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Equality Without Tiers

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ARTICLES

EQUALITY WITHOUT TIERS

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"There is only one Equal Protection Clause."

– *Justice Stevens*[1]

I. INTRODUCTION

The immediate impact of *Grutter v. Bollinger* and *Gratz v. Bollinger* is nothing short of momentous.[2] Not only do the Supreme Court's most recent affirmative action decisions settle the deeply contested question of whether race may be considered in higher education admissions, but they also, more broadly, envision permissible and impermissible uses of racial classifications in that context, and surface new, challenging questions about the official use of affirmative action.[3]

Yet *Grutter* and *Gratz* are also momentous for what they tell us about the long-term struggle over the structure of equal protection doctrine. This

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1. Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).
2. *See* Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (upholding the use of race as a factor in law school admissions); Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (striking down the use of race in an affirmative action plan for undergraduate admissions).
3. For an extended discussion of the Court's application of strict scrutiny in these cases, see *infra* notes 25, 106.

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struggle, which has been under way for decades,[4] will affect the future of equality analyses far beyond affirmative action.

Specifically, two interrelated developments have shaken the foundations of the Court's three-tiered equal protection framework.[5] First, as evidenced in *Grutter* and *Gratz*, the categorical application of rigorous review to suspect classifications has become its own battleground, complete with disputes over whether context should affect the strictness of strict scrutiny.[6] Second, at the other end of the equal protection spectrum, the Court's rational basis jurisprudence wavers between its typical deference to government decisionmaking[7] and the occasional insistence on meaningful review,[8] without a unifying theory for meshing the two seemingly distinct approaches.[9]

Rather than simply tinker with the three tiers of equal protection review to address these theoretical and doctrinal challenges, this Article takes a step back from the front lines of equal protection jurisprudence to consider how and why the tiered framework evolved and whether we still

4. *See infra* Part II (reviewing the development of suspect classification analysis and rational basis review).

5. Throughout this Article, references to equal protection analysis encompass review under both the Fourteenth Amendment's Equal Protection Clause and the equality guarantee incorporated into the Due Process Clause of the Fifth Amendment. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (stating that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than on the state governments to protect against certain forms of unequal treatment).

6. *See infra* notes 25, 106 and Part II.

7. *See infra* Part II. The Court enshrined the dismissive treatment of nonsuspect classifications and the distinction between this treatment and the rigorous treatment of suspect classifications during the 2002 Term by reinforcing the tiered framework's additional role as a cornerstone of Eleventh Amendment jurisprudence. *See* Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003). In *Hibbs*, the Court invoked its intermediate scrutiny of sex-based classifications as the reason Congress could address sex discrimination by states more freely than age or disability discrimination. *See id.* at 1982 (commenting that it is "easier for Congress to show a pattern of state constitutional violations," as the Court requires for classifications such as sex, which it subjects to heightened scrutiny, than to prove a state's "'widespread pattern' of irrational reliance" on traits such as age or disability, which are subject only to rational basis review) (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000)).

8. *See infra* Part II. In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), which was also decided in the 2002 Term, Justice O'Connor made the latest entry into the debate over the contours of rational basis review by advocating more stringent review for laws aimed at "harm[ing] a politically unpopular group." *Id.* at 2485 (O'Connor, J., concurring) (internal quotation marks omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)). Justice Scalia, in his dissent, charged Justice O'Connor with further muddying the rational basis inquiry. *See id.* at 2496 (Scalia, J., dissenting).

9. *See infra* Part II.

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need it.[10] The fault lines within suspect classification analysis[11] and rational basis review, as well as the overlapping values expressed within high and low levels of scrutiny, prompt an urgent, though rarely addressed, question for equal protection jurisprudence: can a single standard of review effectively screen all types of classifications without negating either the deference to government decisionmaking traditionally accorded under rational basis review or the bias-sensitive review effectuated by strict and intermediate scrutiny?[12]

10. The focus here is exclusively on the Court's approach to differentiating between classifications. The tiered framework, however, is not the only aspect of equal protection jurisprudence that warrants reconsideration. In particular, the Court's insistence that discriminatory purpose necessarily be proven to trigger scrutiny of facially neutral measures, *see* Washington v. Davis, 426 U.S. 229, 244–48 (1976), has been extensively criticized as interfering unduly with effective equal protection analysis. *See, e.g.*, Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993) (advocating "deliberate skepticism [by whites] regarding the race neutrality of facially neutral" legislation); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (asserting that the "color-blind" approach to constitutional analysis legitimates racial inequality); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that the intentional discrimination requirement fails to address unconscious racial motivation); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1147 (1997) (maintaining that the intentional discrimination requirement in *Washington v. Davis* "sanction[s] practices that perpetuate the race and gender stratification of American society"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (criticizing the Court's purposeful discrimination requirement as a troublesome retreat from the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

Critique of the fundamental rights strand of the Court's equal protection jurisprudence, which dovetails partially with the critique offered here, also falls outside the scope of this Article. For a discussion of the Court's fundamental rights jurisprudence, see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-6 to 16-13 (2d ed. 1988) (addressing fundamental rights theory and doctrine), and Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996) (same).

11. Unless otherwise indicated, this Article's references to "suspect classification" encompass classifications deemed quasi-suspect as well, because the Court treats both types of classifications as meriting its suspicion. Similarly, references to "heightened scrutiny" encompass all levels of review above rational basis unless otherwise indicated.

12. This question presupposes at least two important points that are the subject of considerable debate. First, the effort here to assess and revamp a judicially created test accepts that, notwithstanding the countermajoritarian difficulty presented by appointed life-tenured judges reviewing legislative acts, courts will continue to review official enactments for compliance with the Equal Protection Clause. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (analyzing the countermajoritarian difficulty and defending judicial review as located in our national and constitutional history); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (advocating that the Court should be relieved of the final power of constitutional construction). The relationship between the countermajoritarian difficulty and the analysis presented here is addressed later in this Article. *See infra* text accompanying notes 320–24.

Second, the reconceptualization of the equal protection doctrine presented here assumes that doctrinal analysis and critique have some value beyond illuminating (or obscuring) the broader political

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My principal aim is not to revisit and reshape core elements of the current doctrine;[13] instead, I take the bulk of the current doctrine "as is" to demonstrate that the 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, even absent other doctrinal transformations.

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or ideological agenda of the Supreme Court. *Cf.* Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1177 (2002) [hereinafter Rubenfeld, *Anti-Antidiscrimination Agenda*] (suggesting that scholars consider "jettison[ing] the whole enterprise of taking constitutional doctrine seriously" in light of the Court's manipulation of cases and doctrine to achieve ideological aims). Although Rubenfeld makes a compelling case for the simultaneous doctrinal dissonance and political coherence in contemporary constitutional analysis and, as conceded below, any doctrinal test is ultimately malleable, the Court's doctrine continues to warrant scholarly attention for several reasons. *See infra* notes 239–41 and accompanying text. First, doctrinal tests are the Court's central mode of discourse with the lower courts, which render the bulk of constitutional decisions. Moreover, although doctrinal tests lack the ultimate power to dictate outcomes or constrain judicial overreaching, they have tremendous potential either to cloak or to highlight the Court's principles of decisionmaking.

13. As many thoughtful critiques have demonstrated, particular doctrinal elements are in need of transformation. *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427–28 (1997) [hereinafter Rubenfeld, *Affirmative Action*] (criticizing the theory underlying affirmative action cases); Siegel, *supra* note 10, at 1113 (challenging the requirement that discriminatory purpose be shown before state actions are found unconstitutional). Among these critiques is a challenge to the symmetrical treatment of classifications burdening dominant and vulnerable classes. *See generally* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 617–18 (2003) (critiquing the Court's simultaneous solicitude for socially advantaged classes and lack of solicitude for socially disadvantaged classes). As antisubordination theory suggests, powerful reasons support reviewing burdens on politically marginalized groups more strictly than burdens on dominant groups that enjoy full, meaningful access to the political process. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–81 (1980) (arguing that the intensity of equal protection review should hinge on a group's access to the political process); Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–56 (1976) (advocating "the group-disadvantaging principle" to focus constitutional review on the actual harms to a burdened group). *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (observing that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and that classifications burdening those minorities may warrant "more searching judicial inquiry"). If equal protection review were reconceptualized in this manner, many of the problems identified above would be addressed, if not fully resolved. Nothing in the Court's current record, however, suggests that such a transformation is imminent. *See generally* Rubenfeld, *Anti-Antidiscrimination Agenda*, *supra* note 12 (arguing that an "anti-antidiscrimination" agenda underlies many recent Supreme Court decisions, which the Court justified on other doctrinal grounds, and that this agenda firmly underlies the current Court's thinking). *Cf.* Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 92 (1995) (arguing that racial prejudice has driven the Court's affirmative action decisions).

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The long-standing stasis of the set of classifications deemed suspect or quasi-suspect initially suggests the need to reconsider the tiers.[14] The Court did not articulate detailed indicia for discerning which classifications should fill this set until the early 1970s[15]—decades after it first referred to race as a suspect classification.[16] Almost immediately, the "set" closed when a majority of the Court accorded sex-based classifications quasi-suspect status.[17] It has not expanded since. Notwithstanding advocates' efforts to demonstrate that measures based on traits outside the "set" similarly embody prejudice, the Court repeatedly has rejected suspect status for classifications based on other characteristics.[18] While lack of expansion does not necessarily mean the screening system is flawed, it does suggest possible ossification of the governing framework that warrants careful examination.

Further raising concern are the indicia the Court developed in 1973 to identify which classifications are more likely than not to be prejudice laden and, therefore, suspect. A close look reveals intractable internal contradictions. The indicia, which focus on, inter alia, a history of discrimination based on the trait, the trait's immutability, and the relative political powerlessness of those bearing the trait,[19] are at once overbroad and underinclusive.[20] Considered as a group, the inquiries could sweep out

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14. This set includes classifications based on race, alienage, national origin, sex, and nonmarital parentage. For a discussion of these classifications and the development of the suspect classification process, see *infra* Part II.A–B.

15. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (articulating "the traditional indicia of suspectness"). *See also* Frontiero v. Richardson, 411 U.S. 677, 682–88 (1973) (Brennan, J., plurality opinion) (elaborating on the same).

16. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

17. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (declaring that sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives"). Preceding *Craig*, in 1973, a plurality of the Court explicitly subjected a sex-based distinction to heightened scrutiny. *See Frontiero*, 411 U.S. at 688–91 (Brennan, J., plurality opinion). Some have argued that the Court had actually been applying a form of heightened review since *Reed v. Reed*, 404 U.S. 71 (1971). *See* TRIBE, *supra* note 10, § 16-26; Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 33–34 (1972). *See also infra* note 226 (discussing the timing of the application of heightened scrutiny to classifications of nonmarital children).

18. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985) (rejecting heightened review for classifications of people with mental retardation); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976) (declining to treat age as a suspect classification); James v. Valtierra, 402 U.S. 137, 140–42 (1971) (refusing to extend suspect status to wealth-based classifications and rejecting the argument that wealth amounted to a proxy for race).

19. *See, e.g.*, *Rodriguez*, 411 U.S. at 28 (detailing suspect and quasi-suspect classification inquiries). *See also infra* Part II.

20. Ironically, over- and underinclusiveness of classifications are some of the very evils the Equal Protection Clause forbids. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the*

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some of the traits that currently receive the Court's extra attention and sweep in others, such as disability and sexual orientation, that the Court has not yet subjected to heightened scrutiny.[21] In fact, if faithfully applied, the "test" potentially would support removal of race from the set of classifications deemed suspect because—although it has historically (and today) been the basis for significant discrimination and is arguably immutable[22]—race, and in particular the problem of race discrimination against members of minority racial groups, has received significant positive attention from the majoritarian political process in recent years.[23] Given that suspect classification analysis was conceived initially to streamline and intensify review of race-based classifications, which were presumed to be infected with impermissible prejudice,[24] a test that would result in race not being considered a suspect classification has questionable calibration.

Laws, 37 CAL. L. REV. 341, 343–53 (1949) (explaining and criticizing both types of classifications and their relationship to equal protection jurisprudence).

