when sexual activity is not viewed as a series of isolated events, but rather as part of a defining bond between committed partners, it became evident that singling out the particular intimacy of consensual same-sex partners for criminality lacks a substantial justification.[93] For Justice Kennedy, this insight was essential in honoring the dignity of committed same-sex partners.

The *Lawrence* holding would have been more easily achieved had the Court identified same-sex intimacy as a fundamental right triggering strict scrutiny, as it had the right to birth control,[94] and to terminate pre-viability pregnancies.[95] Justice Kennedy declined to do that, however, perhaps motivated by the desire to avoid forecasting a fundamental right to same-sex marriage. Even so, Justice Scalia claimed that the *Lawrence* dignity analysis ren-

88 *Id.* at 639 (claiming a right to retain victories from lower levels in a multi-tiered democracy is "unheard of"). Unlike in *Moreno* and *Cleburne*, where the rationales set aside under rational basis review related to the merits, in *Romer*, the rationale set aside related to the process of enactment.

89 *Id.* at 640–41.

90 *Lawrence v. Texas*, 539 U.S. 558, 566, 578 (2002).

91 *Id.* at 578.

92 Although Justice Kennedy employed the term "substantial" at various points in his opinion, see, for example, *id.* at 565; *id.* at 572, the overall opinion does not appear to rely on either intermediate or strict scrutiny. Most notably, Justice Kennedy did not refute Justice Scalia's observation that the majority had applied rational basis review. *Id.* at 586 (Scalia, J., dissenting).

93 *Id.* at 567 (majority opinion) (describing sexual intimacy as part of "a personal bond that is more enduring").

94 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

95 Roe v. Wade, 410 U.S. 113, 155 (1973); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality) (reclassifying a woman's interest in abortion as a liberty interest, rather than a fundamental right).

dered an eventual ruling finding a right to same sex-marriage inevitable.[96]

In *United States v. Windsor*,[97] Justice Kennedy further relied on the animus analysis as the basis for striking down § 3 of the Defense of Marriage Act ("DOMA"). After citing the relevant line of cases, Justice Kennedy stated, "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[98] In dissent, Justice Scalia further maintained that the majority opinion had not resolved what he viewed as the central issue in the case: "The opinion does not resolve and indeed does not even mention . . . whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality."[99] Justice Scalia was correct. Although Justice Kennedy had shown that rationality review is sometimes fatal, he had not yet resolved the question that most thought controlling in context of same-sex marriage, namely which tier of scrutiny the Court would apply.

3. Intermediate in Theory but Either Strict or Rational in Fact

The final complication for tiers of scrutiny analysis involves intermediate scrutiny in gender- or sex-based classifications. This was the standard that many envisioned in the context of same-sex marriage, and that, as previously explained, had been applied then rejected, in the context of affirmative action.[100]

The history of equal protection review of gender-based classifications is well known.[101] What started as a seemingly more piercing rational basis scrutiny quickly emerged as a formal third tier. That tier requires proof of an important governmental interest and means substantially in furtherance

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96 *See Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case 'does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.' . . . Do not believe it."). *See also infra* note 99 and accompanying text. Assuming Justice Scalia believed that *Lawrence* and *United States v. Windsor*, 133 S. Ct. 2675 (2013), controlled *Obergefell*, one might have envisioned a concurrence in the judgment, lamenting precedents to which he was bound as a matter of ironic consistency. That was not the approach Justice Scalia ultimately chose. *See* Obergefell v. Hodges, 135 U.S. 2584, 2626 (Scalia, J., dissenting).

97 *Windsor*, 133 S. Ct. at 2682. For a further discussion of *Windsor*, see *infra* Part III.C.

98 *Id.* at 2693.

99 *Id.* at 2706 (Scalia, J., dissenting).

100 *See supra* Part I.C.1.

101 As is the history of substituting the grammatical term "gender" in place of the anatomical term "sex." *See* Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14 (crediting Ginsburg's secretary, who was concerned with improper connotations of "sex," with the substitution).

of that interest.[102] The results have been mixed, as the Court has neither systematically struck down nor sustained such classifications. The dividing line appears to be that the Court sustains policies based on its perception of real differences between the sexes or of laws seeking to overcome the present effects of historically adverse treatment of women, primarily in workplace settings. Conversely, the Court strikes down policies it believes reflect "overbroad generalizations" about the sexes,[103] sometimes called "old fogyism."[104] Two relatively recent cases demonstrate the analytical difficulties these cases have presented.

In *United States v. Virginia*,[105] Justice Ginsburg, writing for a majority, struck down the exclusion of women from the Virginia Military Institute ("VMI"), a state military-style academy that prided itself on the adversative method of training and its Spartan barracks life and dining arrangements, especially for first years, referred to as "rats." Under conventional intermediate scrutiny, the exclusion of women was arguably justified by the requisite accommodations respecting privacy and physical exertion imposed on rats and even upperclassmen before women could enter the program. For that reason, the Commonwealth developed the Virginia Women's Institute for Leadership ("VWIL"), housed at the all-women's Mary Baldwin College, for women interested in developing military-style leadership skills in what the creators regarded as a more congenial setting.[106]

As Justice Ginsburg observed, the differences between the two programs—VMI and VWIL—were profound, including philosophical differences in pedagogy, with VWIL focused on group participation and building self-esteem rather than the breakdown-and-rebuild model embodied in the adversative method, and qualitative differences in degree programs, faculty, and opportunities for alumni networking.[107] The *Virginia* case thus resembled *Sweatt v. Painter*,[108] as the Court drew parallels between VWIL in the context of gender and the obviously inadequate effort by Texas to construct a law school for blacks in lieu of admission to the flagship University of Texas School of Law in the context of race.[109] Still, there were notable differences between *Virginia* and *Sweatt*, not the least of which was the context—gender, not race—and the doctrine—intermediate scrutiny, not strict.

If intermediate scrutiny accommodates legislation recognizing real-sex differences and if admitting women requires changing institutional accul-

102 Craig v. Boren, 429 U.S. 190, 197 (1976).
103 United States v. Virginia, 518 U.S. 515, 533 (1996).
104 *Id.* at 543 (citation omitted).
105 *Id.* at 556–58.
106 *Id.* at 526–27.
107 *Id.*
108 339 U.S. 629 (1950).
109 *Virginia*, 518 U.S. at 553–54.

turation and pedagogy, then a small number of women seeking admission to VMI would not suffice to invalidate the exclusion of women. Given the preexisting understanding of the test to accommodate laws reflecting such differences between the sexes, Justice Ginsburg thus had to refine intermediate scrutiny to strike the law down. She did so by stating that the government has the burden to show an "exceedingly persuasive justification" for its policy,[110] which must be contemporaneous, and thus intended at the time of enactment, rather than constructed to justify the policy after the fact.[111] This doctrinal transformation had three important components. First, the burden of proof is squarely on the government. Second, an "exceedingly persuasive justification" is closer to "compelling" than "important." Third, that justification must be contemporaneous.

The contemporaneity requirement proved essential in striking VMI's exclusion of women. Even if the adversative system and spartan barracks life were grounded in important pedagogical concerns that justified excluding women, which the majority refuted,[112] that was irrelevant if the Virginia legislature did not rest on those reasons when creating VMI in 1839. As Chief Justice Rehnquist observed in his concurrence in the judgment, since Virginia was unaware of any obligation to offer such a program to women until, at the earliest, the 1982 decision, *Mississippi University for Women v. Hogan*,[113] which held that an *all-women's* nursing program violated the equal protection rights of *men*, the majority analysis produced a constitutional anachronism.[114]

This strict version of intermediate scrutiny did not last. In *Tuan Anh Nguyen v. INS*,[115] Justice Kennedy, writing for a majority, sustained an INS

110 *Id.* at 524 (citations omitted).

111 *Id.* at 536 (citations omitted).

112 *Id.* at 549–50.

113 458 U.S. 718, 733 (1982).

114 *Virginia*, 518 U.S. at 561–62 (Rehnquist, C.J., concurring).

115 533 U.S. 53, 58–59 (2001). As this Article was nearing publication, the Supreme Court issued Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (Gorsuch, J., recused), which continued the ongoing volley as to whether intermediate scrutiny, as applied to parental sex-based immigration distinctions, is lite or heavy. The case involved a Fifth Amendment Due Process Clause challenge to § 1401(a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7) (1958 ed.). *Id.* at 1686 n.1. The provision imposed a longer—ten-year, five of which must be post-age fourteen—durational residency requirement on U.S. citizen fathers, as compared to a one-year durational residency requirement for U.S. citizen mothers, who are the parents with a non-U.S. citizen of an illegitimate child born outside the United States who later seeks to become a U.S. citizen. The child of a deceased U.S. citizen father, who fell short of the post-age fourteen, five-year requirement by twenty days, and who was himself subject to deportation due to his criminal record, brought suit. *Id.* at 1686. He claimed that because he would have been granted citizenship status, thereby preventing deportation, had his mother been a U.S. citizen, the statute violated his equal protection rights as applied to the federal government under the Fifth Amendment Due Process Clause.

Justice Ginsburg wrote for a majority of six, including Justice Kennedy, who wrote the *Nguyen* majority opinion. (Justices Thomas wrote a concurrence in the judgment that Justice Alito

policy that automatically conferred citizenship status on the foreign-born illegitimate children of U.S. citizen mothers, but that required affirmative steps prior to maturity before similarly situated children of U.S. citizen fathers could acquire citizenship.[116] The *Nguyen* majority held that real sex differences justified the policy because whereas fathers of illegitimate children are often unaware of the conception, let alone birth, of the child, mothers of illegitimate children are invariably aware of their births and are thus more likely to form meaningful parental bonds.[117] Even though at the time of enactment, one consideration was proof of paternity, a concern overtaken by DNA testing, that contemporaneous justification proved irrelevant. Justice Kennedy's opinion omitted any discussion of exceedingly persuasive justifications that the government must prove. Instead, he reverted to the pre-*Virginia* intermediate scrutiny analysis, which generally deferred to claims of real-sex differences.

This analysis raises two important points: First, although the Court has articulated an intermediate scrutiny standard, in this context the test does no real work. Behind the intermediate scrutiny veil, the Court readily sorts into the presumptively good bin (intermediate lite) those laws based on real differences or that remedy past adverse treatment and into the presumptively bad bin (intermediate heavy) those laws based on "old fogyism." Of course the old-fashioned two-tiered scheme, with rational basis in place of intermediate lite and strict scrutiny in place of intermediate heavy, is entirely adequate to this binary task. Both the *Virginia* case, which required redefining intermediate scrutiny to strike down a law implicating a real sex dif-

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joined, and Justice Gorsuch did not participate). In her opinion, Justice Ginsburg ratcheted back up the demands of intermediate scrutiny consistent with her earlier opinion, *United States v. Virginia*, albeit by distinguishing, not overruling, *INS v. Nguyen*. She reasoned that whereas *Nguyen* involved the validity of a sex-based parental acknowledgement requirement, thus arguably promoting connectedness to the United States, *Morales-Santana* instead involved a challenge to the more attenuated sex-based parental durational residency requirement. Although Ginsburg determined that the statutory distinction drawn in § 1401(a)(7) violated due process, she nonetheless denied relief on the ground that the Supreme Court was not empowered to level-up a remedy respecting naturalization. *Id.* at 1698. Because the Court ultimately denied Mr. Morales-Santana relief, the Court's due process analysis, including its elevation of the intermediate scrutiny test, might be construed as dictum. *See generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005). Whether this part of the opinion is holding or dictum, however, has no bearing on the dimensionality analysis. In either case, the question remains where to draw the permissibility line along a single dimension of gender and anti-subordination. *See also* United States v. Flores-Villar, 536 F.3d 990, 993 (9th Cir. 2008) (determining that, based on the Supreme Court's decision in *Nguyen*, "intermediate scrutiny applies to Flores-Villar's gender-based claim and rational basis review applies to his age-based claim, [such that] the residence requirements of [the Immigration and Nationality Act, 8 U.S.C.] §§ 1401(a)(7) and 1409 survive."), *aff'd by an equally divided court*, 564 U.S. 210, 210 (2011) (per curiam) (Kagan, J., recused).

116 For a discussion of a fractured-panel predecessor case raising closely related issues, *Miller v. Albright*, 523 U.S. 420 (1998), including a breakdown of the opinions, see STEARNS, *supra* note 44, at 7–14.

117 *Nguyen*, 533 U.S. at 70, 73.

ference,[118] and the more recent case, *Sessions v. Morales-Santana*, which, although not overruling *Nguyen*, had a similar effect, suggest that the intermediate scrutiny volley continues.[119]

Second, the analysis helps to explain why Justice Kennedy avoided treating restrictions on same-sex marriage as a gender-based classification in *Obergefell*. Justice Kennedy had already resolved intermediate scrutiny away from Justice Ginsburg's stricter *Virginia* version. Although Justice Kennedy could easily have distinguished *Nguyen* in *Obergefell* given their very different contexts, he might have reasoned that treating a same-sex marriage bans as an illicit gender-based classification would nonetheless force a retreat from his skeptical stance on strict intermediate scrutiny.

D. Critiques and Proposals

This case survey suffices to explain the critical reception that the Supreme Court's approach to tiers of scrutiny has received. Although aspects of the scheme are not without defenders,[120] commentators have generally criticized the Court's approach, focusing on apparent doctrinal inconsistencies, disingenuous applications of standards, and outcomes that seem overly determined by the chosen tier.[121] These concerns have given rise to myriad, sometimes conflicting, doctrinal prescriptions. Most notably, proposals for reform have included Justice Stevens's advocating abandoning tiers of scrutiny altogether in favor of a uniform approach to all equal protection cases,[122] and Justice Marshall's advocating for a broad array of tiers, linked

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118 *See supra* notes 97–98 and accompanying text

119 For a discussion of Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017), and United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008), see *supra* note 115.