21. *See infra* Part II.B. *Compare* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (noting that racial "classifications are subject to the most exacting scrutiny"), *with* Romer v. Evans, 517 U.S. 620, 632 (1996) (applying rational basis review to sexual orientation-based classifications, although not deciding whether such classifications should be considered suspect or quasi-suspect), *and Cleburne Living Ctr.*, 473 U.S. at 442 (declining to find mental retardation to be a quasi-suspect classification). This is not to suggest that it would be ill-advised to add disability and sexual orientation to the list of suspect traits, but to underscore the lack of fit between the inquiries and the current set of classifications considered suspect.

22. The Court has recognized that the significance accorded to race in American society may be socially constructed, acknowledging that "[c]lear-cut [racial] categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. . . . [R]acial classifications are for the most part sociopolitical, rather than biological, in nature." Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (citations omitted). *See also* IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (analyzing the role of courts in defining race); *infra* notes 100–01 and accompanying text.

23. *See, e.g.*, 42 U.S.C. §§ 2000d to 2000d-6 (2000) (prohibiting, inter alia, race discrimination in programs receiving federal funds); *id.* §§ 2000e to 2000e-17 (prohibiting employment discrimination because of, inter alia, race); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–65), *reprinted as amended in* 42 U.S.C. § 2000e app. at 606–09 (1994) (authorizing the Equal Employment Opportunity Commission to study the barriers to promotion for members of racial minorities and women). The current test, if applied literally, would also likely support removal of sex from the set of suspicious characteristics in light of the similar legislative commitment to eradicating sex discrimination. *See* 42 U.S.C. § 2000e-2(a)(1) (1994) (prohibiting employment discrimination based on, inter alia, sex); 15 U.S.C. § 1691(a)(1) (2000) (prohibiting discrimination based on, inter alia, sex in credit transactions); 20 U.S.C. § 1681(a) (2003) (prohibiting sex discrimination in education programs and activities receiving federal funds). *See also infra* note 175 and accompanying text. *Cf. Cleburne Living Ctr.*, 473 U.S. at 443–46 (noting that although people with mental retardation have historically suffered discrimination and bear an unchangeable characteristic, their receipt of positive attention from elected officials supports the determination that retardation-based classifications not be deemed quasi-suspect).

24. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (finding that the Fourteenth Amendment's "strong policy" to eliminate official race discrimination "renders racial classifications

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If suspect classification analysis operated well, notwithstanding the flawed indicia and fixed set of suspicious classifications, rethinking the heightened scrutiny tiers would not be warranted. There is more, however. Perhaps the most pressing issue raised by the Court's equal protection jurisprudence is the now primary use of suspect classification analysis to invalidate or call into question measures seeking to remedy past racial discrimination or limit the effects of racial bias in electoral politics.[25] Put another way, the suspect classification label has made it more, rather than less, difficult for government to remedy the effects of hostility toward racial minorities in employment, voting, and other arenas.[26] Instead of serving primarily to ensure freedom from race-based discrimination, the Court's categorical use of rigorous review for all suspect classifications,

'constitutionally suspect,' and subject to the 'most rigid scrutiny,' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose") (citations omitted).

25. Even in *Grutter v. Bollinger*, the Court made clear that it was sustaining the law school's consideration of race in admissions in part because "universities occupy a special niche in our constitutional tradition," and not necessarily because it intended generally to permit race-based affirmative action in other contexts. Grutter v. Bollinger, 123 S. Ct. 2325, 2339–41 (2003). *See also* Hunt v. Cromartie, 526 U.S. 541, 547 (1999) (stating that "strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision"); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 218–31 (1995) (discussing the evolution of the application of strict scrutiny to race-based affirmative action plans); *infra* note 106 (discussing limitations of *Grutter*'s application of strict scrutiny for other affirmative action cases). *Cf. Adarand*, 515 U.S. at 245–46 (Stevens, J., dissenting) (criticizing the majority's insistence that strict scrutiny be applied consistently to all racial classifications, including those made for remedial purposes).

Since *Adarand* and the explosion of redistricting cases addressing the use of race, substantial commentary has pondered the effects of the Court's strict scrutiny mandate for measures that purport to remedy the effects of past and current race discrimination. *See, e.g.*, Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1570 (2002) (explaining how "[s]trict scrutiny has been rather useless to the groups whose mistreatment prompted its adoption" and addressing differences in the application of strict scrutiny redistricting and affirmative action cases); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996) (exploring possibilities for class-based affirmative action in the wake of the Court's insistence in *Adarand* on strict scrutiny for racial classifications); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1 (2000) (maintaining that courts often invoke strict scrutiny as an outcome-determinative device, rather than a useful analytical tool, and proposing a solution to this problem); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1 (2002) (engaging in public policy analysis of affirmative action plans based on race and ethnicity).

26. *See, e.g.*, *Cromartie*, 526 U.S. at 546 (stating "that all laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized," regardless of the legislative purpose); *Adarand*, 515 U.S. at 234–35 (requiring an affirmative action program aimed at remedying the effects of racial discrimination to meet the rigorous strict scrutiny standard, which insists that a racial classification "serve a compelling governmental interest, and . . . be narrowly tailored to further that interest"). *See also* Rubenfeld, *Anti-Antidiscrimination Agenda*, *supra* note 12, at 1169–77.

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regardless of context, functions today as a barrier to programs designed to redress race discrimination.[27]

The Court's reorientation of an analysis originally conceived to ferret out governmental reliance on arbitrary or biased assumptions regarding individual traits[28] may point to intractable structural contradictions within suspect classification analysis regarding the purpose of, and triggers for, skeptical scrutiny. Alternatively, the analysis might work well in theory

27. *See* Siegel, *supra* note 10, at 1143 ("[T]oday doctrines of heightened scrutiny function primarily to constrain legislatures from adopting policies designed to reduce race and gender stratification . . . ."). *See also* Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (invalidating a university's effort to diversify its student body by according weight to race in a numerically scaled admissions process). Because sex-based classifications are subjected to a less rigorous, though still demanding, standard of review, the Court retains greater flexibility in evaluating affirmative action programs that seek to remedy past sex discrimination than in assessing race-based remedial measures. *Compare* United States v. Virginia, 518 U.S. 515, 524 (1996) (stating that a sex-based classification must be "substantially related" to an "exceedingly persuasive" government interest to survive equal protection review), *with Adarand*, 515 U.S. at 235 (affirming strict scrutiny's application to a race-based affirmative action initiative). *See also* Sidney Buchanan, *Affirmative Action: The Many Shades of Justice*, 39 HOUS. L. REV. 149, 157–58 (2002) (arguing that all affirmative action challenges should be reviewed under intermediate scrutiny to reconcile the paradox that sex-based programs face more lenient review than race-based remedial plans). As the Court demonstrated recently, it views intermediate scrutiny as allowing broader freedom to uphold sex-based distinctions. *See* Nguyen v. INS, 533 U.S. 53, 70 (2001) (upholding different immigration rules for men and women seeking to naturalize a child). Perhaps the flexibility afforded by intermediate scrutiny would not have given rise to the immediate need for reconsideration of the tiered approach. On the other hand, as contended here, a single standard could achieve the positive effects of stabilizing equal protection doctrine, ensuring a focused, meaningful inquiry and diminishing the real problems flowing from the extant standard. *See infra* note 105 (discussing cases in which the Court sustained sex-based classifications). *Cf.* Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 820–21 (2002) (characterizing intermediate scrutiny as neither sensible nor consistent). Applying the proposed standard to sex discrimination cases, *infra* Part V.B, shows how intermediate review likewise can give way to a single standard of review without abandoning the current and necessary careful review of sex-based distinctions.

28. For a discussion of these traits, see *infra* notes 65, 75–87 and accompanying text. The cases that led the Court to articulate the suspect classification standard in *McLauglin*, 379 U.S. at 192, all involved government distinctions based on race that were imbued either explicitly or implicitly with the assumption of white supremacy, *see, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (addressing the harm caused by the separate-but-equal theory), or of a danger whites perceived to be posed by people of color, *see, e.g.*, Korematsu v. United States, 323 U.S. 214, 218, 223–24 (1944) (upholding detainment of Japanese Americans during World War II based on fears of "espionage and sabotage"). *Cf.* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (voiding Virginia's antimiscegenation law because it was based on "invidious racial discrimination"). Indeed, as will be addressed at greater length below, notwithstanding its invocation in *McLaughlin* nearly forty years ago, strict scrutiny has often not been necessary to invalidate racial classifications. *See infra* notes 63, 68 and accompanying text. Even in *Loving*, which invoked the strict scrutiny and compelling government interest language from *Korematsu* and *McLaughlin*, the Court ultimately invalidated Virginia's antimiscegenation law using the language of rational basis review: "There is patently no *legitimate* overriding purpose independent of invidious racial discrimination which justifies this classification." *Loving*, 388 U.S. at 11 (emphasis added).

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but lack sufficient constraints against misapplication in practice.[29] For the purposes of this Article, the questions raised by the critique of suspect classification analysis are whether a different analytic framework could play a role in (1) enabling and encouraging courts to consider the legislative context in reviewing a classification's compliance with the Equal Protection Clause, and (2) constraining, or at least exposing, individual judges' reactions to particular traits or particular uses of classifications, such as remedial legislation.

At the other end of the equal protection spectrum—rational basis review—the Court highlights its deferential approach to the law- and policymaking branches.[30] So long as a classification is neither suspect nor quasi-suspect, the Court promises that it will give every beneficial presumption to the government when assessing the validity of differential treatment.[31] And the Court has done so, for the most part, by upholding over one hundred classifications on rational basis review since 1973.[32]

Notwithstanding this deference, the Court has invalidated almost a dozen classifications since 1973 as lacking a rational basis for equal protection purposes.[33] For example, in cases addressing subjects as varied as access to absentee ballots,[34] distribution of dividends from state projects,[35] and taxation of out-of-state car purchases,[36] the Court has departed from its habitual approval of governmental distinctions. Finding that the differential treatment in these and related cases either lacked a legitimate and specific explanation or gave effect to stereotypic assumptions or hostility toward a class, the Court firmly rejected the measures at issue.[37]

29. *See* Rubenfeld, *Anti-Antidiscrimination Agenda*, *supra* note 12, at 1172–77; Spann, *supra* note 13, at 92.

30. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993) (emphasizing that rational basis review does not "authorize 'the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations'") (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam)) (alteration in original).

31. *See, e.g.*, *id.* (stressing that "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity") (citations omitted). *See generally infra* Part II.D (describing rational basis review).

32. *See* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 416–19 (1999) (listing rational basis cases decided from 1973 through May 1996).

33. *See id.* *See also infra* notes 118, 120 and accompanying text.

34. *See* O'Brien v. Skinner, 414 U.S. 524, 530–31 (1974).

35. *See* Zobel v. Williams, 457 U.S. 55, 65 (1982).

36. *See* Williams v. Vermont, 472 U.S. 14, 27 (1985).

37. *See supra* notes 34–36; *infra* note 120.

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Against the backdrop of the Court's respect for government's need to distinguish between constituents and the related commitment not to intrude on most government decisionmaking, this set of rational basis invalidations has challenged scholars—as well as the Court—to identify some unifying theory.[38] Yet, while the Court regularly explains its approach to rational basis review,[39] it has not offered a theory for making collective sense of its variable lot of decisions. Nor has the Court broadly embraced any of the rational basis review theories proffered by scholars during the past three decades as holding the key to its rational basis jurisprudence.[40]

As with strict scrutiny, however, the problems of extant rational basis review go beyond doctrinal instability. In particular, the deferential formulation of rational basis review can skew judicial analysis where the government appears to have acted to achieve a legitimate goal. In these cases, the standard's emphasis on deference at times leads courts to skip over the required step of evaluating the link between that permissible goal and the government's action.[41] For example, although a government body may have a legitimate interest in conserving scarce financial resources as a general matter, that goal alone does not explain why a government would single out one group from among all others to bear the cost-savings

38. *See infra* Part V. One could argue that a dozen or so cases not adhering to the usual deferential rule do not merit treatment as anything other than odd or random cases falling outside the doctrine, as some cases inevitably do. However, the analytic consistency among these cases, the regularity of their appearance over time, and the sheer number—nearly ten percent of all equal protection cases decided under rational basis review during three decades—make it unreasonable to brush off these cases as exceptional, unusual, or unrelated to the Court's overarching equal protection analysis.

39. For recent characterizations of the standard, see, for example, *Romer v. Evans*, 517 U.S. 620, 632–33 (1996), *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313–16 (1993), and *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441–42 (1985).