120 *See, e.g.*, Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 329 (1998) ("Intermediate scrutiny . . . is generally a better solution to analogical crisis [of the sort characterized by comparing race, sex, and sexual preference] than denying certiorari, implementing a sliding-scale approach, or announcing a maximalist rule.").

121 *See* Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2343–46 (2006) (summarizing "[s]tandard [c]ritiques of [t]iered [r]eview," including lack of guidance, excessive rigidity, and inadequate normative foundation).

122 *See* Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."); *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484 (2004) ("[T]he problems with the three-tiered framework for judicial scrutiny are sufficient to warrant immediate consideration of an alternative standard for review, such as the single standard proposed here . . . ."); Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 819, 824 (2002) ("The hard-judicial-look approach [set out in *United States v. Virginia*] could and should become the norm in both racial and gender cases."); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 177 (1984) ("The multiple tiers could be transformed readily into a comprehensive system based upon the unitary standard . . . which in all instances would inquire whether there is an appropriate gov-

to the invidiousness of the classification or the importance of the claimed right.[123] More recently, in avoiding discussing tiers altogether, Justice Kennedy has at least implicitly offered yet another approach.[124]

Although the system of tiers is problematic, the discussion that follows explains why none of these prescriptive approaches can succeed in repairing it. A system resembling tiers of scrutiny is an inevitable feature of equal protection doctrine. Applying the existing tiers would be simpler and more compelling if the Court better related its scheme of tiers to the dimensionality of the underlying case law.

II. TIERS AND DIMENSIONALITY

The following discussion offers an innovative framework for analyzing tiers of scrutiny. We begin with a simple numerical illustration. Although the example does not capture the nuance and complexity of constitutional doctrine, abstracting away from such detail, and then adding layers of complexity, will help relate the essential concepts to underlying cases.

A. Odds, Evens, Primes, and Non-Primes

Consider a simple binary division of whole numbers as odd or even, presented horizontally in Table 3.[125] These broad categories, resting along a single dimension, suffice to sort as small a set as two consecutive integers (2, 3), or infinite integers (2, 3, 4, etc.), based on whether that number can be divided by two while yielding another whole number. None of the numbers listed as odds (3, 5, 7, etc.) meet this criterion; all numbers listed under evens (2, 4, 6, 8, etc.) do. These two categories, resting along the odds/evens dimension, suffice for this elementary sorting task even over potentially infinite whole numbers.

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ernmental interest suitably furthered by the governmental action in question.") (citation omitted) (internal quotation marks omitted).

123 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1972) (Marshall, J., dissenting) ("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."); *see also* James E. Fleming, *"There Is Only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2311 (2006) (concluding from review of cases that Justice Stevens and Justice Marshall were correct that "[t]here is only one Equal Protection Clause, with a 'continuum of judgmental responses' or a 'spectrum of standards.'").

124 *See infra* Part II.C. (relating Kennedy's avoidance of tiers to Justice Stevens's and Justice Marshall's proposals).

125 Whole numbers are the subset of integers that are non-negative.

TABLE 3

DIMENSIONALITY IN CATEGORIZING INTEGERS

	Odds	Evens
Primes	**3**, 5, 7, 9, 11, 13, 17, 19 . . .	**2**
Non-Primes	9, 15, 21, . . .	**4**, 6, 8, . . .

Now consider adding another criterion: is each listed integer a prime number, meaning a whole number larger than 1 that can only be divided by itself and 1 while generating a whole number? Sorting whole numbers as odd or even cannot complete this sorting task. The difficulty is that the number 2 is an even prime, whereas the remaining primes are a subset of odds. The number 2 is thus the mathematical equivalent of an aloft hot air balloon.[126] Without introducing the separate primes/non-primes categories, even the simple sequence of integers—234—presented in bold in Table 3 cannot be sorted according to the criteria of odd/even, prime/non-prime. This holds even though either binary scheme—odds/evens or primes/non-primes—suffices to sort infinite data,[127] and even though a single dimension can capture multiple criteria that move in a common direction.[128]

Constitutional doctrine is obviously more complex than sorting integers. And yet, assessing challenged laws based on tiers of scrutiny implicates a similar dimensionality problem. As with integers, infinite cases or challenged laws can be sorted over two tiers—rational basis or strict scrutiny—that rest along a single dimension, provided that the dimension accurately captures the relevant normative stakes. And yet, certain constitutional hot air balloons—affirmative action and cases implicating politically unpopular groups that are neither suspect nor quasi-suspect—can thwart a sorting scheme that fails to appreciate the need for an additional dimension. The remainder of this Part explores these points in the context of evolving rules.

126 The dimensionality analysis also helps to explain why the original sequence of tiers, 12345, is less predictive than the peculiar sequence, 14325. *See supra* Tables 1 and 2; *see also supra* note 15 (clarifying assumptions).

127 Thus, for each listed dimension, we can overlay an additional normative criterion—small to large—without forcing yet another dimension. In Table 3, starting in the upper left and moving clockwise or counterclockwise, for each box we can plot an infinite sequence from small to large. *See* Table 3.

128 By combining categories vertically or horizontally along each separate dimension, Table 3 reveals small-to-large odds or evens (the horizontal dimension), and small-to-large primes or non-primes (the vertical dimension).

B. Shifting Lines Along a Single Dimension

A single dimension can accommodate not only infinite data, but also changes in how we sort data over time. Imagine the need to divide children and adults. In the ancient Jewish tradition, the age of thirteen marked the Bar Mitzvah (for boys only, with girls considered adults at twelve).[129] Even the most devout Jew would no longer consider a boy of thirteen (or a girl of twelve) an adult.[130] For a long time within the United States and elsewhere, many marked adulthood at the age of eighteen, corresponding roughly to completing high school. For many, meaningful responsibility is deferred through the end of college, typically age twenty-two. And the Affordable Care Act ("ACA") treats offspring up to age twenty-six as "children" for insurance purposes,[131] potentially extending dependency through the comple-

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129 *See* THE NEW ENCYCLOPEDIA OF JUDAISM 106, 109–10 (Geoffrey Wigoder et al. eds., 2d ed. 2002) (dating earliest liturgical bat mitzvah ceremony to the 1920s).

130 That is, other than for the very limited purpose of counting toward a minyan, the requisite quorum of ten required for collective prayer. *Id.* at 106. This also marks the point of assuming personal responsibility for mitsvot, or religious good deeds. *Id.*

131 Patient Protection & Affordable Care Act, Pub. L. No. 111-148, § 1001(a)(5), 124 Stat. 119, 132 (2010) (codified at 42 U.S.C. § 300gg-14) (amending § 2714(a) of the Public Health Service Act) (requiring insurers offering coverage for the dependent children of beneficiaries to cover "an adult child (who is not married) until the child turns 26"). During his campaign and in the early months of his presidency, President Donald Trump pledged to "repeal and replace" the ACA, also known as "Obamacare." Early on, his administration took steps toward repeal, but without putting forth a comprehensive replacement proposal. *See* Mark Landler, *Trump Says Health Law Replacement May Not Be Ready Until Next Year*, N.Y. TIMES (Feb. 5, 2017), https://www.nytimes.com/2017/02/05/us/politics/donald-trump-health-care-law-repeal-replace-plan.html (noting that President Trump stated in an interview that a replacement health care law would likely not be ready until the end of 2017 or 2018 but that he had "signed an executive order to begin unwinding the [ACA]" in January 2017); Julie Hirschfeld Davis & Robert Pear, *Trump Issues Executive Order Scaling Back Parts of Obamacare*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/us/politics/trump-executive-order-obamacare.html (describing President Trump's first executive order, which "directed government agencies to scale back as many aspects of the [ACA] as possible," but noting that the President had yet to devise a replacement plan).

After the House finally approved a plan to repeal Obamacare, albeit without a comprehensive alternative plan that would, for example, ensure coverage for those with pre-existing conditions, Republican Senate leaders proved unable to satisfactorily amend the bill. They instead moved to send a slightly modified version of the House bill to the Senate floor, opening it more broadly to motions to amend. The leadership simultaneously sought assurances from their House counterparts that the bill, which became known as the "skinny repeal," would not be passed and sent to the President in its then-existing form should the Senate pass it. Juliet Eilperin et al., *Senate Rejects Measure to Partly Repeal Affordable Care Act, Dealing GOP Leaders a Major Setback*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/powerpost/senate-gop-leaders-work-to-round-up-votes-for-modest-health-care-overhaul/2017/07/27/ac08fc40-72b7-11e7-8839-ec48ec4cae25_story.html (noting that Senators McCain, Graham, and Johnson had sought "an iron-clad guarantee . . . that . . . the House would not move to quickly approve the bill in its current form . . . .").

These developments coincided with an announcement that Senator John McCain (R. Ariz.), whose vote was likely to be decisive, had suffered a rare brain cancer requiring surgery. Noam N. Levey & Lisa Mascaro, *With Pence Breaking a Tie, Senate Votes to Begin Debate on Obamacare Repeal Bill*, L.A. TIMES (July 25, 2017), http://www.latimes.com/politics/la-na-pol-

tion of graduate or professional training. In effect, we have seen a doubling through four- or five-year increments—thirteen, eighteen, twenty-two, and twenty-six—of a once-accepted age of maturity.[132]

TABLE 4

SHIFTING DIVISION ALONG A SINGLE DIMENSION

Age of Maturity			
Child	Adult		
Child	Adult		
Child	Adult		
Child	Adult		
13	18	22	26

The single dimension—young to old—accommodates the incremental adjustment of adulthood from ancient to modern times.[133] To be sure, such blunt divisions might not succeed for all affected persons. Given the purpose for which the line is drawn—the ability to participate in particular religious rituals, to enter into binding contracts, to consent to sexual activity, to marry, to finish school, to work, to live on one's own, to assume personal financial responsibility—its placement determines who can and who cannot lawfully engage in, or be held accountable for, the consequences of such activities. The rule accomplishes this sorting function even though some indi-

obamacare-senate-vote-20170725-story.html. In a dramatic sequence of events, after surgery, McCain flew from Arizona to Washington to vote in favor the procedural maneuver to get the bill to the floor with the result of a tie, which Vice President Pence broke in favor of approval. *Id.* The debates included an emotional floor speech by McCain that received great fanfare, after which he cast the decisive vote that defeated the bill. In fact, the bill would also have failed had McCain not returned for the procedural vote. For my contemporaneous account of "The McCain Moment," and of why Senators Susan Collins (R. Me.) and Lisa Murkowski (R. Alaska), who were more persistent in opposing skinny repeal received less limelight, see Max Stearns, *The McCain Moment*, BLINDSPOT (July 28, 2017), https://www.blindspotblog.us/single-post/2017/07/28/The-McCain-Moment, and Max Stearns, *About Susan Collins and Lisa Murkowski*, BLINDSPOT (July 28, 2017), https://www.blindspotblog.us/single-post/2017/07/28/About-Susan-Collins-and-Lisa-Murkowski.

132 For a recent debate relying on neuroscience to assess the child-adult line, see Laurence Steinberg, *Adulthood: What the Brain Says About Maturity*, N.Y. TIMES (May 29, 2012, 3:09 PM), http://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity (arguing that different age thresholds of legal maturity for different types of acts is the natural implication of the varying rates of maturation of different parts of the brain).

133 In other contexts, the relationship of age to other criteria, like competency to grant consent, could require a splitting of dimensions, as when considering the diminished capacity of those who are the very young or aged. *Id.*

viduals sorted as children are more mature than others sorted as adults and vice versa.[134] That is the nature of a rule.

Dimensionality is highly relevant to evolving bodies of constitutional doctrine. Degrees of invidiousness of challenged classifications or of the importance of claimed fundamental rights are equally subject to shifting societal understandings—and thus shifting lines along the relevant dimension—over time. Same-sex marriage is the most obvious modern illustration. The speed with which societal impressions on this issue have changed, thereby affecting dramatic legal change, has been stunning.[135] A mere generation ago, one prominent liberal scholar described constitutional arguments supporting same-sex marriage as "quite adventurous."[136] Indeed, they were, highlighting the Red Queen nature of constitutional law making. The case law trajectory including *Romer v. Evans*,[137] *Lawrence v. Texas*,[138] and *United States v. Windsor*,[139] created an increasingly firm foundation for such challenges, leaving most observers wondering how, not if, the Supreme Court would find in favor of the *Obergefell* claimants.

C. On the Inevitability of Tiers

Even sorting constitutional cases along a single dimension can generate complexity. To illustrate, imagine how Justice Stevens's proposed regime—a single meaningful tier for all cases arising under the Equal Protection Clause—would operate in practice. Justice Stevens long maintained that equal protection demands that laws operate consistently with a regime that

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134 For example, in *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012), the Supreme Court extended *Roper v. Simmons*, 543 U.S. 551, 578 (2005), which disallowed the death penalty for juveniles, to further disallow mandatory life without parole for juveniles, acknowledging that some below age eighteen have sufficient cognitive awareness to comprehend the gravity of their offenses, whereas others above eighteen may not.

135 President Obama's "evolution" presents a good example. *See* Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html (describing President Obama's endorsement of same-sex marriage and characterizing it as a "transformation on the issue").

136 *See* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 26 (1994) ("[T]he argument I have explored here—for the proposition that same-sex relations and even same-sex marriages may not be banned consistently with the Equal Protection Clause—is, to say the least, quite adventurous.").

137 517 U.S. 620, 635–36 (1996) (holding that a Colorado law that singled out homosexuals as a class for unequal treatment was forbidden by the Equal Protection Clause).

138 539 U.S. 558, 562, 578 (2003) (holding that a Texas law criminalizing same-sex private consensual intimate conduct violated protected liberty interests under the Due Process Clause and was thus unconstitutional).

139 133 S. Ct. 2675, 2682 (2013) (holding that the Defense of Marriage Act unconstitutionally discriminated against same-sex couples married under their states' laws).

governs impartially.[140] Although impartiality is an appealing conception, applying it in actual cases can test constitutional doctrine in unanticipated ways.

From the perspective of lower federal and state courts, a single tier identifies an analytical dimension along which a line demarcating permissibility and impermissibility will eventually be drawn. The Supreme Court does not typically seek out a precise dividing line within any given case.[141] Rather, over myriad cases, the Court identifies particular features that result in each challenged law being sustained or struck down. Lower courts carefully read these cases for guidance. Eventually those courts will come to associate certain descriptors as signaling a presumptively problematic law, and others as signaling a presumptively non-problematic law. Because of the inevitably dynamic responses, most notably by legislatures or other lawmakers, to the Court's pronouncements, a set of proxies emerges that inform the initial sorting. Over time, as lawmakers seek to avoid adverse characterizations based on the Court's pronouncements that prevent them from accomplishing certain objectives, the Court identifies other rules that allow a search for errors missed in the initial sort.

Eventually as characterizations solidify, some come to be associated with presumptively bad, and others with presumptively good, laws. Those respective groupings fall on opposite sides of what inevitably becomes a de facto dividing line. Along the relevant analytical dimension, the dividing line sorts characterizations associated with invidious versus non-invidious classifications, and sorts characterizations associated with fundamental rights versus mere liberty interests. Once again, the analysis is not changed by the fact that the precise location of that line is unknown or might change over time.

Justice Thurgood Marshall's contrary approach, applying multiple tiers of scrutiny based on the degree of invidiousness of the challenged classification or the relative importance of the claimed right, is subject to the same analytical difficulty.[142] Each approach—one standard or many—suffers from a category mistake. The appropriate number of tiers must correlate with the dimensionality of the case law, not with the number of cases or case categories being sorted.[143] Within any case law category, as precedents ac-

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140 *See* Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially."). Cass Sunstein has suggested more generally that the Constitution embraces a principle of impartiality. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 24 (1993).

141 Indeed, such efforts might constitute dictum. *See generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

142 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (discussing a "spectrum of standards" in equal protection cases).

143 This follows from the insight that a single dimension can sort infinite data such as "odds or evens," or "primes or non-primes," provided the relevant sorting criterion correlates to what the dimension captures, and yet a single dimension cannot capture even three data—such as the sequence 2, 3, 4—if the relevant criteria, such as combining odds/evens and primes/non-primes, thwart either single dimension. *See supra* Part II.A.

cumulate, lower courts will realize which of the several tiers result in classifying the challenged law as presumptively bad or presumptively good, and which factors justify further inquiry, leading to a potential opposite result from that predicted by the initial sort.[144] Whether starting with one or many tiers, the Court will eventually achieve two presumptive tiers, albeit with different terminology, and until the signals sort themselves out, less guidance.

Justice Kennedy's most recent decisions affecting sexual minorities are subject to the same analysis. Although he avoided ascribing a specific tier in *Lawrence v. Texas*,[145] and avoided the language of tiers altogether in *Obergefell v. Hodges*,[146] the holdings reveal that the challenged laws fall on the prohibited side of the relevant dimension along which such cases are inevitably assessed.[147] Future cases will reveal which, if any, laws affecting sexual minorities will fall instead on the permitted side of the same analytical dimension.[148] Avoiding a discussion of tiers cannot eliminate the inevitability of dimensionality in assessing the case law, a feature that necessarily results in a set of tiers-like doctrines.[149]

D. Third Tier as Splitting the Difference

The preceding analysis further demonstrates the analytical difficulty of the third tier. If intermediate scrutiny provides a means of avoiding difficult sorting decisions, the effect is temporary. The same set of difficulties that confront the Marshall-Stevens-Kennedy approach to tiers inevitably confronts the middle tier.[150] We know that cases involving gender classifications are not automatically placed in the bin for presumptively bad or presumptively good laws. What we do not know is which challenged gender-based laws are presumptively bad or presumptively good. Avoiding an immediate answer does not mean avoiding an eventual answer.

Over time, the Court will attach characterizations to those cases that are, in fact, presumptively bad (associated with "overbroad generalizations" or "old fogyism") or presumptively good (associated with "real-sex differences" and making up for past adverse treatment of women). Ironically, given the context, once the intermediate scrutiny fig leaf is lifted, the true

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144 This follows from Bayes theorem. *See generally* Steven C. Salop, *Evaluating Uncertain Evidence with Sir Thomas Bayes: A Note for Teachers*, 1 J. ECON. PERSP. 155 (1987).

145 539 U.S. 558 (2003).

146 135 S. Ct. 2584 (2015).

147 *See infra* Part III.C. (explaining that the prohibited side of the relevant analytical dimension is anti-subordination).

148 For example, we might imagine an unsuccessful equal protection challenge to a law providing sexual minorities, as past victims of discrimination, special consideration in hiring in particular employment contexts.

149 For a more detailed analysis, see *infra* Part III.C.

150 This is also true more generally of proposals for single-tier systems. *See supra* Part I.D. (describing proposed alternative systems of tiers of scrutiny, including a single meaningful tier).

gender dimorphism is revealed. Intermediate scrutiny lite becomes de facto rational basis review, and intermediate scrutiny heavy becomes de facto strict scrutiny. The so-called middle standard is doing no work in the context of gender classifications because if its purpose is to serve as a placeholder for tough eventual decisions, there is no work for it to do.[151]

Of course this does not mean that the two-tier system or the lines drawn along the dimensions that such systems implicate invariably succeed. But it does mean that a third tier must be justified by something other than present uncertainty. That "something" involves dimensionality, and this analysis returns us to race.

E. Expanded Dimensionality and the Benign Use of Race

Justice Brennan long advocated applying intermediate scrutiny in cases challenging the so-called benign use of race, meaning cases in which the challenged racial classification was intended to provide a benefit to identified racial minorities. For a short time, from *Metro Broadcasting* through *Adarand*, he succeeded for federal racial preferences.[152] Eventually, the Court reverted to the traditional two-tier scheme—strict or rational basis review—in race cases. Because the scheme conflates dimensions, the seeming simplification has had the opposite effect. Table 5 illustrates the conceptual difficulty.

TABLE 5

RACE AND DIMENSIONALITY

	Condoning benign use of race	Not condoning benign use of race
Condoning adverse use of race		Jim Crow
Not condoning adverse use of race	Modern Liberal	Color-blind

The vertical dimension involves the binary choice whether or not to condone the adverse use of race, meaning reliance on race in a manner that benefits whites as a class and harms blacks as a class. The horizontal dimension involves the separate binary choice whether or not to condone the benign use of race, meaning laws designed to benefit blacks as a class at the expense of whites or other non-recognized minorities as a class. Within Table 5, "adverse" and "benign" are defined from the perspective of histor-

151 In contexts in which the goal is not to place data on either side of a binary permissibility line, there is often a demand for intermediate categories. Thus, for example, commodities such as medicines, prescription lenses, and clothing are measured in precise increments.

152 For a review of the case history, see *infra* Part I.C.1.

ical victims of race-conscious discriminatory laws.

The scheme has been simplified with two binary choices even though laws affecting race have historically reflected a spectrum and even though the line of permissibility has shifted over time. Our country has moved from permitting ownership of chattel slaves to permitting virtually any segregation to permitting segregation other than in public schools to permitting no formal segregation to grappling with the reality that race-neutral laws often affect race-specific outcomes.[153] And of course one could add several gradations in between.

For purposes of the vertical dimension—condoning or not condoning adverse use of race—the critical issue is not where the line is drawn at any one time, but rather, it is the inevitability of drawing a line. In the modern era, the line has been drawn so as to exclude all racial classifications that harm African Americans in terms along with facially neutral laws that harm African Americans in purpose and effect. The earlier historical position from which the present line has moved was, of course, Jim Crow. That regime condoned express racial classifications operating to the benefit of whites and to the detriment of blacks based on accepted societal, or dominant white, understandings concerning the appropriate relationships between the races.

Long before tiers of scrutiny were formalized,[154] the color-blind understanding of equal protection implicitly assumed that laws affecting race rested along a single dimension. Against the backdrop of laws countenanced by Jim Crow, the color-blind view of equal protection represented a liberal position inasmuch as it would ban adverse race-conscious laws. This was the view expressed, perhaps most poignantly, in Justice Harlan's famous dissenting opinion in *Plessy v. Ferguson*:

> [In] view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[155]

The concept of a color-blind Constitution is admirable, especially in the historical context of the *Plessy* decision. It remains so for those who embrace it as an ideal embedded within the Constitution. Justice Thomas strongly asserted just this view in *Parents Involved in Community Schools v. Seattle School District No. 1*,[156] and in his opposition to reliance on race as part of an effort to help blacks, he identifies himself as heir to a tradition that includes

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153 The 2016 Netflix documentary 13th draws an analogous trajectory from the subjugation of African Americans through slavery to Jim Crow to mass incarceration primarily of African-American men. 13th (Kandoo Films & Netflix 2016).

154 For a discussion of the history of tiers, see Part I.A.

155 163 U.S. 537, 559 (Harlan, J., dissenting).

156 551 U.S. 701, 748 (2007) (Thomas, J., concurring).

Justice Harlan. Thus, Justice Thomas states:

> Most of the dissent's criticisms of today's result can be traced to its rejection of the colorblind Constitution. The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." And my view was the rallying cry for the lawyers who litigated *Brown*.[157]

Justice Thomas had previously gone further, claiming "a 'moral [and] constitutional equivalence,' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[158] Justice Thomas has since softened his moral-equivalence stance, acknowledging the good intentions of Justice Breyer, who took an opposing position on the permissibility of elective race-conscious integration measures in public schools.[159] Justice Thomas's ultimate position on this question is less important than the merits of the substantive analysis contained in the longer *Parents Involved* quotation. The analysis returns us to the problem of dimensionality.[160]

Justice Harlan expressed his view in a specific historical context. The context reflected the then-dominant understanding that the relevant spectrum along which racial laws were assessed involved possible limitations on a state's power to use race in a manner perpetuating the status and interests of the dominant white race. In the *Plessy* era, the prevalent understanding condoned express reliance on race to perpetuate a racial caste, consistent with then-dominant cultural mores. So long as the enacting legislature had a rational justification in support of the law—otherwise, it would presuma-

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157 *Id.* at 772 (citations omitted).

158 Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in the judgment) (alteration in original) (internal citation omitted).

159 *Parents Involved*, 551 U.S. at 781 n.30 (Thomas, J., concurring) ("Justice Breyer's good intentions, which I do not doubt, have the shelf life of Justice Breyer's tenure."). Justice Thomas later posited: "There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits." Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2428 (2013) (Thomas, J., concurring). Assuming that what makes those who condone race-conscious affirmative action morally equivalent to those condoning Jim Crow is (1) the willing acceptance of race-conscious policies that have (2) the purpose and effect of harming African Americans, the parenthetical quotation is in tension with Justice Thomas's earlier moral-equivalence stance. In acknowledging Justice Breyer's good faith in *Parents Involved*, Justice Thomas implies that Justice Breyer, along with the other dissenters, does not seek to harm, but rather seeks to help, blacks, even if he disagrees on the merits of the underlying policies in question.

160 There is, in addition, a contestable factual premises embedded in Justice Thomas's analysis. Whereas Justice Thomas claims that the *Brown* litigants embraced Justice Harlan's color-blind vision, historians have demonstrated that color blindness was part of a larger strategy that freely combined elements of anti-classification and of anti-subordination, and that the deciding justices did not uniformly embrace either theory. *See generally* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008).

bly violate dominant social mores—the law would be sustained.

Even Justice Brown, writing for the *Plessy* majority, acknowledged possible laws that might cross the permissibility line, namely those with the sole or dominant purpose of harassing the minority race.[161] Justice Harlan, relying on his color-blind reading of equal protection, drew a more restrictive line of permissibility. In his view, whatever the dominant cultural norms of the day were, the races—more to the point, whites—had to realize that their fates were inextricably intertwined. And thus, Justice Harlan asked, what could more powerfully prevent eventual, and indeed inevitable, race progress than a law boldly signaling that one race was so unfit as to be unsuited to sit next to another on a railway coach?[162]

Although the Supreme Court has nominally applied strict scrutiny while sustaining a limited use of race in the context of admissions in state institutions of higher learning, it inevitably distorted its tiers analysis in doing so. In addition to relaxing the understanding of narrow tailoring so as not to require exhausting race-neutral alternatives that might accomplish diversity at the expense of the law school's elite status, the *Grutter* majority afforded unprecedented deference to the law school's asserted desire to eventually bring to a close its reliance on race-advertent admissions.[163] The *Grutter* majority accepted the law school's claimed holistic daily monitoring, which functionally replicated the *Gratz* Court's rejected point-driven algorithm.[164]

This might help to explain why in *Fisher I*, Justice Kennedy claimed that as applied to the University of Texas, the *Grutter* version of strict scrutiny appeared "feeble in fact."[165] Traditional strict scrutiny would not delegate to the very institution seeking to defend its race-conscious policy against an equal protection challenge the power to determine that its claimed interest was sufficiently compelling or that its chosen means were adequately tailored. In remanding *Fisher I*, Justice Kennedy implied that *Grutter*'s strict scrutiny framework was at war with itself.

More surprising, perhaps, was Justice Kennedy's apparent about-face in

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161 Plessy v. Ferguson, 163 U.S. 537, 549–50 (1896) (illustrating, with laws that would require blacks and whites to walk on opposite sides of the street, that state use of the police power must "not [be used] for the annoyance or oppression of a particular class.".)

162 *Id.* at 560 (Harlan, J., dissenting). Even then, Justice Harlan was explicit that his concern was limited to formal legal equality; he continued to adhere to the idea that the races were destined to remain in a state of social inequality. *Id.* at 559.