40. *See, e.g.*, ELY, *supra* note 13, at 145–79 (analyzing the courts' role in enforcing the constitutional equal protection guarantee when groups are disadvantaged in the lawmaking process); Gunther, *supra* note 17, at 20–24 (advocating that rational basis review should insist on meaningful justifications for government action); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713–17 (1984) [hereinafter Sunstein, *Naked Preferences*] (arguing that "naked preferences" for interest groups do not constitute legitimate justifications for government action). *See also infra* notes 294–316 and accompanying text. *Cf.* Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257–58 (1996) (contending that the "pariah principle" explains the Court's invalidation of the antigay amendment in *Romer*, and that the principle falls outside and does not explain the lowest level of the three-tiered equal protection framework).

41. *Cf. Romer*, 517 U.S. at 631–33 (explaining rational basis review's insistence on a rational connection between a legitimate government interest and the government's action). *See also infra* notes 332–42 and accompanying text (illustrating how the highly deferential approach to rational basis review interfered with the Court's review of whether a proffered justification actually explained a governmental classification in *Dandridge v. Williams*, 397 U.S. 471 (1970)).

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burden.[42] As a result, the rational basis "test" may fail to ensure even a baseline of meaningful review.[43]

As an alternative to reworking the three tiers in response to the conflicts within suspect classification analysis and the Court's uneven maneuvering between deferential and meaningful rational basis analysis, I contend that a single standard of review may provide a starting point for revitalizing meaningful equal protection review at the highest and lowest levels. By the same token, a unitary standard potentially would narrow the gap between the virtually assured fatal blow dealt to classifications under strict scrutiny and the rubber stamp regularly received by classifications subjected to rational basis review.[44] In addition to offering a forward-looking device[45] for balancing the dual competing priorities of scrutiny and deference, the single standard proposed here—by slipping out from the Court's current tiered categorization—may shed light on the cohesiveness not readily apparent in the Court's rational basis cases.[46]

The proposed single standard consists of three inquiries that emerge from the Equal Protection Clause's fundamental opposition to laws

42. *See infra* note 211 and accompanying text (discussing cases in which the Court considered a cost-savings justification for official action).

43. *See infra* notes 332–42 and accompanying text (illustrating how the highly deferential approach to rational basis review interfered with the Court's review of whether a proffered justification actually explained a governmental classification in *Dandridge v. Williams*, 397 U.S. 471 (1970)).

44. As Gerald Gunther observed, the most rigorous version of judicial review has often been "'strict' in theory and fatal in fact," in contrast to "the deferential old equal protection . . . with minimal scrutiny in theory and virtually none in fact." Gunther, *supra* note 17, at 8 (footnote omitted). *But see* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (emphasizing that strict scrutiny is not always fatal to suspect classifications).

45. *Cf.* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988) [hereinafter Sunstein, *Sexual Orientation*] (referring to the Equal Protection Clause as a forward-looking measure in contrast to the history-oriented Due Process Clause). *But see* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1185–86 (2000) (arguing that analysis under the Equal Protection Clause frequently defers to past practices, whereas the Due Process Clause has destabilized traditional forms of discrimination).

46. This lack of cohesiveness could be tolerated and, indeed, embraced if the flexibility of rational basis review enabled occasional extra-rigorous review as its sole consequence. *Cf.* Craig v. Boren, 429 U.S. 190, 210 n.* (1976) (Powell, J., concurring) (stating that "candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification"); Gunther, *supra* note 17, at 18–24 (characterizing this heightened form of review as rational basis with "bite"). However, no standards guide when the "bite" should be imposed, perhaps because the Court has not acknowledged this heightened form of rational basis review other than in cases reviewing classifications based on traits of sex and illegitimacy that were ultimately deemed quasi-suspect or suspect. *See infra* notes 88, 205, 226 and accompanying text.

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distinguishing between classes for no legitimate purpose[47]—best known as "class legislation" in the pre-*Lochner* era.[48] The three distinct yet overlapping inquiries grow out of commitments common to equal protection review at the highest and lowest levels. First, the standard proposes an "intracontextual" inquiry, which asks courts to consider whether a plausible, nonarbitrary explanation can justify the government's singling out of a particular trait from among all others within the regulatory context.[49] Second is an "extracontextual" inquiry, which seeks to ensure that justifications are not simply generalizations about a characteristic that, though plausible, lack specific relevance to the regulatory context and could support broad, acontextual distinctions based on that trait (i.e., class legislation). Finally, where a trait-based distinction is justifiable in context based on a government interest that would not support broad-scale burdening of the trait holders, the proposal urges courts to pursue a "bias" inquiry. This inquiry would determine whether the line drawing reflects impermissible government purposes, such as hostility toward or stereotyping of the trait being regulated.

To lay the foundation for the proposed single standard, I focus initially on tensions in the current tiered approach to equal protection review. Turning first to suspect classification analysis, Part II explores the genesis and development of the suspect classification indicia, and then highlights weaknesses within and conflicts between the indicia. I also consider the role that suspect classification analysis has played in driving the Court's categorical, rigid review of racial classifications. Finally, Part II turns to suspect classification's lenient counterpart within the tiered framework and sketches the Court's wavering between reflexive, unfocused deference and meaningful review during the past thirty years. Part II ultimately concurs with the Court and other scholars that the extant rational basis jurisprudence lacks internal coherence.

Part III initiates consideration of whether a single standard might respond to the structural and analytic problems identified in Part II. Can a

47. *See infra* Part IV.A.

48. *See generally* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997) (discussing the original understanding of "class legislation" within the public debate and early judicial interpretation of the Equal Protection Clause).

49. The phrase "regulatory context" is used throughout this Article to refer to the context in which a classification operates or has its effect. So, for example, the regulatory context of a measure restricting the adjustment of eyeglass lenses would be the eye wear business and all who work in it. Although the parameters of this context may be set broadly or narrowly, as will be addressed below, the determination of whether a classification is reasonable (or not arbitrary) under any review standard can be made only by reference to the context in which the distinction is made.

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single standard provide sufficiently careful review to capture prejudice-infested classifications while not becoming excessively rigid? Can a single standard also provide for meaningful review of ordinary classifications without unduly restricting the government's need, at times, to draw imprecise distinctions between its constituents? Further, would a single standard entirely disrupt contemporary jurisprudence or, more positively, provide the focused analysis and theoretical and doctrinal coherence that is currently lacking?

As background to later efforts to answer these questions, I consider why the tiered structure remains in place even while many of its flaws have received judicial and scholarly attention. Because suspect classification was first adopted as an analytic device, justices on the Supreme Court have repeatedly taken issue with the dual (and ultimately triple) track taken by equal protection analysis. I look first to how and why these justices have called the multiple tiers into question. This part next considers why, in light of widespread criticism of the tiered framework's operation, no judicial or scholarly consensus has emerged to date in favor of a single standard of review.

Part IV distills a single standard from the Court's equal protection jurisprudence. This part first demonstrates the essential concern with class legislation that permeates review of all classifications, and then derives the three specific inquiries described above from the common concerns of high and low levels of review. Part IV then considers the proposed standard in light of various equality theories, including three of the leading positions in the ongoing debate regarding the values equal protection review should aim to protect.

Turning a critical eye toward the proposed single standard, Part V examines some of the issues that might arise in application. In particular, Part V applies the standard to reconsider a number of rational basis and heightened scrutiny cases to assess the standard's effect, if any, on equal protection jurisprudence.

In Part VI, I conclude that the three tiers may be understood best in historical terms; that is, they may have served as a "training" tool for the Supreme Court and lower courts that lacked an inclination or ability to identify bias or outmoded stereotypes within familiar classifications, such as those based on race, sex, and nonmarital parentage that pervaded much long-standing legislation. At this point in the evolution of constitutional doctrine, however, I contend that the tiers may have outlived their role in streamlining judicial analysis of distinctions based on race, sex, and other traits that historically enjoyed wide acceptance as bases for differential

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treatment. Instead of effectuating the Court's ability to enforce the basic constitutional equality guarantee, the high degree of deference flowing from rational basis review and the rigidity of strict scrutiny have become obstacles to equality. In contrast, a single standard, such as the one advanced here, would provide sufficiently careful scrutiny to capture invidious classifications currently screened under heightened scrutiny. At the same time, a unitary standard's insistence that deference be coupled with meaningful review would ensure genuine review of all other classifications without overly burdening the leeway and flexibility essential to an effective legislative process.

II. PARSING THE LANDSCAPE: A CLOSE LOOK AT SUSPECT CLASSIFICATION STANDARDS AND THE "MIXED BAG" OF RATIONAL BASIS JURISPRUDENCE

Within a relatively brief time period, the equal protection guarantee moved from being "the usual last resort of constitutional arguments"[50] to enjoying a new status as "the Court's chief instrument for invalidating state laws."[51] In scores of cases throughout the past fifty years, the Court has woven together first principles with additional underlying concerns to create a multifaceted doctrinal framework for the analysis of government action that differentiates between classes.[52]

Today, this framework has evolved to a point where suspect classification analysis has become the Court's "chief instrument" for invalidating measures intended to remedy rather than perpetuate past race discrimination,[53] and rational basis review has been applied so variably that even the Court admits that "[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles."[54]

50. *See* Buck v. Bell, 274 U.S. 200, 208 (1927).

51. Zablocki v. Redhail, 434 U.S. 374, 395 (1978).

52. *See generally* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991). Klarman notes that in *McLaughlin*, for the first time, the Court "both articulated *and* applied a more rigorous review standard to racial classifications." *Id.* at 255.

53. In contrast, under the Court's current jurisprudence, affirmative action plans aimed to benefit green-eyed people would face far less rigorous review than plans that seek to eradicate the effects of conceded racial or sex-based discrimination. *Cf.* Grutter v. Bollinger, 123 S. Ct. 2325, 2360 (2003) (Thomas, J., concurring in part and dissenting in part) (maintaining that the Equal Protection Clause "does not . . . prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures," but "does prohibit . . . classifications made on the basis of race").

54. U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 n.10 (1980). *See also* Schweiker v. Wilson, 450 U.S. 221, 243 n.4 (1981) (Powell, J., dissenting) ("Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear, and about the degree of deference

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To lay a foundation for reconsidering the tiered framework, this part will examine how equal protection jurisprudence has evolved by first exploring the genesis and evolution of suspect classification analysis. As shown below, the indicia of suspectness and the categorical application of strict review have inhibited the Court's ability to review carefully the full range of classifications embodying bias and to conduct a nuanced, contextualized analysis of a classification designated as suspect but adopted for benign or remedial purposes.

Second, this part will look closely at the "mixed bag" of rational basis cases decided following the *Lochner* era's demise.[55] For the most part, these cases are laissez-faire in approach, embracing nearly all instances of government line drawing.[56] Yet even with this determinedly deferential posture, the Court has invalidated nearly ten percent of all classifications reviewed during the past twenty years.[57] What links these cases—and what separates them from the majority of their doctrinal peers that have upheld official classifications—is not apparent at a glance. Indeed, scholars have puzzled over the driving force of rational basis review for the past quarter

afforded the legislature in suiting means to ends.") (internal citations omitted); Vlandis v. Kline, 412 U.S. 441, 462 (1973) (Burger, C.J., dissenting) (stating that "[t]he doctrinal difficulties of the Equal Protection Clause are indeed trying"). Justice White also noted the Court's inconsistent approach to rational basis review:

> [W]e employ not just one, or two, but . . . a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." Sometimes we just say the claim is "invidious" and let the matter rest there . . . . But at other times we sustain the discrimination, if it is justifiable on any conceivable rational basis, or strike it down, unless sustained by some compelling interest of the State . . . .

Vlandis, 412 U.S. at 458 (White, J., concurring) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting)).

55. *Cf.* Lochner v. New York, 198 U.S. 45 (1905). While the Court invalidated a number of measures during the *Lochner* era, the analytic strength of these rulings is questionable as the Court continues to distance itself from the active role in reviewing government action that it assumed during the early 20th century. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 459–60 (1985) (Marshall, J., concurring in part and dissenting in part) ("The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational-basis review—a small and regrettable step back toward the days of *Lochner v. New York*.") (citation omitted); Dandridge v. Williams, 397 U.S. 471, 484–85 (1970) ("[The *Lochner*] era long ago passed into history."). *See also* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) [hereinafter Sunstein, Lochner*'s Legacy*] ("The basic understanding has been endorsed by the Court in many cases taking the lesson of the *Lochner* period to be the need for judicial deference to legislative enactments.").

56. *See, e.g.*, *Schweiker*, 450 U.S. at 230 (recognizing that the equal protection guarantee does not impose "an obligation to provide the best governance possible," and that the "Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems") (citation omitted).

57. *See supra* note 32 and accompanying text; *infra* notes 118, 120 and accompanying text.

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century in an effort to enshrine some sense of doctrinal stability.[58] To date, none of their proposed theoretical constructs has been fully embraced by the Court.[59] Nor has the Court articulated its own connective link between the cases.

A. THE GENESIS AND REFINEMENT OF SUSPECT CLASSIFICATION ANALYSIS

Shortly after *United States v. Carolene Products Co.* pronounced in 1938 that certain forms of governmental discrimination warrant closer review than others,[60] the Court made its first explicit reference to race as a "suspect" basis for discrimination.[61] Given that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race,"[62] the initial application of the "suspect"

58. *See, e.g.*, ELY, *supra* note 13, at 31, 146, 151, 156–70; Sunstein, *Naked Preferences*, *supra* note 40, at 1713–17; Gunther, *supra* note 17, at 20–24.

59. *See supra* note 40 and accompanying text. *See, e.g.*, Brian Boynton, Note, *Democracy and Distrust After Twenty Years: Ely's Process Theory and Constitutional Law from 1990 to 2000*, 53 STAN. L. REV. 397, 421–22, 439–46 (2000) (identifying "crucial differences" between Ely's process theory and the Supreme Court's equal protection analysis).

60. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that "a more searching judicial inquiry" may be warranted where government action burdens "discrete and insular minorities"). As Bruce Ackerman has suggested, "anonymous and diffuse" classes may be equally or more at risk of unequal treatment by prejudice-infected governing bodies than "discrete and insular" minorities, but the Court has not, at least overtly, wrestled with that important observation. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 722–24 (1985). For additional discussion of footnote four, see also Lea Brilmayer, Carolene*, Conflicts, and the Fate of the "Insider-Outsider*,*"* 134 U. PA. L. REV. 1291, 1294 (1986) (critiquing the process-based theory in *Carolene Products* as "substantially at odds with the United States Constitution"), and Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982) (describing footnote four's historical development and examining its enduring legacy).

61. Korematsu v. United States, 323 U.S. 214, 216 (1944). The Court opined that racial classifications are "immediately suspect" and "subject to the most rigid scrutiny." *Id.* In *Hirabayashi v. United States*, the Court upheld a wartime curfew for people of Japanese ancestry and declared that race is "in most circumstances irrelevant" to any permissible government interest. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

62. Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (footnote omitted). *See also* Strauder v. West Virginia, 100 U.S. 303, 303–08 (1879); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 8 (1988) (asserting that the purpose of the Fourteenth Amendment is "to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights, and local self-rule"). Even with this mandate, a willingness to recognize the invidious nature of racial classifications was neither immediate nor wholehearted following the enactment of the Equal Protection Clause. Although explicitly burdensome classifications were invalidated regularly for many years, the Court maintained the view that separate treatment could constitute equality. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 543 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483, 494–95 (1954). *Cf.* Derrick Bell, *Racial Libel as American Ritual*, 36 WASHBURN L.J. 1, 13 (1996) ("The spirit of *Plessy*'s 'separate but equal' standard is revived in the

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designation in 1944 to a racial classification made historical sense. Although racial classifications were regularly invalidated in light of this purpose well before the concept of suspect classification became associated with strict judicial scrutiny,[63] the embrace of a suspicious stance[64] toward the government's differential treatment based on particular traits was new.[65] By incorporating this suspicion into a legal test,[66] the Court took its

Court's willingness to employ disingenuous terms to disguise its continued willingness to sacrifice black rights to further white interests.").

Of course, the Equal Protection Clause also has long been applied to assess classifications based on characteristics other than race. *See, e.g.*, Wheeling Steel Corp. v. Glander, 337 U.S. 562, 574 (1949) (invalidating a value-added tax imposed on foreign but not domestic corporations); Valentine v. Great Atl. & Pac. Tea Co., 299 U.S. 32, 33 (1936) (striking down a gross receipts tax as arbitrary and, therefore, violative of the equal protection guarantee); Smith v. Cahoon, 283 U.S. 553, 566–67 (1931) (observing that "the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary"). Indeed, the Court had, early on, completely accepted an interpretation of the Equal Protection Clause that extended the equality guarantee beyond the specific rights envisioned to be protected by the Framers. *See* Klarman, *supra* note 52, at 216. *See also* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1028–32 (1979) (arguing that early interpretation of the Equal Protection Clause reflected a "broader understanding of the amendment").

63. Although *Korematsu* deployed the term "suspect," "the Court actually applied its most deferential brand of rationality review" to the racial classification at issue. *See* Klarman, *supra* note 52, at 232. Michael Klarman has argued persuasively that the Court did not apply more rigorous review of racial classifications for another two decades, until *McLaughlin* was decided. *See id.* at 254–57. In *McLaughlin*, the Court utilized the concept of suspectness it had first introduced in *Korematsu* and *Hirabayashi*, but it enhanced the rigor of its review, emphasizing that racial classifications presumptively contravene the Fourteenth Amendment's "strong policy" against distinguishing between individuals based on race. McLaughlin v. Florida, 379 U.S. 184, 192 (1964). The Court in *Cleburne* reinforced *McLaughlin*'s centrality to contemporary analysis of racial classifications by citing it to explain strict scrutiny. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). For examples of racial classifications struck down prior to *McLaughlin*, see *Watson v. City of Memphis*, 373 U.S. 526, 533 (1963) (rejecting a plan to delay desegregation of city recreational facilities nine years after *Brown*), *Brown*, 347 U.S. at 495 (invalidating racial segregation in education as "inherently unequal"), *Sipuel v. Board of Regents of University of Oklahoma*, 332 U.S. 631, 632–33 (1948) (ordering Oklahoma to provide legal education without regard to race), and *Strauder*, 100 U.S. at 303, 307–08 (rejecting a race-based restriction for jury service). *But see Plessy*, 163 U.S. at 537 (upholding racial segregation of railroad cars).

64. As the Court has explained, "[Racial] classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." *Palmore*, 466 U.S. at 432–33 (quoting *McLaughlin*, 379 U.S. at 196) (omission in original).

65. The designation of certain traits as warranting a heightened level of review broke sharply with the *Plessy* regime's view that race-based differential treatment should be reviewed no differently from other government distinctions between classes. *See Plessy*, 163 U.S. at 543–45. Even prior to *Plessy*, however, the Court occasionally evaluated racial classifications with reference to the recognized purpose of the Fourteenth Amendment: combating racial discrimination. In *Strauder*, for example, Justice Strong asked, "What is [equal protection] but declaring . . . in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" *Strauder*, 100 U.S. at 307.

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first formal step since the adoption of the Equal Protection Clause in 1868 toward streamlining review of governmental trait-based distinctions.[67] The suspect classification formulation also put governing bodies on explicit notice that any race-based decisionmaking was going to meet skeptical judicial review.[68]

During the fertile period of social change in the 1960s and 1970s, American cultural ideas of equality and impermissible discrimination changed dramatically regarding traits in addition to race. Moving beyond an awareness of the pervasive harm caused by racial discrimination, albeit grudging in some jurisdictions, American society faced new demands for

66. The elaboration of what is commonly thought of as the suspect classification test—indicia that signal which classifications merit close judicial review—did not come until years later as the Court contemplated applying heightened scrutiny to classifications of characteristics other than race. *See infra* text accompanying notes 73–87. The delay between the conceptualization of suspectness and the crafting of a test to determine which traits fit within the suspect category may have resulted from the widespread awareness that the equal protection guarantee condemned race discrimination. This background assumption rendered unnecessary the creation of a test to explicate or justify the Court's suspicion of racial classifications.

67. The Court illustrated the streamlining effect of the new analysis by explaining that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category." *Palmore*, 466 U.S. at 432 (citation omitted). *See also McLaughlin*, 379 U.S. at 196 (insisting that racial classifications be "necessary, and not merely rationally related" to a legitimate government interest).

68. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003) ("'[A]ny person . . . has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.'") (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 224 (1995)).

Given that explicit racial classifications were almost invariably invalidated after *Plessy* and well before the adoption of suspect classification analysis and its accompanying heightened review, one could argue that the Court's "new" approach represented a largely external stylistic shift rather than a fundamental change in analysis. *See, e.g.*, Anderson v. Martin, 375 U.S. 399, 401–02 (1964) (invalidating—before the Court decided *McLaughlin*—a law requiring a candidate's race to be posted on electoral ballots because it lacked a legitimate purpose); *Brown*, 347 U.S. at 495 (holding that "[s]eparate educational facilities are inherently unequal," but not referencing heightened scrutiny); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 426–27 (1948) (invalidating a statute denying commercial fishing licenses to "alien Japanese"); Pierre v. Louisiana, 306 U.S. 354, 361–62 (1939) (finding an equal protection violation in the systematic exclusion of African Americans from grand jury venire).

Further, one could argue that the truly significant shift for purposes of assessing racial classifications occurred in the abandonment of *Plessy*'s separate-but-equal formulation. *See Brown*, 347 U.S. at 494–95. Nevertheless, because a majority of the Court treats the shift to strict scrutiny as analytically important for racial classifications, I will proceed from that premise for purposes of revisiting the applicable standard of review. *See Adarand*, 515 U.S. at 236 (referencing *Korematsu*'s validation of a now-condemned racial classification and observing that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future").

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equality in a wide range of arenas.[69] Building on the legal and social change sparked by the civil rights movement, the movements for women's rights and lesbian and gay rights raised challenges of unprecedented breadth to then widely accepted forms of discrimination based on sex and sexual orientation.[70] Advocates for people with mental retardation, the poor, noncitizens, and others likewise pressed for the removal of barriers to their constituents' equality.[71] The creation of legal defense funds, inspired by the NAACP Legal Defense and Educational Fund's triumphs, provided the legal tools to complement the organizing accomplished by their grassroots counterparts.[72]

69. *See generally* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001). The concept of equality advocated by many of these groups in their public rhetoric and legal actions was a broad and varied one. *See generally, e.g.*, Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998) (discussing the evolution of feminist thought regarding legal rights); Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998) (addressing the relationship between feminist theory and law reform). Numerous cases also reflect the varying efforts through legislation and litigation to achieve equality. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 719–21 (1982) (challenging the denial of admission to men desiring nursing degrees); County of Wash. v. Gunther, 452 U.S. 161, 164–65 (1981) (demanding a pay increase under comparable worth theory to compensate for the undervaluation of jobs performed predominantly by women); Hampton v. Mow Sun Wong, 426 U.S. 88, 90–91 (1976) (seeking to end discrimination in civil service based on alienage); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (arguing that the recovery of workmen's compensation benefits not be denied to children whose parents did not marry); *Brown*, 347 U.S. at 486–88 (challenging the constitutionality of racial segregation in public schools on the ground that separate schools were unequal). *Cf.* Dunn v. Blumstein, 405 U.S. 330, 331–33 (1972) (asserting that a one-year residency requirement for voting rights denied equal treatment).

70. *See generally* DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW (1998). For a comprehensive list of sex discrimination cases beginning with *Reed v. Reed*, 404 U.S. 71 (1971), through mid-1998, see Becker, *supra* note 69, at 273–77. For early judicial responses to challenges brought by lesbians and gay men to discrimination based on sexual orientation, see, for example, *Singer v. U.S. Civil Service Commission*, 530 F.2d 247, 255 (9th Cir. 1976), *vacated*, 429 U.S. 1034 (1977) (upholding a gay man's dismissal from federal employment for "openly and publicly flaunting his homosexual way of life") (internal quotation marks omitted), *Norton v. Macy*, 417 F.2d 1161, 1161, 1168 (D.C. Cir. 1969) (sustaining a gay man's challenge to employment discrimination based on sexual orientation), *Gaylord v. Tacoma School District No. 10*, 559 P.2d 1340, 1341 (Wash. 1977), *cert. denied*, 434 U.S. 879 (1977) (rejecting a teacher's challenge to sexual orientation-based employment discrimination), and *Singer v. Hara*, 522 P.2d 1187, 1188 (Wash. App. 1974), *appeal denied*, 84 Wash. 2d 1008 (1974) (rejecting a gay couple's challenge to the denial of a marriage license). *See also Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989).

71. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (mental retardation); Plyler v. Doe, 457 U.S. 202 (1982) (citizenship); James v. Valtierra, 402 U.S. 137 (1971) (poverty).

72. *See generally* Jack Greenberg, *War Stories: Reflections on Thirty-Five Years with the NAACP Legal Defense Fund*, 38 ST. LOUIS U. L.J. 587 (1994). *See also In re* Thom, 301 N.E.2d 542 (N.Y. 1973) (per curiam) (reversing denial of charitable organization status to Lambda Legal Defense

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In addition to engendering popular discussion and debate, these advocates pressed the Supreme Court to complicate its analysis of barriers to equality.[73] Through legal challenges to nonracial classifications, advocates demanded the same skepticism that the Court was already applying to race-based laws and policies.[74] Taking up this gauntlet, the Court began the process of articulating more precisely than it had in the race discrimination cases[75] exactly when a classification would be accorded close judicial scrutiny.

In 1971, the first phase of this articulation began with the invocation of the concern expressed in *Carolene Products* for "'discrete and insular' minorit[ies]"[76] in a case strictly scrutinizing a state law denying welfare benefits to noncitizens.[77] Declaring in *Graham v. Richardson* "that classifications based on alienage, like those based on nationality or race, are inherently suspect,"[78] the Court opined that noncitizens "are a prime

and Education Fund, the first national organization focused exclusively on gay and lesbian civil rights litigation); COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 34–40, 107–11 (1976) (discussing the NAACP Legal Defense and Educational Fund and the Mexican American Legal Defense and Educational Fund); PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000) (reviewing and analyzing the history of lesbian and gay civil rights litigation); ROBERT WEISBROT, FREEDOM BOUND: A HISTORY OF AMERICA'S CIVIL RIGHTS MOVEMENT 8 (1990) (noting that the NAACP "anchored" the "escalating protests against discrimination [d]uring the 1930s [with] a concerted attack on school segregation"); Hon. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI LEGAL F. 9, 11 (discussing the Women's Rights Project of the American Civil Liberties Union); Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158, 158–63 (1985) (reviewing the history and strategic decisionmaking process of the NAACP Legal Defense Fund); Karen O'Connor & Lee Epstein, *A Legal Voice for the Chicano Community: The Activities of the Mexican American Legal Defense and Educational Fund, 1968–82*, 65 SOC. SCI. Q. 245, 245–56 (1984) (examining the history and activities of the Mexican American Legal Defense and Educational Fund); William B. Glaberson, *Puerto Rican Legal Fund: 10 Years Old and Growing*, 188 N.Y. L.J. 1, 1 (July 9, 1982) (discussing the origins and litigation strategy of the Puerto Rican Legal Defense and Education Fund); NATIVE AMERICAN RIGHTS FUND, OUR HISTORY, *at* http://narf.org/intro/history.html (reviewing the history of the Native American Rights Fund) (last visited Mar. 17, 2004).

73. *Cf.* J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2315–16 (1997) (addressing the relationship between constitutional analysis and social movements).

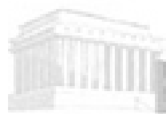
74. *See supra* notes 69–71 and accompanying text.

75. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944). As discussed above, *supra* notes 60–65 and accompanying text, in its earlier race discrimination cases, the Court had not developed a test for suspectness even while designating racial classifications as suspect.

76. Graham v. Richardson, 403 U.S. 365, 372 (1971) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

77. *Id.* at 376.

78. *Id.* at 372 (footnotes omitted).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example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[79]

Unadorned reference to footnote four of the *Carolene Products* decision gave way to a more elaborate analytic framework, still in place today, as cases continued to present the Court with a wide range of potentially suspect classifications beyond race, nationality, and alienage. Just two years after *Graham*, in 1973, Justice Lewis Powell outlined what he called the "traditional indicia of suspectness,"[80] adding history and political power to the growing set of judicial concerns. He explained that, to be deemed suspect, "the class [must be] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[81] Also in 1973, a plurality of the Court added that a characteristic's "relation to ability to perform or contribute to society" was an important indicator of whether government's use of a characteristic should be deemed suspect.[82] By way of example, the plurality in *Frontiero v. Richardson* contrasted sex with "such nonsuspect statuses as intelligence or physical disability."[83] In an apparent effort to further refine and control the set of classifications

79. *Id.* (citation omitted) (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)). After *Graham*, the Court regularly invoked the discrete and insular minority concept in discussing laws drawing distinctions based on alienage. *See, e.g.*, Bernal v. Fainter, 467 U.S. 216, 219 n.5 (1984); Toll v. Moreno, 458 U.S. 1, 20 (1982) (Blackmun, J., concurring); Cabell v. Chavez-Salido, 454 U.S. 432, 438 (1982); Foley v. Connelie, 435 U.S. 291, 302 (1978) (Marshall, J., dissenting); Nyquist v. Mauclet, 432 U.S. 1, 17 (1977) (Rehnquist, J., dissenting); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976); *In re* Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973).

80. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Notwithstanding Justice Powell's reference to tradition, this precise formulation—involving history, immutability, and relative political powerlessness—had never before appeared in the Court's analysis. Notably, too, Justice Powell referred to the "class," not the "classification," in setting forth these indicia. *See id.* See *infra* notes 91–99 and accompanying text regarding the consequences of the focus on the burdened subclass within the classification.

81. *Rodriguez*, 411 U.S. at 28. Later decisions assessing whether potential classifications should be treated as suspect have tended to require all three criteria—history of discrimination, immutability, and relative political powerlessness—to be satisfied. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–47 (1985) (finding that although mental retardation is immutable, classifications based on mental retardation did not satisfy all the indicia of heightened scrutiny).

82. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion). *See also* Mathews v. Lucas, 427 U.S. 495, 505 (1976) (identifying this concern as relevant, although rejecting an argument that classification based on illegitimacy warranted strict scrutiny). In *Murgia*, the Court formulated this inquiry to focus on whether the group at issue (people aged fifty and over) had been singled out "on the basis of stereotyped characteristics not truly indicative of their abilities." Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–13 (1976) (per curiam).

83. *Frontiero*, 411 U.S. at 686 (Brennan, J., plurality opinion).

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potentially eligible for close review, the Court in *Frontiero* inquired, for the first time in the suspect classification context, whether the characteristic at issue was "an immutable characteristic determined solely by the accident of birth."[84]

This set of indicia, as developed over time, aimed to identify characteristics that "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy,"[85] and, as a result, warrant the extrajudicial suspicion that comes with suspect classification analysis. As John Hart Ely observed, "the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its

84. *Id.* (Brennan, J., plurality opinion). In some cases, the immutability inquiry was characterized as a concern with whether the characteristic at issue was "obvious" or "distinguishing." *See Murgia*, 427 U.S. at 313–14. *See also* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (citing *Murgia*, 427 U.S. at 313–14). The concern with the relationship between judicial review and personal agency had surfaced earlier in the rational basis review context as the Court assessed whether an individual's membership in the prejudice-laden category was voluntary and, therefore, avoidable. The Court, while applying rational basis review to a nonmarital parentage classification a year before *Frontiero* was decided, explained that it would be "illogical and unjust" to penalize an infant for a status out of his or her control. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (footnote omitted). *See also* Plyler v. Doe, 457 U.S. 202, 223 (1982) (finding that children of undocumented noncitizens were "not accountable for their disabling status" and, therefore, should not be denied public education). In contrast, the Court in *Cleburne* observed that an immutable status might, in some instances, correlate with ability and provide a basis for sustaining a classification. *Cleburne Living Ctr.*, 473 U.S. at 442 n.10. *See also infra* text accompanying note 104.

With some frequency, lower courts have relied on the "immutability test" to refuse close review of sexual orientation-based classifications. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 293 & n.2, 300–01 (6th Cir. 1997) (explaining that sexual orientation-based classifications merit only rational basis review because "attempted identification of homosexuals by non-behavioral attributes could have no meaning"); Padula v. Webster, 822 F.2d 97, 101–03 (D.C. Cir. 1987) (upholding the Federal Bureau of Investigation's refusal to hire a lesbian applicant and rejecting heightened scrutiny in part because "[i]t would be quite anomolous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause"). *But cf.* Watkins v. U.S. Army, 875 F.2d 699, 726, 728 (9th Cir. 1989) (en banc) (Norris, J., concurring) (concluding that "homosexuals constitute a suspect class" in part by defining immutability to encompass "those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically").

85. *Cleburne Living Ctr.*, 473 U.S. at 440. *Cf.* Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . .") (footnote omitted). Although later cases set out the suspect classification criteria in different ways, the basic indicia—history of discrimination, immutability, and political power—were fully in place in the early 1970s. Later decisions simply wrestled with their application. *See, e.g.*, *Cleburne Living Ctr.*, 473 U.S. at 440–47.

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members."[86] And the demanding review imposed on suspect classifications, requiring that use of the protected trait be narrowly "tailored to serve a compelling state interest,"[87] takes a lesson from *Carolene Products*: that bias-infected discriminatory classifications based on that trait are unlikely to be corrected promptly by legislative means.

B. CONFLICTS WITHIN AND AROUND THE INDICIA OF SUSPECTNESS

The suspect classification indicia—including the history of discrimination, the immutability or distinctiveness of a trait, and relative political power—currently suffer from both misapplication and theoretical inconsistencies. As a result, the set of classifications that might be considered suspect or quasi-suspect has remained largely unchanged for more than a quarter century.[88] Given the strong correlation between the indicia and some nonsuspect traits, it appears that a central reason for heightened scrutiny's restriction to five traits is temporal, in that those traits received the Court's protection before slippery slope-type fears about the potential reach of rigorous review set in.[89] By privileging temporality over equity, this "first in time is first in right" approach underscores the urgent need to revisit the framework for equal protection review.[90]

86. ELY, *supra* note 13, at 153.

87. *Cleburne Living Ctr.*, 473 U.S. at 440.

88. The point in time at which the set actually closed is somewhat debatable. The Court's 1976 decision to apply intermediate scrutiny to a sex-based classification in *Craig* was arguably the last time the Court altered its method of analyzing a particular classification. Craig v. Boren, 429 U.S. 190, 210 (1976). *But see* Gunther, *supra* note 17, at 33–36 (arguing that the Court had already begun applying heightened scrutiny in *Reed v. Reed*, 494 U.S. 71 (1971), although it did not acknowledge that it was doing so). In fact, it was not until 1988 that the Court formally acknowledged its application of intermediate scrutiny to classifications of nonmarital children. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988). But long before that decision, the Court tended to rigorously review classifications based on illegitimacy. Gunther, *supra* note 17, at 33–36. With respect to sex-based classifications, the battle continues over where exactly those classifications should fall on the suspect/quasi-suspect spectrum. In *United States v. Virginia*, the majority described the heightened scrutiny test as requiring an "exceedingly persuasive justification" for sex-based classifications, 518 U.S. 515, 531 (1996), while Chief Justice Rehnquist, concurring, characterized the test as requiring that the classification "'serve important governmental objectives and . . . be substantially related to [the] achievement of those objectives.'" *Id.* at 558 (Rehnquist, C.J., concurring) (quoting *Craig*, 429 U.S. at 197 (citations omitted)). In dissent, Justice Scalia maintained that the Court has "no established criterion to determine when to apply 'immediate scrutiny.'" *Id.* at 568 (Scalia, J., dissenting).

89. *Cf. Cleburne Living Ctr.*, 473 U.S. at 445 (voicing concern that "if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups"); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 562 (1998) (describing as "restrictive animus" the Court's "desire to limit the number of groups protected" under heightened scrutiny).

90. *See* Yoshino, *supra* note 89, at 562.

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The quieting of a once-vibrant analytic tool also suggests that the indicia themselves have become ossified or that they lack the specificity necessary to constrain misapplications of suspect classification analysis. As this section argues, the contradictions between indicia and outcomes, whether the result of deliberate manipulation or logical error, support reconsideration of the tiered framework.