163 *See supra* Part I.C.1 (discussing the *Grutter* decision in more detail); *see also* Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."); *id.* at 343 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.").

164 *See supra* Part I.C.1.

165 Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2421 (2013).

Fisher II.[166] Justice Elena Kagan had recused herself in both *Fisher I* and *Fisher II*,[167] and by the time *Fisher II* was decided, Justice Scalia had passed away,[168] leaving seven justices to decide the case. Justice Kennedy emerged the pivotal justice on the seven-member Court, which would decide whether affirmative action would be jettisoned or retained.[169] As the median justice, joining Justices Breyer, Sotomayor, and Ginsburg in voting to uphold the Texas plan, and with Chief Justice Roberts and Justices Thomas and Alito voting to strike it down, Justice Kennedy revealed himself as unwilling to end race-based affirmative action in higher education. Justice Kennedy thus sustained the Texas plan even though in doing so, he condoned the very deferential strict scrutiny analysis of race that he had deemed feeble in *Fisher I*.

Table 5 exposes the analytical difficulty in using strict scrutiny to accomplish the *Bakke*, *Grutter*, and *Fisher II* results as a problem of dimensionality. Benign race-conscious programs, specifically affirmative action, occupy the lower left box, whereas adverse race-conscious laws, namely Jim Crow, occupy the upper right box, within a two-dimensional issue space. In a world in which relevant laws rested along a single dimension, with laws harming minorities at one end and race-neutral laws at the opposite end, Harlan's color-blind Constitution is not merely apt—it is comprehensive.[170]

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166 *See* Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198, 2212 (2016) ("Though a college must continually reassess its need for race-conscious review, here that assessment appears to have been done with care . . . ."). For a more detailed analysis, *see infra* Part II.F.2.

167 *See* Lyle Denniston, *Argument Preview: What's at Issue in the* Fisher *Case This Time?*, SCOTUSBLOG (Dec. 2, 2015, 12:39 AM), http://www.scotusblog.com/2015/12/argument-preview-whats-at-issue-in-the-fisher-case-this-time/ (reporting that Justice Kagan had to recuse herself from both *Fisher* decisions due to "her role in the government's part in the case" while serving as U.S. Solicitor General).

168 *See* Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0 (reporting on Justice Scalia's death).

169 A majority of four on a seven-member Supreme Court is treated as binding precedent. *See* 28 U.S.C. § 1 (2006) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."); Mitchell v. W. T. Grant Co., 416 U.S. 600, 615 (1974) (affording binding status to *Fuentes v. Shevin*, 407 U.S. 67 (1972), a 4-3 decision in which Justices Powell and Rehnquist abstained); *see also* Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 EMORY L.J. 831, 834–35 (2009) (discussing historical instances of a four-Justice majority in the Supreme Court).

170 Locating benign racial preferences before the modern era is fraught. Some post-Civil War laws benefitted blacks based on specific statuses, notably as former slaves or dependent widows, as opposed to based on race (thus also benefitting some whites). *See* Ira C. Colby, *The Freedmen's Bureau: From Social Welfare to Segregation*, 46 PHYLON 219, 219 (1985) (noting that historians debate the reputability of the Freeman's Bureau's attempts to better the positions of freedmen because of its support of segregationist policies). Justice Thomas rested on this very distinction in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 772 n.19 (2007) (Thomas, J., concurring) ("What the dissent fails to understand . . . is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not incon-

In that world, wherever the eventual line is drawn along the single dimension—harmful race-conscious laws to race-neutral laws—color blindness represents the minority-protecting position; conversely, along that same dimension, a regime that condones race advertence is decidedly illiberal. And yet, introducing benign race-advertent laws, the constitutional equivalent of an aloft hot air balloon, forces a dimensionality split.

The terms "adverse" or "benign" require clarification. Justice Thomas claims all use of race is inherently problematic such that he rejects labeling any such use as benign.[171] This posit, however, does not eliminate the separate analytical dimensions respecting race depicted in Table 5. To see why, we must consider why race is widely condemned as a permissible basis for legal categorization.

All laws draw lines along some analytical dimension, thereby defining which activity is or is not permitted to particular classes of individuals. The analytical dimension along which the classifications are drawn, in either a binary or spectral fashion, can involve quite literally anything: sex, height, weight, wealth, IQ, willingness to pay, ability to perform a given task, or completion of degrees or other formal training. As an historical matter, classifications have also included race. Why has race almost exclusively been taken off the table?

It will not do to suggest that of all the potential bases for classification in the world (those listed above plus countless others), only skin color or other racial characteristics are sacrosanct. It also cannot be because race is never plausibly relevant, which is all that would be required if race were subject to rational basis scrutiny. Rather, throughout most of history—not merely in the United States—empowered groups have used race to acquire and

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sistent with the colorblind Constitution.") (emphasis in original) (internal citation omitted). Other post-Civil War laws targeted destitute blacks as a class. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–33 (1997) (citing and describing statutes which were designed to provide financial support only to "destitute '*colored*' persons"); Mark A. Graber, *The Second Freedmen's Bureau Bill's Constitution*, 94 TEX. L. REV. 1361, 1397 (2016). These laws operated in parallel with laws benefiting destitute whites, *see id.* at 431 n.23, and thus employed race for administrability purposes, not as an early counterpart to modern benign race-based preferences.

Even so, Table 5 does not necessarily preclude the benign use of race during the Jim Crow era, which is why it frames the dimensions in terms of which practices are or are not condoned. Consider the combined effect of laws that are or are not condoned along each separate dimension. During Jim Crow, the dominant (illiberal) understanding condoned a regime in which the only race-specific laws were adverse to blacks (thus lacking benign race-based laws); the color blindness position failed to condone any race-based laws on the understanding that all such laws were detrimental to blacks; and the modern liberal position condones benign race-based laws but not adverse race-based laws. In this reading, each camp believes that its combined views are consistent with equal protection even if each separate component is not specifically compelled. And each camp holds a contrary view respecting the permissibility of at least one, and possibly both, of the alternative combinations.

171 See *supra* notes 156–59 and accompanying text.

maintain privilege, often through brute force, at the expense of other groups. The historical problem is reliance on race to entrench dominant power structures at the expense of disadvantaged minorities and sometimes out-of-power majorities.[172]

Simply put, the historical use of race has almost always been adverse, often severely, to out-of-power groups, and in the United States, that has most notably included African Americans. Race is not off-limits because it has randomly been plucked for exclusion. Rather, race has been excluded because historically race has been employed adversely to minorities. For some, this alone is sufficient to ban its use altogether. That position, however, does not contradict characterizing some intended uses of race as adverse, and others as benign. And most importantly, these characterizations do not depend on the wisdom or efficacy of the policies under review.[173]

The fact that the category "race" is excluded due to its adverse historical treatment of blacks means that it has been used to benefit those in power. This necessarily implies that racial classifications can be structured in reverse, seeking to help those who have been historically subordinated due to race, with a cost borne by those who have been historically dominant. Table 5 labels this the benign use of race.[174]

Table 5 reveals a true dimensionality problem. Although the Jim Crow and modern liberal positions embrace opposing positions on each of the two critical questions—(1) condoning or not condoning adverse use of race, and (2) condoning or not condoning benign use of race—unlike the color-blind camp, each condones some use of race. Color blindness might appear to offer a partial victory to each side. Those embracing color blindness join modern liberals, who would not condone the adverse use of race. They also join Jim Crow, which did not condone benign use of race. Despite this, because these combined positions implicate more than a single dimension, color blindness does not occupy a middle ground between the modern liberal and Jim Crow positions.

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172 Consider, for example, apartheid-era South Africa. Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 1956–57 (1996) (noting that "approximately *eighty-seven percent* of the population was disadvantaged by formal race classification during the decades of apartheid: the country's 29.26 million Africans, 3.08 million mixed-race 'Coloureds,' and 1.16 million persons of Indian descent.") (footnotes omitted).

173 Just as it would be mistaken to label an adverse racial policy benign because it fortuitously produces a beneficial result for some minorities, so too it would be mistaken to label a benign result adverse because it sometimes produces the opposite effect.

174 The term "benign" might also appear objectionable on the ground that policies benefiting minorities based on race impose costs on non-minorities based on race. For consistency, reframing from the perspective of the non-minority race requires flipping the words "benign" and "adverse" along both dimensions. This produces the same dimensionality problem, albeit with reversed labels.

F. Dimensionality, Cycling, and Multicriterial Decision Making

The presentation that follows lays the analytical foundation for a critical insight: as applied to race, the problem of dimensionality can persist even though only two of the three positions that generate it are presently occupied. More generally, dimensionality and the related phenomenon of cycling can arise even if one of the contributing historical positions has been abandoned. That is because present positions are influenced by abandoned past positions, which combine to effect multicriterial decision making. Although modern liberals and those embracing a color-blind view abhor Jim Crow, these current positions remain influenced by that discredited position because each draws different lessons—and generates different rules—in response to past mistakes associated with Jim Crow. The remaining discussion in this subpart, which is somewhat technical, provides the analytical tools that explain this insight, thus strengthening the analysis of how dimensionality has affected affirmative action, same-sex marriage, and other equal protection doctrines.[175]

1. Cycling and the Condorcet Paradox

The analysis begins with three individuals (P1, P2, and P3) holding the following ordinal preferences over options ABC: P1: ABC, P2: BCA, P3: CAB. Assume that each person holds internally transitive orderings, meaning that P1 not only prefers A to B to C, but also A to C; P2 not only prefers B to C to A, but also C to A; and so on. Because this group has no first choice majority candidate, a plausible way of working this through would be to take binary comparisons (A versus B, B versus C, etc.) hoping that a consensus candidate emerges. With the listed preferences, however, the group will instead discover that P1 and P2 prefer B to C, P2 and P3 prefer C to A, and yet with one more iteration, P1 and P3 prefer A to B. The result is a cycle in which the group prefers A to B and B to C, but C to A.

The cycle is not inevitable. If we slightly modify P3's preferences so that she ranks her preferences CBA rather than CAB, although there is still no first-choice winner, a stable outcome emerges. A regime of binary comparisons reveals that P1 and P2 prefer B to C, and P2 and P3 prefer B to A. This time, a final comparison, between A and C, is beside the point. Although P2 and P3 prefer C to A, B defeats either alternative in direct comparisons. In social choice theory, option B, the option that defeats all others in direct comparisons, is known as a Condorcet winner.[176]

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175 Those wishing to avoid the technical presentation can rest on the preceding summary, and continue with Part II.F.2.

176 For a general discussion, see Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE. L.J. 1219 (1994).

Although Condorcet winners and rules capable of generating them when they are available are often viewed favorably, such rules carry important limitations. When there is no Condorcet winner and when the institution must generate an outcome, rules ensuring that Condorcet winners prevail risk cycling instead of producing an outcome. Cycling need not imply endless indeterminacy. It might mean no more than that the chosen outcome was arbitrary in the sense that it was heavily influenced by the order of decisions, such that a different voting protocol might have yielded a different outcome.[177] In addition, the Condorcet criterion only allows the expression of ordinal rankings; it does not permit participants to register how intensely they feel about particular options.

Dimensionality is the condition that generates cycling preferences. Dimensionality implies a cycle in that it creates the conditions from which, with plausible assumptions,[178] one might infer cycling preferences. When dimensionality arises, those who resolve the identified issues along each separate dimension in opposite fashion nonetheless share some common value. Those occupying the lower left and upper right positions in Table 5 resolve in opposite fashion whether or not to condone (1) the adverse use of race and (2) the benign use of race. Despite that, these two groups each condone *some* use of race. By contrast, those in the lower right appear to provide a partial victory to each other camp (not condoning adverse use of race, favoring modern liberals, and not condoning benign use of race, favoring Jim Crow), yet thwart the common willingness of the remaining groups to condone some use of race.

Although the details of the possible cycles are unimportant, each rests on at least one contestable assumption. Here the assumption is that either the Jim Crow or modern liberal positions might rank each other ahead of color blindness to secure the lawful permissiveness of relying on race, hoping to defeat what each regards as the disfavored use of race politically.[179]

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177 Cycling rests at the core of another social choice insight, namely Arrow's Impossibility Theorem, or simply Arrow's Theorem. Arrow proved that any set of rules designed to avoid cycling when transforming member inputs into collective outputs will necessarily violate one of several conditions that he considered essential to fair group decision making. For a detailed discussion, see STEARNS, *supra* note 44, at 81–94.

178 Plausible does not mean irrefutable; cycles are often constructed with alternative sets of contestable, yet plausible, assumptions. For an illustration, see *infra* note 179.

179 Based on Table 5, we can construct either of two theoretical cycles over these three positions, (A) Modern liberal, (B) Jim Crow, and (C) Color-blind. For a forward cycle, assume that modern liberals believe that they can defeat adverse race-conscious laws politically, but fear a rule altogether banning benign race-conscious laws. If so their preferences are ABC. The positions allowing Jim Crow to rank BCA, and color-blind to rank CAB, are intuitive, and together generate a cycle ApBpCpA where p means preferred by simple majority rule and each preference is based on binary comparisons. To generate a reverse cycle, assume that the Jim Crow camp believes it can defeat benign race-conscious measures politically, but fears the inability to pass adverse ones (CBA); that the color-blind camp is more fearful of benign race-preferences, which are likely to endure, than adverse ones, which they believe are sufficiently reprehensible that they will soon be

Dimensionality, and cycling, arises not only from positions people hold over choices, but also from background rules or conceptual framings that affect those choices. In multicriterial decision making, background rules combine with present options to forge dimensionality. Although all three identified positions in Table 5 were once accepted as legitimate, at any given time, no more than two were viewed as dominant or creditworthy. During the Jim Crow era, the two dominant positions were Jim Crow and color blindness. Today, with Jim Crow thankfully discredited, only color blindness and the modern liberal position are creditworthy.

Recall that with preferences P1: ABC, P2: BCA, P3: CAB, the group will discover a cycle such that ApBpCpA, where p means preferred to by simple majority rule. But even if a decision maker is removed, the cycle can persist due to a combination of remaining preferences and governing rules. Rules extend the preferences of past participants to the decision-making process. Indeed, rules *are* the formal extension past decision makers' preferences.

If P3 plans to retire, she might encourage P1 and P2 to embrace a rule that captures all or part of her preferences. Imagine the proposed rule provides that when choosing either between B and C or between B and A, P3's preferences, which least favor B, must be credited. The rule would discourage either P1 or P2, working with P3's replacement, P4, from enacting either of their last choices.[180] When combined with the ordinal preferences of P1 and P2, the P3 rule replicates the earlier forward cycle.[181] Although cycling is often viewed unfavorably, a cycle might be preferable to the risk that P4 will team up with either P1 or P2 to produce P3's least preferred result.[182]

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politically defeated (BCA); and that the modern liberals intuitively prefer color blindness to Jim Crow (ACB). The result is a reverse cycle CpBpApC. Notably, each ranking includes both available orderings for each camp over the remaining options.

180 For a fascinating study of multicriterial decision making, see LEO KATZ, WHY THE LAW IS SO PERVERSE 25–31 (2011). In a fanciful illustration, Katz demonstrates how competing rules of triage and free exchange (the Pareto principle) can create a confounding cycle for a physician with time to treat only one of three patients involved in an automobile crash: one member of a married couple, Al and Chloe, with Al suffering a relatively severe, and Chloe, a relatively minor, injury, and another woman, Bea, with a moderate injury. If Al and Chloe prioritize Chloe's treatment over Al's, then under the Pareto principle, Chloe is treated first. Under triage, Bea takes priority over Chloe. And under triage again, Al takes priority over Bea. Then under Pareto, Chloe regains priority. This combination generates a treatment cycle: Chloe p Al p Bea p Chloe, where p means preferred to under the conflicting multicriterial decision making of triage and Pareto. This holds even if only a subset of patients participates in the formal decision making at a given time.

181 This further explains the parallel logic of Arrow's Theorem and multicriterial decision making. For a discussion of multicriterial decision making, see Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke*, the FCC, and the Courts*, 88 YALE L.J. 717, 719–20 (1979). For a discussion of Arrow's Theorem, see STEARNS, *supra* note 44, at 81–94.

182 Thus, whereas Donald Saari ascribes cycling to the "curse of dimensionality," depending on the threatened outcome, some might instead regard dimensionality, and the resulting cycle, as a blessing. DONALD G. SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES:

This dynamic can arise when present jurists frame equal protection options based upon conflicting understandings of discredited positions from the past. Modern liberals infer from Jim Crow the need to avoid racial subordination even if doing so means condoning occasional reliance on race to benefit a once subordinated group. Color-blinds infer from Jim Crow that regardless of how it is characterized, any reliance on race is harmful and must be prohibited. Despite its general condemnation, Jim Crow has forged ongoing multicriterial decision making.

2. *Multicriterial Decision Making and the Complexity of Race:* Fisher I *and* Fisher II *Revisited*

Multicriterial decision making helps to explain the complexity of our race jurisprudence. At the time that Harlan issued his *Plessy* dissent, race-based laws were obviously not intended to advance the interests of African Americans.[183] Justice Harlan's color-blind Constitution operated against the backdrop of Jim Crow, a regime in which the universe of race-advertent laws perpetuated a racial caste system operating to the detriment of blacks.

Table 5 exposes how the relationship between the color-blind Constitution and race is shaped by dimensionality. Increased racial sensitivity has placed stress on where the line should be drawn as to which legal policies affecting race are or are not permitted. It is widely accepted that laws expressly relying on race to the detriment of blacks, and laws with the purpose and effect of harming blacks, are presumed invalid and will be struck down. Uncertainty concerning that line's precise location, or the possibility of its shift over time, does not remove the inevitable binary sorting along the vertical dimension in Table 5.

The horizontal dimension in Table 5 depicts the more recent analytical category of race-specific laws designed to benefit African Americans. At first blush, the modern liberal position (lower left) appears precisely opposite the discredited Jim Crow position (upper right). The analysis of dimensionality reveals why this is misleading. Although these two groups resolve questions along each separate dimension in opposite fashion, they nonetheless hold in common condoning some use of race. This explains why Justice Thomas accuses modern liberals, despite their intentions, of perpetuating the evils of Jim Crow.[184] By contrast, the color-blind (lower right) position resolves partially in favor of each group, yet refuses to condone any

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SOCIAL CHOICE ANALYSIS 13–15 (2008) (ascribing cycling in group decision making to the "*curse of dimensionality*"). Because preferences can cycle either forward or in reverse, the same phenomenon can arise if P1 and P2 reject the P3 position, albeit on different normative grounds. *See supra* note 179 (illustrating forward and reverse cycles).

183 For a discussion of post-Civil War laws benefitting African Americans, see *supra* note 170, and cites therein.

184 *See supra note* 156–59 and accompanying text.

use of race, including those designed to benefit African Americans.

The discredited Jim Crow position continues to affect dimensionality, much like the post-retirement P3 rule.[185] Although modern liberals and color-blinds remain influenced by its dangers, each reads the lessons of history differently and constructs different, and conflicting, rules as a result. Our legal doctrines work reasonably well toward challenging race-specific laws adversely affecting blacks along with race neutral laws with an adverse purpose and effect. Such cases represent evolving choices along the dimension involving "condoning or not condoning adverse use of race." As with age, the dividing line along this single dimension has shifted over time.[186] By contrast, the scheme works less well in confronting the alternative dimension of "condoning or not condoning the benign use of race," which like the hot air balloon or the number 2, forces a split in dimensionality.

Ironically, by forcing consideration of all race-based laws into a single category, equal protection doctrine has prevented the meaningful assessment of race along a single dimension with two simple tiers, rational basis and strict scrutiny. If adverse and benign use of race were treated as separate categories, a two-tiers system operating along each separate spectrum based on the invidiousness or other difficulties associated with the racial classification under review, would allow for a clean dividing line as to when race may or may not be used in each category. Combining these as a single category of race, however, forges dimensionality and thus creates the need for a third tier. And because the most obvious candidate for a third tier—intermediate scrutiny—has been disallowed,[187] the result has been to force a disingenuous applications of strict scrutiny in the context of race, thus contributing to the anomalous 14325 sequence. In effect, we have forced strict scrutiny to do the work of a different analytical test, with the consequence of having Category 4 (strict scrutiny lite) abut Category 1 (rational basis) rather than Category 5 (strict scrutiny).

Imagine instead that the benign and adverse use of race were treated as separate categories, and that, as under present doctrine, some reliance on race is permitted. As applied to affirmative action in higher education, for example, the split would place laws resembling the Harvard plan, which Justice Powell favored in *Board of Regents of the University of California v.*

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185 *See supra* Part II.F.1 (explaining cycling and dimensionality). As a result, it becomes possible to construct a set of plausible, albeit contested, preferences from which to infer either a forward or reverse cycle. *See supra* note 179 and accompanying text.

186 *See supra* Part II.B (describing how the age that a child is considered to become an adult has changed over time). For a counter-illustration in which age affects dimensionality, see supra note 133.

187 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (overturning *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), which had sustained benign race-based classification under intermediate scrutiny).

Bakke,[188] the Michigan Law School plan sustained in *Grutter v. Bollinger*,[189] and now the Texas plan sustained in *Fisher v. University of Texas (Fisher II)*[190]—plans that do not employ formal quotas and that use race as one factor among many as part of a claimed holistic admissions process—in the rational basis bin for presumptively good laws. And it would place laws like those struck down in *Bakke* and in *Gratz v. Bollinger*—plans that set up quotas, segregate files, or award fixed points based on race—in the strict scrutiny bin for presumptively bad laws.

The conflicting results in the *Fisher I* remand followed by the *Fisher II* affirmance highlight the analytical difficulty with the Court's combined approach to race. To better appreciate these cases, some background will be helpful. In *Hopwood v. Texas*,[191] the United States Court of Appeals for the Fifth Circuit interpreted *Adarand Constructors, Inc. v. Pena*,[192] a case that applied strict scrutiny in the context of a race-based set-aside program for federal contracting rather than affirmative action in higher education,[193] as demanding the application of strict scrutiny in its more traditional form for all race-based classifications.[194] The *Hopwood* Court thus applied traditional strict scrutiny to strike down the University of Texas School of Law's affirmative action plan. The University responded by implementing an admissions policy relying on holistic factors, without relying expressly on race, as proxies for diversity. The state legislature responded by enacting a top ten-percent law, guaranteeing qualified high school graduates who met certain criteria admission to any public state college, including the University of Texas. Following *Grutter*, which sustained the University of Michigan School of Law affirmative action program, and with the top ten-percent plan already in place, the University of Texas adopted its revised holistic race-conscious plan at issue in *Fisher* to ensure a "critical mass" of students, including meaningful minority classroom enrollment.[195]

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188 438 U.S. 265, 316–18 (1978).

189 539 U.S. 306, 343–44 (2003).

190 136 S. Ct. 2198, 2214 (2016).

191 78 F.3d 932 (5th Cir. 1996).

192 515 U.S. 200 (1996).

193 *See supra* Part I.C.1 (discussing *Adarand*); *see also* Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 334–35 (2000) (positing that Justice Scalia joined the *Adarand* majority opinion despite fundamental disagreements to create the necessary majority to overturn *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

194 *Hopwood*, 78 F.3d at 940.

195 Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411, 2415–16 (2013) (describing the history of race-conscious admission policies at the University of Texas at Austin leading up to the program being challenged in *Fisher I*). Justice Kennedy described the challenged program as follows:

> To implement the Proposal the University included a student's race as a component of the PAI [Personal Achievement Index] score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

In *Fisher I*, Justice Kennedy, writing for a majority of seven on an eight-member Court, explained that the combined post-*Hopwood* regime improved overall racial diversity relative to the final year of the pre-*Hopwood* regime, with the entering class being composed of 4.5% African Americans and 16.9% Hispanics as compared with 4.1% African Americans and 14.5% Hispanics.[196] The combined scheme, which the Fifth Circuit sustained largely based on *Grutter*, substantially improved minority enrollment.[197] Justice Kennedy explained:

> [The Fifth Circuit] held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.[198]

Justice Kennedy observed that although the *Grutter* Court had deferred to the Michigan Law School's assertion that diversity was central to its educational mission, the application of strict scrutiny remained a judicial inquiry. He explained:

> Narrow tailoring . . . requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" then the university may not consider race. . . . [S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.[199]

Id. at 2416 (2013).

196 *Id.*

197 Although the *Fisher I* Court did not recount admissions statistics under the new plan, the Fifth Circuit stated:

> In an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African-American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times, from 762 students to 1,228 students. Asian-American enrollment also increased nearly 10%, from 1,034 students to 1,126 students. By contrast, in 2004, the last year the Top Ten Percent Law operated without the *Grutter* plan, fall enrollment included only 275 African Americans and 1,024 Hispanics.

Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 226 (5th Cir. 2011) (internal citations omitted).

198 *Fisher I*, 133 S. Ct. at 2417 (citation omitted).

199 *Id.* at 2420 (second and third alterations in original) (citations omitted) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986)) (citing Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

Justice Kennedy then explained the need for a remand:

> Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." And in considering such a challenge, the court would "presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption.[200]

Perhaps the most striking feature of *Fisher I* is what Justice Kennedy did not say. He did not suggest, as Justice Thomas had in *Grutter*,[201] that the University choose either to relinquish its elite status or its racial diversity. And yet, he maintained that deferring to the University's good faith judgment about how to balance these competing concerns—the deference that *Grutter* afforded the University of Michigan Law School—was inconsistent with strict scrutiny and, in fact, risked rendering strict scrutiny "feeble in fact."[202] Although Justice Kennedy maintained that strict scrutiny should be neither fatal nor feeble, he failed to offer a meaningful alternative, other than implying by omission that the alternative is *not* intermediate scrutiny.

Following the *Fisher I* remand, the Fifth Circuit once more affirmed the University of Texas plan against the equal protection challenge.[203] When *Fisher II* returned to the Supreme Court, Justice Kennedy emerged at the center of a seven-member Court.[204] Justice Kennedy observed that the record was devoid of specific details concerning students "admitted solely based on their class rank" as opposed to "through holistic review."[205] He further noted that additional fact-finding would not be productive given the time line: the case had been in litigation for eight years, such "evidence has little bearing on whether petitioner received equal treatment when her application was rejected in 2008," and the claimant, Abigail Fisher, had long since graduated.[206] Rather than dismissing certiorari as improvidently granted or based on mootness, however, Justice Kennedy went on to reject the equal protection challenge to the combined Texas plan.

Justice Kennedy maintained that the Texas legislature could not be faulted for enacting the ten-percent plan in the aftermath of *Hopwood*, given its then understanding of equal protection doctrine. The greater challenge was justifying the combined percentage plan with the race-explicit overlay. Justice Kennedy emphasized that the combined impact had notably im-

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200 *Id.* (alteration in original) (quoting Fisher v. Univ. of Texas at Austin, 631 F.3d 213, 231–32, 236 (5th Cir. 2011)

201 Grutter v. Bollinger, 539 U.S. 306, 361 (2003) (Thomas, J., concurring in part and dissenting in part) ("[T]he Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.").

202 *Fisher I*, 133 S. Ct. at 2421.

203 Fisher v. Univ. of Texas at Austin, 758 F.3d 633, 637 (5th Cir. 2014).

204 *See supra* notes 167–69 and accompanying text (describing the composition of the *Fisher II* Court).