The most apparent conflicts within the suspect classification framework occur between the Court's insistence on symmetrical evaluation of all classifications, whether or not they burden a vulnerable group, and the indicia's targeted focus on the vulnerable group.[91] With respect to the history-of-discrimination inquiry, for example, a dominant group, such as whites, will not have suffered a history of discrimination based on race while the minority or subordinated group, here people of color, will be able to demonstrate that history. Similarly, the inquiry into relative political power is, by definition, answered differently by members of a dominant class, such as men, than by women who have been subordinated based on the same characteristic of sex. Whether race, sex, or alienage negatively influences political power depends on the particular race, sex, or citizenship status of the respondent. Subgroup membership is what matters. Yet to the Court, the classification—and not the affected class—is what will trigger heightened review.[92] This deeply rooted conflict suggests that the current analytic framework, or at least the way it has been developed by the Court, may not be as carefully conceived or applied as its widespread acceptance suggests.

As a practical matter, moreover, the indicia conflict with the Court's own assessment of which traits warrant heightened review. The political powerlessness criterion, for example, asks whether a group is "powerless in the sense that [the burdened group has] no ability to attract the attention of the lawmakers."[93] If pursued to its logical end, this inquiry could actually

91. *See* Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 750–54 (2002) (discussing the tension between symmetrical and asymmetrical approaches to the review of discriminatory laws). *See generally* Hutchinson, *supra* note 13 (criticizing the Court's insistence on symmetry).

92. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 222 (1995) ("'[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification . . . .'") (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (O'Connor, J., plurality opinion)).

93. *Cleburne Living Ctr.*, 473 U.S. at 445. Similarly, in *Foley v. Connelie*, the Court subjected an alienage classification to strict scrutiny because "aliens—pending their eligibility for citizenship—have no direct voice in the political processes." Foley v. Connelie, 435 U.S. 291, 294 (1978) (citation omitted). In making this assessment, the Court also examined whether the legislative response to those

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support removal of traits such as race and sex from the list of suspect classifications, contrary to the Court's expressed intent,[94] in light of the substantial legislation prohibiting differential treatment based on race and sex.[95] Other traits that receive far less legislative attention but nonetheless affect individual opportunity, such as intersexuality or transgender identity,[96] would enjoy a better fit with the Court's stated concerns.[97]

Graham's earlier and simpler version of the *Carolene Products*' political power inquiry into whether classifications would prejudice "discrete and insular minorities" does not escape this tension between the dichotomous commitments to generally applicable scrutiny of a trait regardless of the trait bearer's identity and heightened protection for vulnerable "minorities."[98] Instead, it reinforces the position that the Court's chief concern should be with the latter, and that the dominant group presumably should be able to redress grievances effectively through the political process.[99]

In addition to the tension between concern for the class and for the classification reflected in the history and political power inquiries, the

with the particular trait "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Cleburne Living Ctr.*, 473 U.S. at 443.

94. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 73 (2001) (sex); *Adarand*, 515 U.S. at 237 (race).

95. *See, e.g.*, 5 U.S.C. § 7201(b) (2000) (ensuring equal employment opportunities in government employment regardless of race); 20 U.S.C. § 1681 (2000) (prohibiting educational programs that receive federal financial assistance from discriminating on the basis of sex); 29 U.S.C. § 206(d) (1994) (prohibiting employers from paying different wages based on sex). *See also* James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 380 (1986) ("If the fact that advocates have obtained passage of some noninvidious, protective legislation precludes heightened scrutiny, women and racial minorities should now be consigned to the rational basis test.").

96. *See generally* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001) (describing and analyzing the discrimination against, and the legal claims made by, transgendered individuals); Julie A. Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000) (discussing the legal status of transgender, transsexual, and intersex individuals).

97. Justice Brennan's suggestion that the Court consider a group's demographic representation in government likewise evinces concern for the minority or marginalized bearers of the trait at issue. *See* Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (Brennan, J., plurality opinion) (noting that "women are vastly underrepresented in this Nation's decisionmaking councils").

98. Then-Justice Rehnquist separately criticized this indicator as insufficiently selective, observing that "[o]ur society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." Sugarman v. Dougall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

99. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (discussing the constitutional presumption "that even improvident decisions will eventually be rectified by the democratic processes" absent some defect in those processes, such as unconstrained bias against a particular group).

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importance accorded to immutability as an indicia of suspectness runs contrary to the Court's own recognition that society, not nature, gives many traits their significance.[100] The immutability requirement also finds itself in conflict with the factual reality that purportedly fixed traits, such as sex, are in fact more alterable and flexible than commonly presumed.[101] Other characteristics deemed suspect or quasi-suspect, such as alienage and illegitimacy, may also be changed. Moreover, the Court itself has acknowledged that the immutability requirement for suspect classification status fails to filter classifications meriting heightened judicial skepticism in a meaningful way.[102]

> "Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?"[103]

100. *See, e.g.*, St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4, 613 (1987). *See also* Flynn, *supra* note 96, at 395 (advocating "that gender identity, rather than anatomy, is the primary determinant of sex"). *Cf.* Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Construction Arguments in Court*, 81 OR. L. REV. 629 (2002) (analyzing the potentially destabilizing effect of antiessentialist and social construction arguments on the fixed categorical definitions preferred by most courts).

101. *See* ELY, *supra* note 13, at 150 (criticizing the Court's reliance on immutable traits for suspect classification status, noting that "even gender is becoming an alterable condition").

102. The immutability criterion also has been the suspect classification inquiry subject to greatest misapprehension by lower courts. For example, in analyzing whether sexual orientation-based classifications may be deemed suspect, courts typically have made two errors: (1) they fixate on the science related to sexual orientation and the control an individual has over his or her sexual practices; and (2) they treat the legal test as though physical immutability is an absolute requirement, instead of properly examining whether the characteristic of sexual orientation is obvious, immutable, *or* distinguishing. *See, e.g.*, Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 293 (6th Cir. 1997) (acknowledging the Sixth Circuit panel's earlier conclusion that the law cannot "successfully categorize persons by subjective and unapparent characteristics such as innate desires, drives, and thoughts") (citation omitted); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (maintaining that homosexuality is primarily behavioral in nature and, therefore, cannot be considered an immutable trait). Another court, following a trial at which extensive evidence was introduced regarding the genetic and biological origins of sexual orientation, rejected heightened scrutiny for a sexual orientation-based classification based in part on the court's determination that the scientific evidence related to immutability was not conclusive. Evans v. Romer, 1993 WL 518586, at *11 (Colo. Dist. Ct. Dec. 14, 1993). *See also* LISA KEEN & SUZANNE B. GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 43–73 (1998) (discussing scientific and other evidence regarding sexual orientation presented to the Colorado district court in *Romer*).

103. *Cleburne Living Ctr.*, 473 U.S. at 442 n.10 (quoting ELY, *supra* note 13, at 150) (citations omitted). *See also* Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay,*

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Indeed, the Court has raised its own questions about whether all of its indicia, taken together, actually provide a useful and principled test for determining which types of classifications merit close judicial attention. Commenting on its decision not to apply heightened scrutiny to classifications of people with mental retardation, the Court stated that

> if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.[104]

Although the Court has shown no signs of abandoning these criteria, its concession that the value of the indicia is limited reinforces the prospect that the current three-tiered framework could benefit from reconsideration.

Lesbian, and Bisexual Identity, 36 UCLA L. REV. 915, 923–32 (1989) (analyzing and critiquing the use of immutability arguments).

A related flaw, not addressed by the Court, is that protecting only fixed, unchangeable characteristics provides little useful assistance in assessing classifying measures that discriminate based on outward, changeable manifestations of these deep-rooted traits, such as personal appearance, beliefs, and practices. To the extent that the Court is also committed to focusing the inquiry on characteristics that are "obvious" or "distinguishing," rather than immutable, it succeeds in avoiding the problems outlined above. But, as with an examination of political powerlessness that turns on a particular demographic group's representation in government, a requirement that a characteristic be merely "obvious" or "distinguishing" offers little to limit the potential set of suspicious classifications. Further, like the immutability inquiry, a characteristic's status as obvious or distinguishing provides minimal information, if any, about whether government's use of the characteristic is likely to reflect impermissible bias. *Cf.* Yoshino, *supra* note 89, at 498 (observing that since visibility is relational, whether a trait is visible will "depend not only on the trait but also on the 'decoding capacity of the audience,' which in turn will depend on the social context") (footnote omitted).

More useful perhaps, though still suffering from some of the flaws identified above, is the inquiry made in the asylum context regarding whether possession of a trait gives rise to "membership in a particular social group," which is one of the five grounds on which a person may be eligible for asylum in the United States. *See* 8 U.S.C. § 1101(a)(42)(A) (2000). The Board of Immigration Appeals has explained that the trait "'must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.'" Hernandez-Montiel v. INS, 225 F.3d 1084, 1092 (9th Cir. 2000) (quoting Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985)).

104. *Cleburne Living Ctr.*, 473 U.S. at 445–46. Dissenting from the decision to strike down the Virginia Military Institute's ("VMI") sex-based admissions policy, Justice Scalia described the Court as applying different levels of scrutiny "whenever we feel like it," adding that "[w]e have no established criterion for 'intermediate scrutiny' . . . but essentially apply it when it seems like a good idea to load the dice." United States v. Virginia, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting).

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C. THE RIGID APPLICATION OF STRICT SCRUTINY

The virtue of the judicial presumption that certain types of trait-based legislation, such as laws distinguishing on the basis of race or sex, are impermissible[105] also contains its own vice. Categorically imposing that negative presumption any time government relies on a suspect trait has two primary unfavorable consequences. First, it requires application of the bias presumption even where the classification is aimed to remedy bias. Second, it has a distorting effect on rational basis review by discouraging designation of additional traits as suspect, even where the traits fit well within the Court's indicia, out of concern that all classifications based on those traits, including those that are long established or have wide popular support, will be presumed invalid.

The first concern with the strict presumption of illegitimacy regarding use of a suspect classification surfaces most prominently in review of affirmative action programs designed to ameliorate the effects of race discrimination. For example, the Court in *Adarand Constructors, Inc. v. Peña*, citing suspect classification analysis's demand for strict scrutiny, treated the remedial context as irrelevant and required the lower court, on remand, to apply the same rigorous review as it would to a program designed to perpetuate race discrimination.[106] Of course, it is possible that

105. Arguably, sex-based classifications suffer less from this lack of flexibility in review because the Court has recognized that they are sometimes relevant to government action; but such cases are relatively rare and their holdings arguably reflect traditional stereotypes about women. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 57, 73 (2001) (finding the difference between mothers and fathers to be sufficiently significant to uphold a law imposing greater restrictions on obtaining citizenship for the child of a U.S. citizen father than for the child of a U.S. citizen mother); Rostker v. Goldberg, 453 U.S. 57, 83 (1981) (sustaining the categorical exemption for women from registration for military service based on the different roles of men and women in military service); Michael M. v. Superior Court, 450 U.S. 464, 476 (1981) (upholding a statutory rape law penalizing men but not women because it "reasonably reflect[ed] the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than the male"); Fiallo v. Bell, 430 U.S. 787, 799–800 (1977) (deferring to Congress's power to regulate immigration and upholding an immigration law preference for children of American women but not American men); Kahn v. Shevin, 416 U.S. 351, 352–53 (1974) (citing distinct financial vulnerability of "lone" women as the basis for upholding a tax exemption provided to widows but not widowers).

106. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 204, 224, 229–31 (1995). At first glance, the insistence in *Grutter* that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause" might suggest that the Court has backtracked from its flat refusal in *Adarand* to distinguish between classifications imposed to diminish the effects of racial discrimination and those imposed to enshrine it. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) (citation omitted). On a careful reading, however, it appears to be the *higher education admissions* context and not the context of affirmative action more generally that inspired this flexibility. Throughout its opinion, the Court emphasized its "deference to a university's academic decisions" and the "fundamental role" of education in "maintaining the fabric of society" and "preparing students for work

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this rigid and categorical review flows not just from the suspect classification analysis itself, but also from the majority's belief in the perniciousness of any racial classification.[107] Indeed, some have argued that the Court's ideological commitments are entirely responsible for the disregard of context in evaluations of remedial measures.[108]

The contention here, however, is that regardless of whether these ideological commitments would lead the Court to invalidate a remedial program under lesser scrutiny, suspect classification analysis's insistence on consistent, tough review for every use of a suspect trait is independently detrimental to the analysis. Even if strict scrutiny allows limited room for careful contextual review, "there is a danger that the fatal language of

and citizenship" in reaching its conclusion. *Id.* at 2339–40. By framing the case through the lens of Justice Powell's analysis in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), rather than any of the more recent affirmative action decisions, the Court reinforced the notion that, while university admissions policies may escape the usual rigidity of suspect classification analysis, no other category of decisionmaking is likely to receive that same benefit of the doubt. *See also Grutter*, 123 S. Ct. at 2374 (Kennedy, J., dissenting) (declaring that the university admissions process is a "special context," and the "one context" that could warrant giving "appropriate consideration to race").

Further, the Court's application of strict scrutiny to reject the University of Michigan's undergraduate admissions plan for according a point value to racial identities demonstrates that even within the educational environment, the presumption that consideration of race is illegitimate remains strong and not as context sensitive as *Grutter* might imply. Gratz v. Bollinger, 123 S. Ct. 2411, 2417, 2419–20 (2003). Although the undergraduate admissions office argued that its volume of applications rendered a more individualized approach "impractical," the Court dismissed that argument in light of "the limits imposed by [its] strict scrutiny analysis." *Id.* at 2430. Justice Souter's contention, in dissent, that the undergraduate and law school admissions programs are not fundamentally dissimilar, also reinforces the perception that *Grutter*'s commitment to a less categorical analysis may not have wide-ranging effect. *See id.* at 2441 (Souter, J., dissenting) ("The very nature of a college's permissible practice of awarding value to racial diversity means that race must be considered in a way that increases some applicants' chances for admission . . . . The college simply does by a numbered scale what the law school accomplishes in its 'holistic review . . . .'").

107. In *Adarand*, the Court explained that "'[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Adarand*, 515 U.S. at 220 (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)). Justice Thomas went further to spell out his view of the across-the-board danger of race-based classifications:

> [T]here can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. . . . In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple.

Id. at 241 (Thomas, J., concurring) (footnote omitted).

108. *See* Rubenfeld, *The Anti-Antidiscrimination Agenda*, *supra* note 12, at 1175–77 (criticizing the Court's manipulation of cases and doctrine); Spann, *supra* note 13, at 92 (accusing the majority of the Court of racism).

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'strict scrutiny' will skew the analysis and place well-crafted benign programs at unnecessary risk."[109] Further, to the extent that the tiered framework requires identical treatment of every use of a suspect classification, its rigidity runs contrary to the Equal Protection Clause's core values.[110]

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction . . . .[111]

As Justice Stevens added, "The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat."[112]

Although a majority of the Court has promised that strict scrutiny will not always be "'fatal in fact,'"[113] the Court's categorical application of strict scrutiny to suspect classifications inescapably sends the message to governments that developing a race-conscious effort to ensure equality is a high-risk proposition that stands only a limited chance of surviving legal challenge.[114]

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109. *Adarand*, 515 U.S. at 243 n.1 (Stevens, J., dissenting).

110. *See infra* Part III.A (discussing the equal protection guarantee's concern with eradicating class legislation through careful contextual assessment of all types of laws).

111. *Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (footnote and citation omitted).

112. *Id.* at 245. Similarly, Justice Ginsburg has commented that

> [t]his insistence on consistency would be fitting were our Nation free of the vestiges of rank discrimination long reinforced by law. But we are not far distant from an overtly discriminatory past. . . . Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated.

Gratz v. Bollinger, 123 S. Ct. 2411, 2443–44 (2003) (Ginsburg, J., dissenting) (citations omitted).

113. Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) (quoting *Adarand*, 515 U.S. at 237).

114. Indeed, moments after the Court issued its ruling upholding the University of Michigan Law School's affirmative action plan, opponents of affirmative action vowed to force careful scrutiny of the admissions process of every institution of higher education to ensure that none oversteps the narrow bounds set by the Court. *See* Greg Winter, *The Supreme Court: Other Campuses; Ruling Provides Relief, but Less than Hoped*, N.Y. TIMES, June 24, 2003, at A26. The recent group of redistricting cases also reinforces the vulnerability of plans that take race into account for remedial purposes. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 958, 985–86 (1996) (O'Connor, J., plurality opinion) (holding that Texas's redistricting plan constituted impermissible racial gerrymandering); Shaw v. Hunt, 517 U.S. 899, 902, 905 (1996) (using strict scrutiny to invalidate North Carolina's congressional redistricting scheme because race was used as a "dominant and controlling" factor) (quoting Miller v. Johnson, 515 U.S. 900, 909 (1995)); Miller v. Johnson, 515 U.S. 900, 910, 927–28 (1995) (holding that Georgia's

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In addition, the all-or-nothing application of heightened scrutiny to classifications designated as suspect functions as a disincentive to broadening the existing set of suspect classifications. Because most classifications do not give effect to bias all the time, courts have been reluctant to impose an analytic framework that would always require extra-rigorous review of classifications that can sometimes have a benign use. As a result, when the Court has found that a nonsuspect classification embodies prejudice, it has engaged in a careful type of rational basis review that contrasts sharply with its typical emphasis on legislative deference.

For example, as the Court effectively acknowledged in *City of Cleburne v. Cleburne Living Center, Inc.*, the risk of designating classifications based on mental retardation as suspect is that all legislation regarding people with mental retardation—including positive, supportive legislation—would have to be strictly scrutinized.[115] However, the refusal to designate a classification as suspect raises the risk that even where bias has motivated the classification, it will not be caught by an application of lenient rational basis review.[116] Although *Cleburne*'s zoning provision ultimately was invalidated because of its impermissible fear-based purpose, the problem with this all-or-nothing approach to equal protection is that the next invidiously motivated governmental classification to burden people with mental retardation may not be caught in rational basis review's loosely knit web.[117]

congressional redistricting plan, which gave consideration to race in drawing district lines, violated the Equal Protection Clause). Only very recently has the Court expressed a specific willingness to sustain government action that is motivated in part by a concern with race. *See Grutter*, 123 S. Ct. at 2325. This new development, however, does not appear to presage a future expansion of context-sensitive assessments of racial classifications. *Cf.* Karlan, *supra* note 25 (exploring the differences between applications of strict scrutiny in affirmative action and redistricting cases); Rubin, *supra* note 25 (analyzing the restrictive, formalistic use of strict scrutiny).

115. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–45 (1985). As just noted, the Court could have made this same observation regarding the imposition of heightened scrutiny on race- and sex-based classifications.

116. See *infra* notes 123–25, 131 and accompanying text for a discussion of lenient application of rational basis review.

117. In *Lawrence v. Texas*, Justice O'Connor's formulation of rational basis review suggested that this type of error was not likely to occur because "[w]hen a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review." Lawrence v. Texas, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring). However, as no other justice joined her opinion, it is not clear whether a majority of the Court shares her perspective. *See supra* note 8 (discussing Justice Scalia's critique of this position).

As a separate matter, the issue of strict scrutiny as an all-or-nothing proposition may similarly influence some courts against designating sexual orientation as suspect or quasi-suspect, even though these same courts might agree that sexual orientation fits the heightened scrutiny criteria. These courts may fear that holding the use of sexual orientation to be suspect would require rigorous review and,

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Thus, although the underlying commitment of suspect classification analysis—that the Court's review should capture classifications that likely reflect impermissible prejudice—is a sensible one, the current set of indicia for determining which classifications are suspect, coupled with the rigid application of strict scrutiny to all suspect classifications, may fail to achieve that aim. As shown in the next section, rational basis review shares with suspect classification analysis the same essential concern of ensuring equality. A single standard of review that embraces these common concerns, which is proposed in Part IV, aims to provide the necessary rigor to identify invidious classifications while avoiding the weaknesses of suspect classification analysis as it is currently formulated and applied.

D. THE UNEVENNESS OF RATIONAL BASIS REVIEW

To the extent that strict and intermediate scrutiny serve a homogenizing purpose, in some broad sense, by creating the appearance of consistent analysis and results, the Court's rational basis cases present a sharp counterpoint. Although most classifying laws and policies withstand equal protection challenge, the Court also consistently invalidates classifications under rational basis review. Against a backdrop of more than one hundred cases subjected by the Court to equal protection rational basis review since 1973[118]—the year after Gerald Gunther published his

ultimately, invalidation of all sexual orientation-based classifications, including those restricting service by gay people in the military that, to date, no appellate court has been willing to invalidate. *See, e.g.*, Able v. United States, 155 F.3d 628, 635–36 (2d Cir. 1998) (upholding the "don't ask, don't tell" prohibition against openly lesbian and gay military personnel); Richenberg v. Perry, 97 F.3d 256, 260–62 (8th Cir. 1996) (same); Thomasson v. Perry, 80 F.3d 915, 928–29 (4th Cir. 1996) (same); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (upholding the separation of a lesbian service member from the military under an earlier policy); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (sustaining a gay man's separation from military service).

118. *See* Farrell, *supra* note 32, at 416–19. Of course, some laws challenged prior to 1973 were also invalidated on rational basis grounds. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305, 310–11 (1966) (striking down a New Jersey law requiring imprisoned indigents to reimburse the county for the costs of an unsuccessful appeal, but not imposing the same burden on those receiving suspended sentences). *See also* Gunther, *supra* note 17, at 25–37 (reviewing the 1971 Term's relatively high concentration of these cases). In addition, prior to 1937, the Court invalidated myriad government classifications. *See, e.g.*, Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 35, 38–39 (1928) (invaliding a state disparate taxing scheme that benefited building and loan associations); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 417 (1920) (striking down a scheme taxing an in-state business for its out-of-state revenues); Truax v. Raich, 239 U.S. 33, 43 (1915) (voiding Arizona's Anti-Alien Labor Law); Atchison, Topeka & Santa Fé Ry. v. Vosburg, 238 U.S. 56, 61–62 (1915) (rejecting a rule that imposed an attorney's fee obligation only on railroads); Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 564 (1902) (rejecting an Illinois exemption of agriculturists and livestock dealers from criminal penalties imposed on others); Cotting v. Kan. City Stock Yards Co., 183 U.S. 79, 110 (1901) (invalidating a state law imposing regulations on stock yards operating above, but not below, a certain volume). However, the number of

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landmark article offering a new model for equal protection analysis[119]—the Court has invalidated nearly a dozen classifications.[120] This periodic exercise of judicial authority under the lowest scrutiny level raises a serious

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equal protection invalidations during the *Lochner* era is disproportionately high, owing to the Court's inclination to strike down much of the government regulation that restricted business. *See* Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 293–95 (1985); Sunstein, Lochner*'s Legacy*, *supra* note 55, at 877–81.

119. *See* Gunther, *supra* note 17, at 20–24. For a discussion of this model, see *infra* notes 311–16 and accompanying text.

120. *See* Romer v. Evans, 517 U.S. 620, 631–36 (1996) (invalidating a measure barring antidiscrimination protections for lesbians, gay men, and bisexuals); Quinn v. Millsap, 491 U.S. 95, 109 (1989) (striking down a Missouri property ownership requirement for service on a government board); Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344–46 (1989) (sustaining a challenge to Virginia's systematic undervaluation of some, but not all, real property); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447–50 (1985) (invalidating a town's different treatment of individuals with mental retardation for zoning purposes); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618–23 (1985) (rejecting a New Mexico tax preference distinguishing between long-term and short-term resident Vietnam veterans); Williams v. Vermont, 472 U.S. 14, 27 (1985) (striking down a use tax that burdened out-of-state car buyers); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (rejecting an Alabama law that provided tax relief to in-state but not foreign businesses); Plyler v. Doe, 457 U.S. 202, 230 (1982) (sustaining a challenge to a Texas law that denied education to undocumented children); Zobel v. Williams, 457 U.S. 55, 65 (1982) (invalidating Alaska's dividend distribution system that favored long-term residents); O'Brien v. Skinner, 414 U.S. 524, 530–31 (1974) (striking down a New York statute that permitted county jail detainees to register to vote, or vote as absentees, if they were detained outside, but not within, their county of residence); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (invalidating a legislative restriction aimed at preventing hippies from obtaining food stamps).