205 Fisher v. Univ. of Texas at Austin (*Fisher II*), 136 S. Ct. 2198, 2209 (2016).

206 *Id.*

proved the percentage attendance of minority students, observing that the diversity goal involved not merely aggregate enrollments, but also specific classroom settings.[207] Justice Kennedy rejected Ms. Fisher's argument that the small incidence of reliance on race revealed it to be an unnecessary means of achieving diversity.[208] Here, Justice Kennedy appeared to contradict his own earlier analysis in *Parents Involved in Community Schools v. Seattle School District No. 1*,[209] where he stated:

> [I]t is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III-C of the Court's opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means.[210]

By contrast, in *Fisher II*, Justice Kennedy concluded: "[I]t 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."[211]

Justice Kennedy rejected the alternative methods that Ms. Fisher suggested as a means of minority outreach along with Justice Thomas's alternative approach from *Grutter*,[212] stating "Equal Protection . . . does not force universities to choose between a diverse student body and a reputation for academic excellence,"[213] the very framing that led to the deferential—or "feeble"—approach advanced in *Grutter*.

The more difficult claim involved Ms. Fisher's argument that the university could increase diversity through a stepped-up percentage plan as an alternative to express reliance on race. In rejecting this analysis, Justice Kennedy avoided the virtual elephant in the room, namely the different types of students that the university is likely to attract through these two components of its combined admission regime: the percentage plan, on one hand, and the race-specific admissions, on the other. Instead, Justice Kennedy eschewed the issue by accepting Justice Ginsburg's *Fisher I* analysis. Justice Kennedy stated: "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.

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207 *Id.* at 2212.

208 *Id.*

209 551 U.S. 701 (2007). For a more detailed analysis of *Parents Involved*, see *supra* notes 156–59 and accompanying text.

210 *Id.* at 790 (Kennedy, J., concurring).

211 *Fisher II*, 136 S. Ct. at 2212. I thank Peter J. Artese for bringing this to my attention.

212 Grutter v. Bollinger, 539 U.S. 306, 361–62 (2003) (Thomas, J., concurring in part and dissenting in part) (positing that equal protection disallows the University of Michigan School of Law to couple elite admissions criteria with race-based exceptions to satisfy its twin goals of prestige and diversity).

213 *Fisher II*, 136 S. Ct. at 2213.

Percentage plans are 'adopted with racially segregated neighborhoods and schools front and center stage.'"[214]

Justice Kennedy concluded, "petitioner cannot assert simply that increasing the University's reliance on a percentage plan would make its admissions policy more race neutral."[215] He added: "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."[216] Justice Kennedy closed by speculating about the potential missed applicants Ms. Fisher's approach might entail: "a talented young biologist who struggled to maintain above-average grades in humanities classes,"[217] or "a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in the last three years of school, only to find herself just outside the top decile of her class."[218]

For purposes of the tiers analysis, it is important to parse two important attributes of Justice Kennedy's *Fisher II* analysis. First, perhaps unwittingly, Justice Kennedy flipped strict scrutiny on its head. He did so by positing that petitioner's argument failed because Fisher could not prove that a race-neutral method—a stepped up percentage plan—would result in qualitatively better admitted students. Of course under strict scrutiny—the old-fashioned kind—the state has the burden to prove narrow tailoring. Justice Kennedy instead has placed the burden on Ms. Fisher, the challenger, to prove that a more narrowly tailored program would succeed just as well. As we have previously seen, when the outcomes fall within a gray area, one that neither side can prove or disprove, the allocation of the burden of proof controls the outcome.[219]

Second and perhaps more notably, Justice Kennedy wrote the opinion in a manner that avoided the real stakes of the case. The issue here is not merely the raw number, or even percentage, of minority students admitted through the two separate parts of the combined Texas plan. Rather, it is the probable different nature of the students admitted under each part. The University of Texas officials were certainly well aware that the top percentage plan does not necessarily bring to the University of Texas, a highly elite institution, those students who—although falling below the ten percent threshold—have high stakes test scores on the SATs and ACTs that demonstrate greater academic promise, and thus a higher likelihood of eventual

214 *Id.* (quoting Fisher v. Univ. of Tex. at Austin (Fisher I), 133 S. Ct. 2411, 2433 (Ginsburg, J., dissenting)).

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *See supra* part I.A.

academic success.[220] To allow the University to accomplish its goal of admitting these more highly qualified minority students, Justice Kennedy effectively flipped the burden of proof onto the challenger, thereby extending deference to the University, just as he criticized the *Grutter* Court for having done in his *Fisher I* opinion. In doing so, Justice Kennedy rested on the proposition that equal protection does not force upon the University of Texas the choice of diversity or prestige. But in allowing the University to have the cake it is eating, while also claiming to apply strict scrutiny, Justice Kennedy reconceived that test to do the work of rational basis review. Once more the result is to flip the sequence 12345 to 14325.[221]

This doctrinal inversion was not inevitable. Even if one rejects Justice Stevens's claim in his *Adarand Constructors, Inc. v. Pena* dissent that strict scrutiny is unnecessary to distinguish a "No Trespassing sign" from a "welcome mat,"[222] it is clear that those who embrace the modern liberal position are answering the underlying questions as to when race is or is not permitted differently from those who once embraced Jim Crow. If the Court acknowledged this distinction, thereby aligning its tiers doctrine with the dimensionality of the underlying case law, the conventional two-tier approach would succeed, with a line separating permissible from impermissible conduct drawn for each case category: laws designed to benefit minorities, on one hand, and laws designed to subordinate them, on the other. If, instead, all race cases are forced into the same doctrinal bin of strict scrutiny and yet some of those challenged laws are to be sustained, then we need a mechanism with which to separately handle cases relying on race in opposite ways based on whether the challenged law seeks to benefit or to harm African Americans as a class. The obvious method, limited to the category of benign race-based classifications, is to allow a third tier such as intermediate scrutiny. Despite the *Fisher I* remand, this is the inevitable lesson of *Fisher II*.

Although the case law has produced related anomalies associated with the stricter version of rational basis scrutiny,[223] the dimensionality problem implicating a third tier is endemic to race. The historical role of race within our history and constitutional doctrine has given color blindness a distinct normative status that appears to lack a counterpart of sex- or sexual-orientation-blindness.[224] Whereas race implicates the two dimensions of antidiscrimination (using race as a basis for classification) and anti-

220 *Fisher II*, 136 S. Ct. at 2233–34 (Alito, J., dissenting) (citing the University of Texas's arguments that "holistic admits" had higher SAT scores and noting that "[i]n addition to using socioeconomic status to falsely denigrate the minority students admitted through the Top Ten Percent Plan, UT also argues that such students are academically inferior").

221 *See supra* Introduction.

222 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

223 *See supra* Part I.C.2; *infra* Part III.C.

224 *See infra* Part III.B (distinguishing color- and sex-blindness).

subordination (treating racial minorities disadvantageously), these other case law categories implicate only the anti-subordination dimension.[225] Treating race as a meta-category, thereby collapsing these dimensions and subjecting all race cases to strict scrutiny, has also produced a notorious anomaly: although the Fourteenth Amendment was designed to end longstanding adverse treatment of blacks at the hands of the state, the differential standards for race and sex has allowed the Court to sustain laws expressly designed to benefit women but has disallowed it to sustain laws designed to benefit racial minorities.

III. THE PROBLEM OF TIERS REVISITED: RACE, GENDER, AND SEXUAL ORIENTATION

This part applies the preceding analysis to several important remaining issues implicating race, gender, and sexual orientation, including revisiting the *Obergefell* decision.

A. Dimensionality and Race: Race Neutral Laws and Antisubordination

We begin with the problem of adverse race-neutral laws and then discuss laws that although not racially discriminatory nonetheless subordinate based on race.

1. The Problem of Adverse Race-Neutral Laws

In *Washington v. Davis*, the Supreme Court considered an equal protection challenge to a race-neutral English literacy exam used in hiring District of Columbia police officers.[226] Although the policy disproportionately disqualified African American applicants, the Supreme Court sustained it against an equal protection challenge applying rational basis scrutiny. Writing for a majority, Justice White determined that because the program was motivated by the legitimate purpose of increasing the communicative skills in a workforce valuing such skills, the differential impact did not trigger heightened scrutiny.[227] The Court further rejected a purpose-and-effects analysis, observing that the police department had refuted the claimed illicit purpose through its affirmative efforts to recruit minority officers.[228] The Court applied similar reasoning in two controversial subsequent cases.

In *United States v. Armstrong*, the Court rejected a claim of selective prosecution that resulted in disparate sentencing for crack cocaine, a predominantly

225 *See infra* Part III.A.2 (distinguishing antidiscrimination and anti-subordination as related to race).
226 426 U.S. 229, 232, 239 (1976).
227 *Id.* at 245–46.
228 *Id.* at 235–36.

black offense, versus powder cocaine, a predominantly white offense.[229] Chief Justice Rehnquist, writing for a majority, applied rational basis scrutiny, reasoning that all races did not commit the same offenses proportionately to their demographic representation. He observed, for example, that whereas crack cocaine is a disproportionately black offense, prostitution and child pornography tend to be disproportionately white offenses.[230]

And in *McCleskey v. Kemp*, Chief Justice Rehnquist, again writing for a majority, rejected an equal protection challenge premised on the famous David Baldus study demonstrating the disparate application of the death sentence based on the races of the perpetrator and victim.[231] A black murderer killing a white victim was more than four times as likely to receive the death penalty than any other combination, and overall, black defendants stood a far greater likelihood of receiving the death penalty than white defendants.[232]

Although facially neutral, the challenged laws in *Armstrong* and *McCleskey* were obviously not benign in the sense of affirmatively seeking to benefit blacks. Rather, the government defended these policies as furthering some non-racial objective *in spite of* the policy's adverse racial impact. These cases illustrate another round in a Red Queen game involving: (1) race-specific laws harming blacks; (2) race-neutral laws with the purpose and effect of harming blacks; and *now* (3) race-neutral laws claimed to serve an independent benign purpose, but with an adverse consequence on blacks. Thus far, the Court has drawn the line along this analytical dimension placing Categories 1 and 2 on one side (prohibited), and Category 3 on the other (permitted). Whether the resulting deference in Category 3 cases, to which rational basis scrutiny applies, will continue, or whether the Court will, over time, throw more such cases in the presumptive bad pile remains to be seen. However such future cases are resolved, they do not create a dimensionality problem inasmuch as the challenged laws, although racially neutral, are not intended to benefit racial minorities.

2. The Problem of Nondiscriminatory Laws That Subordinate Based on Race

In *Loving v. Virginia*, the Supreme Court struck down a state anti-miscegenation statute.[233] As previously noted, some media commentators viewed same-sex marriage, and thus *Obergefell*, as a natural extension of *Loving*.[234] Anti-miscegenation laws criminalized the conduct of both parties to

229 517 U.S. 456, 469–70 (1996).

230 *Id.* at 469.

231 481 U.S. 279, 291–92 (1987).

232 *Id.* at 320 (Brennan, J., dissenting).

233 388 U.S. 1, 2 (1967).

234 *See supra* Introduction. The *Obergefell* Court cited *Loving* for the discussion of marriage as a fundamental right, not for its suspect classification analysis. Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015); *see also* Adam Liptak, *A Steady Path to the Justices: Gay Marriage Cases Building Momentum*,

an interracial marriage, and thus applied equally to the white and black spouses.[235] The analytical difficulty, therefore, is that such statutes do not discriminate on the basis of race. They instead discriminate along the separate dimension distinguishing same-race (treated favorably) and mixed-race (treated unfavorably) couples. Of course this does not make such laws benign; they obviously are not, which is the point. Historically discrimination correlated with presumptively bad laws, and conversely, non-discrimination correlated with presumptively good laws. These intuitions are tested not only in the context of benign race-based laws, which discriminate favorably to blacks, but also in the context of anti-miscegenation laws, which discriminate along a separate dimension but subordinate based on race.

Writing in *Loving* for a unanimous Court, Chief Justice Warren struck down the law, which was obviously designed to harm blacks and other racial minorities by protecting, in effect, the white race from corruption of blood. As Justice Stewart, who also joined the majority opinion, aptly observed in a separate concurrence, it is sufficient to say that a law that criminalizes based on the race of the actors cannot stand.[236] And this is true even if the law discriminated along a different dimension.

Loving infuses anti-subordination as an independent principle into equal protection doctrine. Setting aside benign racial preferences, laws that discriminate based on race typically also subordinate based on race. *Loving* demonstrates how a law can subordinate without discriminating, thus thwarting the conventional assumption that antidiscrimination and anti-subordination operate in tandem. The case helps to explain why when we combine the principles of antidiscrimination and anti-subordination in the context of race, we have a true dimensionality problem, whereas outside that context, these two principles coalesce thereby flattening dimensionality. Consider Table 6 below.

N.Y. TIMES, Feb. 15, 2014, at A1, A12 (connecting *Loving* and *Obergefell* prior to oral argument in *Obergefell*).

235 The case facts were more complex. The statute banned intermarriages between minorities and whites, but not between minorities. Chief Justice Warren, writing for the majority, declared that feature irrelevant, holding the challenged law is patently unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Loving*, 388 U.S. at 11–12 n.11 (1967). The text assesses the challenged law as characterized by the *Loving* Court.

236 *Loving*, 388 U.S. at 13 (Stewart, J., concurring).

TABLE 6

DISCRIMINATION, SUBORDINATION, AND DIMENSIONALITY

	Racial Discrimination Condoned	Racial Discrimination Not Condoned
Racial Subordination Condoned	Jim Crow	Null Set
Racial Subordination Not Condoned	Modern Liberal	Modern Conservative

In Table 6, the two critical dimensions involve whether racial discrimination and racial subordination are or are not condoned. The null set, or position no one would logically assume, is not condoning discrimination, but condoning subordination (upper right). The Jim Crow position, upper left, condones both. The modern liberal position condones affirmative action, thus allowing benign discrimination, but does not condone subordination. The modern conservative position, or color blindness, neither condones racial discrimination nor subordination other than as the unintended consequence of laws promoting independent benign goals. Although the Jim Crow and modern conservative positions resolve the two critical issues in opposite fashion, the modern liberal position does not split the difference along a single dimension. Instead, the modern conservative and Jim Crow positions both oppose condoning the benign use of race, albeit for different reasons.

Dimensionality flattens, however, when we eliminate discrimination consistently with Chief Justice Warren's admittedly forced construction of the challenged statute.[237] The normative attachment to color blindness no longer forces a separate dimension. Instead, the binary split, condoning or not condoning racial subordination, rests along one dimension, shown in Table 7. The *Loving* Court unanimously threw the subordinating anti-miscegenation statute into the presumptively bad law bin, and struck it down, with the modern liberals and modern conservatives on the same side, opposing Jim Crow.

237 *See supra* note 235. For presentation purposes, this table is inverted relative to Table 6, with the vertical axis now cast horizontally.

TABLE 7

LOVING IN ONE DIMENSION

Conservative/Liberal	Jim Crow
Loving Result	Anti-miscegenation Result
Prohibit Subordination	Allow Subordination

B. Dimensionality and Gender

The general absence of a sex-blindness equivalent to color blindness supports the intuition that gender cases are more likely to rest along a single analytical dimension. Within our jurisprudential tradition, along with *Loving*, gender-based equal protection cases center on anti-subordination, not antidiscrimination.

The challenge of gender-based classifications is that there are times when the sexes are situated differently in relevant ways and, as a result, when the analogy between race and sex breaks down. To begin thinking about gender and dimensionality, reconsider Table 5, this time using gender, not race, as informing the relevant categories.

TABLE 8

GENDER AND DIMENSIONALITY

	Benign Gender Classifications Permitted	Benign Gender Classifications Prohibited
Adverse Gender Classifications Permitted	Null Set	Pre-*Reed v. Reed* restrictions on participation in bar, estate planning, and jury service
Adverse Gender Classifications Not Permitted	Modern Liberal View	Sex-blindness?

Prior to two landmark gender-distinction cases, the Court routinely sustained laws distinguishing men and women based on then-dominant social mores concerning sex roles. This began to change in *Reed v. Reed*,[238] which struck down a ban on women administering estates, and in *Frontiero v. Richardson*,[239] which struck down a presumption of family benefits for enlisted men but not women in the military. Classic illustrations of earlier treatments in-

238 404 U.S. 71, 74 (1971).

239 411 U.S. 677, 679 (1973).

cluded laws preventing women not married to the proprietor from bartending[240] and rendering jury service voluntary for women but not men.[241]

In *Reed* and *Frontiero*, both of which purported to apply rational basis scrutiny (of the "plus" or "with teeth" variety) while striking the challenged laws down, the Court began developing what we can now view as the modern liberal position. That position no longer condones sex-based distinctions premised on "overbroad generalizations" about the sexes.[242] In *Craig v. Boren*,[243] the non-intoxicating beer case, Justice Brennan articulated what has become known as "intermediate scrutiny." The test states: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[244]

The intermediate tier returns us to the analysis of dimensionality. As in Table 5, the lower right and upper left positions in Table 8 embrace seemingly opposite views respecting the permissibility of challenged laws, this time harming or benefiting women. But there is a critical difference. In contrast with race, there isn't a generally accepted sex-blind position within our jurisprudential tradition.[245] Instead, the conservative and liberal positions on gender agree that sex-based distinctions can be drawn but disagree on the permissibility line.

240 Goesaert v. Cleary, 335 U.S. 464, 465–66 (1948). The Court had similarly rejected due process challenges to laws limiting the hours, or imposing minimum wages, for working women despite evidence that such laws undermined employment prospects for unskilled women as compared with similarly situated men. *See, e.g.*, Muller v. Oregon, 208 U.S. 412, 416–17, 423 (1908) (distinguishing Lochner v. New York, 198 U.S. 45 (1905), and sustaining state law setting ten-hour workday for women), *overruled by* Adkins v. Children's Hospital, 261 U.S. 525, 552–53, 562 (1923) (relying on substantive due process to strike down minimum wage for women).

241 Hoyt v. Florida, 368 U.S. 57, 60–61 (1961).

242 United States v. Virginia, 518 U.S. 515, 533 (1996).

243 429 U.S. 190 (1976). For a more detailed discussion, *see supra* Part I.C.3.

244 *Craig*, 429 U.S. at 197.

245 Of course sex-blindness does exist as a theoretical position and also as policy in some settings. *See, e.g.*, John Tagliabue, *A School's Big Lesson Begins with Dropping Personal Pronouns*, N.Y. TIMES, Nov. 14, 2012, at A8 (discussing Egalia, a preschool in Stockholm, Sweden that eschews gendered pronouns, "him" or "her," in favor of "friend," and that rejects any suppositions about sex roles).

TABLE 9

SEX-BASED EQUAL PROTECTION WITH FLATTENED DIMENSIONALITY

Intermediate Scrutiny		
Rational Basis in Fact	Intermediate Scrutiny as a Placeholder	Strict Scrutiny in Fact
Easy Cases to Sustain	Hard Cases	Easy Cases to Strike Down
Benign Sex-Based Laws		Adverse Sex-Based Laws

When challenged laws draw lines based on gender, as in the prior examples, or are formally gender neutral but have gender-based effects, the analysis generally involves whether the challenged laws do or do not subordinate women.[246] Table 9 thus reveals the real purpose that intermediate scrutiny serves. In the context of sex-based classifications, the easy cases occupy the opposite extremes along one dimension. We know that simple exclusions or disadvantageous treatment of women based on antiquated notions about the gender roles are easily struck down. These cases are subject to intermediate scrutiny in name, and to strict scrutiny in fact. Conversely, while there are few easily sustained sex-based distinctions, there are some. For a long time, separate bathrooms were viewed, perhaps wrongly in hindsight, as a trivial example.[247] Others involve policies that recognize genuine sex differences, for example, who makes the final decision to terminate a pregnancy;[248] same-sex rooming assignments in state institutions of higher

246 *See, e.g.*, Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 146–47 (1980) (striking down a Missouri workers' compensation scheme specially requiring proof of dependency prior to widower, but not widow, receiving benefits); Califano v. Goldfarb, 430 U.S. 199, 202, 206–09 (1977) (relying on the anti-subordination principle to strike down federal program which afforded widows automatic benefits but conditioned widower benefits on proof of dependency). In both cases, the difficulty was not gender discrimination. Both the deceased woman paying contributions and the widower seeking benefits were harmed. Rather, the discrimination favored traditional families by enacting a preference for husbands as primary breadwinners, in contrast with those in which the breadwinning responsibilities rested with the wife or were shared. In that manner, these challenged laws violated the anti-subordination principle.

247 Pending challenges by transgender individuals to gender-specific bathrooms appear to be changing this. *See generally* Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1 (2016); Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom That Matches Gender Identity—Are Co-Ed Bathrooms Next?*, 83 UMKC L. REV. 57 (2014); Rachel E. Moffitt, Note, *Keeping the John Open to Jane: How California's Bathroom Bill Brings Transgender Rights out of the Water Closet*, 16 GEO. J. GENDER & L. 475 (2015).

248 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894–96 (1992) (O'Connor, Kennedy, & Souter, JJ., joint opinion) (holding that a pregnant woman cannot be required to inform her husband of a planned abortion); *see also* Mary Ziegler, *Abortion and the Constitutional Right (Not) to Procreate*, 48 U. RICH. L. REV. 1263 (2014) (discussing history of spousal consent laws as part of larger inquiry into abortion rights framework and assisted reproductive technology).

learning, in the military, or in other venues where government provides housing to non-married persons; and as seen in *Nguyen* and *Morales-Santana*, whether to permit the government to prioritize based on the parent's sex when a non-marital overseas-born offspring of only one U.S. citizen-parent later seeks citizenship.[249]

Intermediate scrutiny might serve as a placeholder for difficult cases. And yet, line drawing difficulties, and even shifting lines over time, do not force problems of dimensionality.[250] To illustrate, consider two much-criticized sex-based equal protection cases. In *Geduldig v. Aiello*, the Supreme Court held that the state did not violate equal protection in denying insurance benefits for pregnancy because the denial is not gender-based.[251] The second decision, *Personnel Administrator of Massachusetts v. Feeney*, involved a challenge to a program benefitting veterans in hiring, which, due to the history of military service, disproportionately benefitted men.[252]

Although each challenged law was technically gender neutral, each also appears to have profound gender-based effects. The Court sustained both policies, and the question is whether intermediate scrutiny is doing any work in reaching those results. *Geduldig* appears problematic in that men obviously cannot become pregnant,[253] and *Feeney* is disturbing because the history of military service affects men differently from women, thereby testing gender neutrality.

What makes these cases hard is not dimensionality. It is instead the difficulty of line drawing. Although the policies at issue in *Geduldig* and *Feeney* affect men and women differently, the effects are subtler than first appears. Consider pregnancy benefits. Although only women become pregnant, only a relatively small number of women will do so during any given coverage period. The beneficiaries of the pregnancy exclusion include persons whose contributions are reduced as a result of the exclusion, and that includes women who will not become pregnant. Notably, however, it does not include all men. For men whose wives are covered on their policies and become pregnant during the coverage period, the exclusion is also financially detrimental.

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249 For a discussion of Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001), *see supra* Part I.C.3. For a discussion of Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017), and United States v. Flores-Villar, 536 F.3d 990, 993 (9th Cir. 2008), see *supra* note 115.

250 *See supra* Part II.A.

251 417 U.S. 484, 496–97 (1974).

252 442 U.S. 256, 281 (1979).

253 Justice Ginsburg unsuccessfully argued for revisiting the *Geduldig* holding in *Coleman v. Court of Appeals of Maryland*, maintaining that pregnancy discrimination "[b]y definition . . . discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." 556 U.S. 30, 55 (2012) (Ginsburg, J., dissenting) (alteration in original) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 161–62 (1976) (Stevens, J., dissenting)). Except for seahorses. *See* JOAN ROUGHGARDEN, EVOLUTION'S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE 45 (2004).

Feeney also appears problematic because we could say that wives of former military service members who benefit from the challenged policy do so along with their husbands, and husbands of women excluded from such positions due to the military benefit are burdened along with their wives. Although the burdens and benefits are not gender specific, the challenged scheme reinforces stereotypical notions about which spouse is responsible for providing housing and related benefits. The point here is not to resolve these cases. Rather, it is to show that the results are contestable because societal understanding of gender roles is evolving along the dimension of anti-subordination.

C. Dimensionality and Sexual Orientation: Obergefell *Revisited*

Following *Romer v. Evans*,[254] and *Lawrence v. Texas*,[255] but before *Obergefell v. Hodges*,[256] the Supreme Court took up two cases that implicated same-sex marriage. In *Hollingsworth v. Perry*,[257] which presented a challenge to California Proposition 108 banning same-sex marriage, Chief Justice Roberts denied the initiative sponsors standing to challenge the California Supreme Court ruling striking the initiative down.[258] In dissent, Justice Kennedy argued in favor of standing, preferring to have the Court address the merits of the same-sex marriage ban.[259] In *United States v. Windsor*,[260] issued the same day, Justice Kennedy, writing for a majority, struck down Section 3 of DOMA, thereby invalidating federal laws that failed to recognize state-sanctioned same-sex marriage.[261] The most compelling reading of the combined cases was that a majority comprising Justice Kennedy and the liberal wing of the Court supported striking down bans on same-sex marriage, but that some coalition members preferred to await a broader societal consensus.[262] Subsequent legal developments appear to have vindicated that reading.[263]

The harder prediction—the one that appears to have evaded most ob-

254 517 U.S. 620 (1996).

255 539 U.S. 558; *see also supra* notes 83–94 and accompanying text (discussing the relationship between *Romer*, *Lawrence*, and *Obergefell*).

256 135 S. Ct. 2584 (2015).

257 133 S. Ct. 2652 (2013).

258 *Id.* at 2659.

259 *Id.* at 2668 (Kennedy, J., dissenting).

260 133 S. Ct. 2675 (2013).

261 *Id.* at 2683, 2695–96. For a more detailed discussion of *Windsor*, see *supra* Part I.C.2.

262 At least it seemed clear to this observer. *See* Stearns, *Grains of Sand*, *supra* note 81, at 393–98 (positing that the liberal Justices Ginsburg, Breyer, and Kagan, who along with conservative Justice Scalia, joined Chief Justice Robert's majority opinion denying standing in *Hollingsworth*, likely preferred to await further consensus in favor of same-sex marriage, and that Justice Kennedy, who dissented, would likely have struck down the same-sex marriage ban had the Court reached the merits).

263 For a comprehensive account of the lower court case law at the time of the *Obergefell* decision, see Obergefell v. Hodges, 135 S. Ct. 2584 app. A (2015) (listing citations of state and federal judicial opinions on the issue of same-sex marriage).

servers—was the eventual basis for the ruling. Commentators generally anticipated three possible rationales, of which two seemed more likely. Justice Kennedy chose a fourth. The first option was to extend the animus analysis from *Romer*, striking the same-sex marriage ban without declaring gays and lesbians a suspect or quasi-suspect class. The second option was to treat bans on same-sex marriage as a form of gender-based classification, thereby declaring sexual minorities a quasi-suspect class. The third, somewhat less likely, rationale was to treat bans on same-sex marriage as analogous to anti-miscegenation laws, thus declaring minority sexual orientation a suspect class.[264] These approaches corresponded with a progression from rational basis (of the animus variety) to intermediate scrutiny (in its stricter form) to strict scrutiny (in its conventional, fatal form). With the benefit of hindsight, it is easier to see why Justice Kennedy instead eschewed suspect classification analysis, other than as the somewhat imprecise basis for an alternative holding, instead resting primarily on due process and finding same-sex marriage a fundamental right.

The likely reason that commentators missed the mark on the eventual basis for the holding is that they were struggling for an approach that would minimize the probability of identifying minority sexual orientation as a quasi-suspect or suspect classification. Viewed along the dimension of anti-subordination, the clearest approach to resolving the case was to find that such laws were subject to strict scrutiny. Either of the rejected alternatives—the animus form of rational basis or stricter intermediate scrutiny—would have accomplished that other than in name. Indeed, this is why treating same-sex marriage bans as a variation on anti-miscegenation laws seemed implausible: such a ruling would have bluntly added minority sexual status to the narrow grouping of suspect classifications. And yet, Justice Kennedy managed to accomplish the same result of functionally applying strict scrutiny without formally declaring sexual minorities a suspect or even quasi-suspect class and without mentioning the applicable tier.

Although Justice Kennedy nominally avoided tiers altogether, Chief Justice Roberts, writing the principal dissent, made plain that the majority opinion presumed strict scrutiny.[265] Not surprisingly, Justice Kennedy offered no refutation. When the Court finds a fundamental right, laws that interfere with it must pass strict scrutiny to survive. In effect, Justice Kennedy managed to raise the tier of scrutiny to the highest level without having to create a new suspect classification in doing so. That stringent test

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264 *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting that racial classifications in criminal statutes were "especially suspect" in light of the Equal Protection Clause); *see also supra* note 235 and accompanying text.

265 *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) ("And a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history can hardly be called irrational.").

will govern future challenges to such laws.

Justice Kennedy's approach also carried additional benefits. The primary difficulty with animus analysis is that it would have resulted in casting aspersions on those opposing the extension of marriage to same-sex couples. Such a ruling would have implied that those denying the extension of the right to marry to same-sex couples had exhibited an animus against gays and lesbians, a politically unpopular group. For Justice Kennedy the difficulty harkened back to his opening remark at oral argument: whatever the merits of the policy question, many individuals long embraced a traditional view of marriage, one that he claimed had stood for millennia.[266]

The fundamental rights analysis instead allowed Justice Kennedy to claim respect for the dignity both of same-sex couples, who were previously denied a right of access to marriage, and of those who held traditional views of marriage for religious or other reasons. Even if critics, including the dissenting justices, questioned the sincerity of this position, the combination proved central to Justice Kennedy's opinion.

Consider this passage from the majority opinion:

> Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.[267]

Perhaps the Court might have broadened the animus concept to include indifference to the harms imposed on politically unpopular groups, rather than hostility toward such groups. Such a conceptual broadening might have allowed Kennedy to invalidate the same-sex marriage ban even if it persisted in spite of, rather than because of, its adverse effects to sexual minorities. The difficulty, however, is that this approach would have broadened the narrow limits of the animus category of rationality review, making it hard to predict when laws enacted or retained for claimed benign, but contested, reasons would be sustained. By instead relying primarily on due process, Justice Kennedy was able to thread the needle and to claim, at least formally, respect for the sincerely held views of those on both sides of this divisive issue.

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266 Transcript of Oral Argument at 6–7, Obergefell v. Hodges, 135 S. Ct. 2548 (2015) (No. 14-556).

267 *Obergefell*, 135 S. Ct. at 2607.

Thus Justice Kennedy continued:

> The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.[268]

In effect, Justice Kennedy took the position that although we should respect those holding competing views of same-sex marriage, due process cannot condone both positions without undermining the fundamental rights of those who are burdened.

To be sure, Chief Justice Roberts, writing in dissent, construed the majority ruling as condemning those opposed to same-sex marriage.[269] Thus he stated:

> Perhaps the most discouraging aspect of today's decision is the extent to which the majority feels compelled to sully those on the other side of the debate. The majority offers a cursory assurance that it does not intend to disparage people who, as a matter of conscience, cannot accept same-sex marriage. That disclaimer is hard to square with the very next sentence, in which the majority explains that "the necessary consequence" of laws codifying the traditional definition of marriage is to "demea[n] or stigmatiz[e]" same-sex couples. The majority reiterates such characterizations over and over. By the majority's account, Americans who did nothing more than follow the understanding of marriage that has existed for our entire history—in particular, the tens of mil-

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268 *Id.* at 2602.

269 More generally, the Chief Justice claimed that the majority decision fell within the tradition of the generally discredited decision, Lochner v. New York, 198 U.S. 45 (1905). *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., dissenting). The Chief Justice didn't disavow fundamental rights analysis altogether, but rather chastised the majority for its failure to abide the admonition to ground identified rights in history and tradition. *Id.* at 2616, 2618, 2620–21 (arguing that by defining the right as marriage rather than same-sex marriage, the majority has effectively overruled Washington v. Glucksburg, 521 U.S. 702 (1997)); *see also id.* at 2640–41 (Alito, J., dissenting) (noting that the finding of a fundamental right to same-sex marriage is contrary to *Glucksberg* because it is not a right grounded in history and tradition). The Supreme Court has made clear, however, that it does not overrule its own precedents by implication. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). The different contexts of *Glucksburg* and *Obergefell*—the right to die and the right to same sex marriage—would readily allow a future Court to distinguish these holdings. The Chief Justice further argued that the claimed right could equally extend to plural marriage, although he also suggested that the two claims could be plausibly distinguished on other grounds. *Obergefell*, 135 S. Ct. at 2621–22 (Roberts, C.J., dissenting).

> lions of people who voted to reaffirm their States' enduring definition of marriage—have acted to "lock . . . out," "disparage," "disrespect and subordinate," and inflict "[d]ignitary wounds" upon their gay and lesbian neighbors.[270]

Although the Court certainly took sides, Justice Kennedy's due process analysis allowed him to claim respect for the views of those supporting or opposing same-sex marriage. That feat would have been nearly impossible to accomplish based on a ruling resting on grounds of animus. An animus ruling would also have required rejecting each proffered rationale for the limitation of marriage to opposite-sex couples. This includes intuitions about traditional cultural mores and even possible opposite-sex complementariness in child rearing to the extent that those opposing the claimed right view marriage and child rearing as linked.[271] The due process analysis appeared to avoid these difficulties, while at the same time elevating, in effect, the level of review to strict scrutiny.

The most plausible alternative rationale would have equated equal protection analysis of sexual orientation and gender. Despite its intuitive appeal, treating a ban on same-sex marriage as an instance of gender discrimination implicates an analytical puzzle. The argument for this position is that restricting marriage to opposite-sex couples allows a woman to marry a man but disallows a man to marry a man, thus discriminating based on

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270 *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting) (alteration in original) (citations omitted).

271 Opposite sex complementarity implicates the much-contested literature on the possible biological bases, as opposed to strictly cultural bases, for brain-sex differences. For literature supporting claims to a biological basis for such differences, see generally, for example, SIMON BARON-COHEN, THE ESSENTIAL DIFFERENCE: THE TRUTH ABOUT THE MALE AND FEMALE BRAIN (2003) (associating different distributions of skills, based on gender, along the axes of empathy and systemization); Debra Soh, *No, the Google Manifesto Isn't Sexist or Anti-Diversity. It's Science*, THE GLOBE AND MAIL (Aug. 8, 2017), https://www.theglobeandmail.com/opinion/no-the-google-manifesto-isnt-sexist-or-anti-diversity-its-science/article35903359/?service=amp (including links to relevant studies.). For literature refuting such claims, or arguing that such claims are overblown as causal determinants for sex-based patterns of observed differences in behavior, see CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE (2010) (expounding a critique of the brain-sex dichotomy thesis); Dhruv Marwha et al., *Meta-Analysis Reveals a Lack of Sexual Dimorphism in Human Amygdala Volume*, 147 NEUROIMAGE 282 (2017) (reviewing meta-analysis of fMRI studies). Resolving this scientific debate is well beyond the scope of this Article.

One related context in which such preferences are playing out is adoption proceedings. For illustrations of state laws favoring opposite-sex marriages in adoption proceedings, see, for example, CONN. GEN. STAT. ANN. § 45a-726a (repealed 2013) ("[T]he Commissioner of Children and Families or a child-placing agency may consider the sexual orientation of the prospective adoptive or foster parent or parents when placing a child for adoption or in foster care."); MISS. CODE ANN. § 93-17-3(5) (Supp. 2016) ("Adoptions by couples of the same gender is prohibited."). In 2011 the Catholic Church withdrew its adoption services from Illinois after determining its agencies could no longer favor married couples. *See* Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1447 (2012) (noting that many Catholic groups were "shedding their adoption services" in response to the fact that they would not be exempted from a law that required them to consider same-sex couples).

gender. The difficulty arises at the level of formal equality: the same restriction allows a man to marry a woman but disallows a woman to marry a woman. So viewed, laws banning same-sex marriage are formally gender neutral inasmuch as they apply equally to both men and women. Although avoiding the gender analogy directly, Justice Kennedy implicitly recognized the difficulty, thereby focusing instead on the subordinating effects of the law's different treatment of same sex (disfavored) and opposite sex (favored) couples.[272]

As seen most clearly in *Loving*, formal non-discrimination (or formal neutrality) does not resolve the ultimate question of constitutional permissibility. Instead it forces consideration of whether the restriction falls on the wrong side of the analytical dimension of anti-subordination. The most straightforward equal protection analysis in *Obergefell* might have been to define minority sexual orientation as a suspect classification, thus applying strict scrutiny, and putting same-sex marriage bans into the presumptive bad law bin. The Court was clearly reticent to add to the list of such classifications, and so it accomplished this result through a ruling based on due process.

Even so, Justice Kennedy linked the due process and equal protection rationales:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[273]

By focusing on the relationship between the two clauses, but resting primarily on due process, Justice Kennedy was able to offer a foundation in the equal protection doctrine that did not rest on finding minority sexual orientation a suspect or quasi-suspect class. The dimension along which the Court effectively ruled was anti-subordination, but the Court nonetheless placed the ban on same-sex marriage on the offending side without formally entrenching the decision in the nuances of tiers analysis. As this Article has shown, however, avoiding a discussion of tiers does not elimi-

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272 *See supra* note 268 and accompanying text (reflecting Kennedy's concern that bans on same-sex marriage "disparage their choices and diminish their personhood"). For a related discussion in the context of employee benefits, see *supra* note 246 and accompanying text (striking down federal program affording widows automatic benefits, but conditioning widower benefits on proof of dependency, and striking Missouri workers' compensation scheme specially requiring proof of dependency prior to widower, but not widow, receiving benefits).

273 *Obergefell*, 135 S. Ct. at 2602–03 (citations omitted).

nate the functions that tiers serve. The effect of Justice Kennedy's *Obergefell* opinion is unambiguous: laws denying access to marriage by same-sex couples will now be subject to strict scrutiny.

CONCLUSION

The tiers of scrutiny doctrines have been widely condemned for producing dissatisfying results. Commentators have found the doctrines muddled and their applications disingenuous. This Article has offered a different way to think about the problem. By focusing on the implications of dimensionality for equal protection cases involving race, gender, and sexual orientation, the analysis reveals the very limited circumstances in which a third tier is likely to prove helpful. Removing clutter—rational basis plus (Category 2) or strict scrutiny lite (Category 4)—is valuable not only for eliminating what is unnecessary, but also for providing a clearer focus on what remains.

The analysis provides the means for a more elegant system of tiers, one that avoids doctrinal contortions. The analysis also helps to explain two important and contested equal protection doctrines, affirmative action and same-sex marriage. Although recognizing the central role that dimensionality plays in tiers of scrutiny analysis will not eliminate the Red Queen Game, it might just allow lower courts to push ever so slightly ahead.

APPENDIX: TIERS OF SCRUTINY CHEAT SHEET

Tiers of Scrutiny Cheat Sheet					
		Doctrinal Test	Actual Test	Comment	Illustrations
Race	Adverse	Strict Scrutiny	Same	Due to Red Queen game, most laws adversely affecting minorities no longer take express form.	Jim Crow laws
	Benign	Strict Scrutiny	Intermediate Scrutiny	Although Court formally applies same test to benign and detrimental laws, this is the one instance that forces a dimensionality split that would distinguish illicit and benign laws. This could be accomplished using intermediate scrutiny within two dimension, or rational basis if benign and adverse classifications were treated along separate spectrums	*Bakke*; *Grutter*; *Fisher II*

	Nondiscriminating/Subordinating	Strict Scrutiny	Same	Dimensionality flattens when antidiscrimination is eliminated, avoiding the central normative position of modern conservativism, associated with color blindness, placing modern liberals and modern conservatives on the same side, opposite Jim Crow.	*Loving*
Gender	Adverse	Intermediate Scrutiny	Strict Scrutiny	Although the Court uses a single test—intermediate scrutiny—to assess gender-based distinctions, the test does no work; laws premised on "overbroad" characterizations are functionally subject to strict scrutiny and cases that are based on real sex differences or that overcome past discrimination against women are functionally subject to rational basis review.	*VMI* illustrates judicial effort to ratchet up intermediate scrutiny to strike down a law that would otherwise likely be sustained based on real-sex differences.
	Benign	Intermediate Scrutiny	Rational Basis Scrutiny		*Nguyen* and *Morales-Santana* illustrate laws prioritizing treatment of mothers over fathers of foreign-born illegitimate children based on real-sex differences.

Sexual Orientation	Adverse	Rational Basis Scrutiny (*Romer, Lawrence*), or no test (*Obergefell*)	Strict Scrutiny	Laws that distinguish gays and lesbians for greater levels of difficulty in lawmaking or that single out their intimate conduct will be invalidated based on animus or an understanding of the essential role intimate conduct plays in forming meaningful relationships, thus benefitting society. Obergefell avoided tiers to avoid casting aspersions on those who hold deeply held religious or moral views of traditional marriage. (Thus far we have no illustration of benign laws challenged under equal protection in this category).	*Romer*; *Lawrence* (overturning *Bowers*); *Obergefell*