In addition, the Supreme Court analyzed numerous classifications based on sex and illegitimacy during this period by using the language of rational basis review. However, because these classifications are now deemed quasi-suspect, cases applying rational basis review to them are not discussed here on the theory that the Court might have been applying heightened review in practice but not in name. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 75–77 (1971) (articulating a "strong" version of rational basis review and rejecting a mandatory preference for men in estate administration). *See also* Gunther, *supra* note 17, at 34 ("It is difficult to understand [the *Reed*] result without an assumption that some special sensitivity to sex as a classifying factor entered into the analysis. . . . Only by importing some special suspicion of sex-related means . . . can the result be made entirely persuasive."); *supra* note 88 (discussing the transition to heightened scrutiny for classifications based on sex and nonmarital parental status). Nonetheless, precisely because these cases can be seen as bridging the purported gap between lower and higher levels of scrutiny, they are useful as illustrations of the core concerns shared by all levels of equal protection review. *See infra* Part IV.

One additional case held that an individual had stated an equal protection claim by alleging that government acts targeted at him lacked a rational basis. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000) (challenging an onerous easement condition as an arbitrary violation of the equal protection guarantee). Because this case had been decided by the district court on a motion to dismiss, the Supreme Court did not determine finally whether the disparate treatment amounted to a constitutional violation. *Id.*

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question about how, exactly, the Court settles on the degree of deference it will give to legislative acts at this bottom tier.[121]

To illustrate this inconsistency and demonstrate how its consequences support reconsideration of the tiered framework and a shift to a single review standard,[122] this section will sketch the Court's "weak" and "strong" approaches to rational basis review. It will then offer some hypotheses regarding the tension between them and the doctrinal wavering that complicates and undermines contemporary rational basis review.

The familiar refrain that courts should stay out of the business of judging most legislative distinctions characterizes the weak rational basis cases and dominates the doctrine in this area. As the Court has explained, "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."[123] Instead, nonsuspect classifications must be sustained "if there is any reasonably conceivable state of facts that could

121. Although the actual number of rational basis invalidations by the Supreme Court since *Gunther* introduced the concept of rational basis with "bite" is small, these cases, with their tension between deference and meaningful review, guide lower court review along with their highly deferential counterparts. *See* Gunther, *supra* note 17, at 20–24. One could render an alternative reading of these cases that would bring the numbers even lower by taking several of them out of equal protection altogether and others out of the realm of rational basis review, leaving only a random few that fall outside the typical deferential guideposts. For example, the invalidation of distinctions based on residence or length of residence might more accurately be explained by reference to the dormant Commerce Clause or the Privileges or Immunities Clause. *See* Erika K. Nelson, *Unanswered Questions: The Implications of* Saenz v. Roe *for Durational Residency Requirements*, 49 U. KAN. L. REV. 193, 217–18 (2000) (reanalyzing the *Zobel* and *Hooper* decisions under the Privileges or Immunities Clause). *Cf.* Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 310 (discussing the residency requirements in *Zobel* and *Hooper* in connection with state citizenship rights and states' ability to foster communities). Similarly, the *Moreno*, *Cleburne*, and *Romer* trilogy could be read as applying covert heightened scrutiny, *see* TRIBE, *supra* note 10, §§ 16-3, 16-31, as illustrating the operation of the "pariah principle," *see* Farber & Sherry, *supra* note 40, at 264, or as illustrating the generalized animus principle. *See* Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 63 (1996) [hereinafter Sunstein, *Leaving Things Undecided*] ("*Moreno*, *Cleburne*, and *Romer* reflect an understanding that other groups, not only African-Americans, may be subject to unreasoning hatred and suspicion."). *Cf. Romer*, 517 U.S. at 634–35 ("[L]aws of [this] kind . . . raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . [This law] offends conventional and venerable [principles]; a law must bear a rational relationship to a legitimate governmental purpose."). However, because the Court frames its analysis as falling within its equal protection jurisprudence, these cases are appropriately considered here as well.

122. While doctrinal inconsistency is a charge that could be levied against the jurisprudence in most areas of constitutional law, this section, coupled with Part V's application of the proposed single standard, shows that the inconsistency, at times, results in inadequate review of certain classifications. *See infra* Part V.A (discussing Dandridge v. Williams, 397 U.S. 471 (1970)). This consequence, in turn, supports reconsideration of the framework designed to guide that review.

123. FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

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provide a rational basis for the classification."[124] In other words, legislatures act with a strong presumption of legitimacy "despite the fact that, in practice, their laws result in some inequality."[125]

Yet alongside these deferential pledges, a separate cluster of strong rational basis cases adds additional weight to the minimal requirements just mentioned by emphasizing that a meaningful relationship must exist between the group singled out and the government's legitimate goals.[126] As the Court has stated, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[127] In other words, deference does not translate into an absence of genuine scrutiny: "even in the ordinary equal protection case calling for the most deferential of

124. *Id.* (citation omitted). In *United States v. Morrison*, the Court's rejection of facts found by Congress regarding the interstate impact of domestic violence suggests that if legislation is to be sustained, the facts at issue must be reasonable to the Court as well as to the legislature. *See* United States v. Morrison, 529 U.S. 598, 627 (2000); *id.* at 666 (Breyer, J., dissenting).

125. McGowan v. Maryland, 366 U.S. 420, 425–26 (1961). *See also* Dandridge v. Williams, 397 U.S. 471, 485 (1970) ("If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'") (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) ("But the law need not be in every respect logically consistent with its aims.").

126. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 416 (1920). Although *F.S. Royster Guano* is a relatively early case, it is cited so frequently that it remains a mainstay of this "strong" characterization of equal protection review. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 63 (2001). For additional examples of strong rational basis cases, see *infra* notes 206, 213–21 and accompanying text.

127. *F.S. Royster Guano*, 253 U.S. at 415. Recognizing the great deference accorded to tax classifications, the Court underscored that even "a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appear [sic] to be altogether illusory." *Id.* Although tax classifications received regular equal protection review during the *Lochner* era, *see, e.g.*, Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 516 (1926) (holding that tax provisions favoring in-state businesses violated the Equal Protection Clause); S. Ry. Co. v. Greene, 216 U.S. 400, 418 (1910) (finding a tax preference for in-state railway companies to be invalid under the Equal Protection Clause), the Court's deferential orientation was so powerful that some precedent suggested that discriminatory tax statutes were entirely immune from compliance with the Equal Protection Clause. *See* Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673, 676–78 (1945) (holding that "privilege" taxes paid by an out-of-state corporation were not subject to equal protection). Ultimately, the Court rejected *Lincoln*'s categorical hands-off approach. *See* W. & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 665–68 (1981) (holding that the Equal Protection Clause applied to states' treatment of a foreign corporation). In *Western & Southern Life Insurance Co.*, the Court held that

> whatever the extent of a State's authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose.

Id. at 667–68.

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standards, we insist on knowing the relation between the classification adopted and the object to be attained."[128]

Grounding this insistence in the Constitution's equality mandate, the Court has commented that "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority."[129] Referring to the underlying purpose of equal protection review, the Court explained that "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[130]

As the preceding discussion illustrates, two distinct emphases emerge in cases using essentially the same rational basis language. One, characterized here as the weak version of rational basis, focuses on the presumption of constitutionality given to government action and the reluctance of courts to second-guess the acts of their sibling branches.[131] The strong cases, in contrast, underscore that even with this presumption of constitutionality, the rationality requirement for government line drawing remains meaningful. These strong cases might also be described as having a contextual focus in that the link between government line drawing and asserted state interests must be grounded in the context in which the classification operates before judicial approval will be granted.[132]

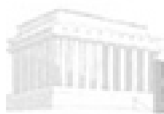
128. Romer v. Evans, 517 U.S. 620, 632 (1996).

129. *Id.*

130. *Id.* at 633 (citation omitted). *See also* Plyler v. Doe, 457 U.S. 202, 227 (1982) ("The State must do more than justify its classification with a concise expression of an intention to discriminate.") (citation omitted).

131. *See, e.g.*, Heller v. Doe, 509 U.S. 312, 319 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of legitimacy."); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) ("[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ."); Dandridge v. Williams, 397 U.S. 471, 486 (1970) ("[F]ederal courts [have] no power to impose upon the States their views of what constitutes wise economic or social policy.") (footnote omitted); McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) ("State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").

132. *See W. & S. Life Ins.*, 451 U.S. at 668 ("In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?").



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A cold look at these characterizations of the rational basis inquiry could suggest that the distinction drawn out above is semantic at best, but that would miss the significant, if subtle, shifts in emphasis. These shifts lead to predictable results, at least in the limited sense that opinions invoking the test's weak version almost invariably reject equal protection challenges while the strong language generally appears in the cases striking down classifications.[133] Not all the cases emphasizing "linkage" result in judicial intervention,[134] however; thus, the predictive value of this distinction is admittedly minor. The distinction's value may be minimized further if the Court's use of the weak or strong articulation is viewed as nothing more than self-serving phraseology or a reflection of unresolved ideological differences on the Court about the role of judicial review. For our purposes, though, whether or not the contrast between the weak and strong cases illustrates a deeper jurisprudential struggle, the divergent emphases reflect a persistent tension about the nature of rational basis review, which has left the doctrine with a somewhat unpredictable feel and, at times, without sufficient focus on whether a meaningful connection exists between government action and the purported justifications for that action.

In sum, although there is general agreement that rational basis review requires the greatest deference and the least rigorous scrutiny of any test seeking to enforce the Equal Protection Clause, differences in emphasis and application remain plentiful. The wide gaps between the expressions and applications of rational basis review in the weak and strong cases and the

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133. However, the weak language dominates discussion in a few of the cases that ultimately strike down government action. For example, in *Metropolitan Life Insurance Co. v. Ward*, the Court stressed that "it is not difficult to establish a rational relationship between a classification and a government purpose." Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1985). The Court was closely split, however, regarding both the articulation of the equal protection analysis and the outcome here, with four justices maintaining that the majority had misapplied the equal protection test and had failed to defer sufficiently to the state's freedom to classify. *Id.* at 884–86 (O'Connor, J., dissenting).

More recently, the Court in *Quinn v. Millsap* similarly stressed the ease of satisfying rational basis review, stating that "[w]e need apply no more than the rationality review articulated in *Turner*" to strike down the property ownership requirement at issue. Quinn v. Millsap, 491 U.S. 95, 107 (1989) (referring to Turner v. Fouche, 396 U.S. 346, 362 (1970)). In *Turner*, the Court had described the rational basis inquiry as asking "whether the challenged classification rests on grounds *wholly irrelevant* to the achievement of a valid state objective." Turner v. Fouche, 396 U.S. 346, 362 (1970) (emphasis added) (footnote omitted).

134. In *Nordlinger v. Hahn*, for example, the plaintiff relied on *Allegheny Pittsburgh Coal Co. v. County Commission* to challenge California's acquisition value taxation scheme, which resulted in new homeowners paying substantially higher taxes than long-term homeowners for similar properties. Nordlinger v. Hahn, 505 U.S. 1, 14 (1992). Although the Court sustained the California approach, it carefully assessed the relationship between the state's interests and the classification in a manner typical of the strong set of cases. *Id.* at 11–17.

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resulting periodic invalidations of government line drawing suggest that the doctrine needs a stabilizing force.

These tensions in rational basis review, coupled with the difficulties in suspect classification analysis addressed above, encourage this Article's next turn toward rethinking the framework that supports these review standards. With the theoretical and doctrinal weaknesses in mind, the remainder of this Article will take steps toward laying a firmer foundation for future judicial application of the Constitution's equality guarantee.

III. QUESTIONING THE THREE TIERS

In light of the serious flaws plaguing the theory and application of heightened scrutiny and rational basis review, it is not entirely surprising that the three-tiered framework has periodically come under fire by members of the Court. What is more puzzling, however, is that no judicial or scholarly consensus has developed in favor of abandoning the tiers and adopting a single standard. This part will approach this puzzle initially by setting out the views of those justices who have questioned the Court's current approach to equal protection review. After a brief tour of these divergent positions, I will then posit several theories as to why, despite doctrinal problems and scholarly critique, the Court's approach to equal protection has remained relatively static. In doing so, I will consider three of the leading theories that have been advanced to provide some coherence to rational basis review and assess their incorporation by the Court.[135]

A. JUDICIAL DISCOMFORT WITH TIERED REVIEW

Even as the Court was first growing comfortable with an approach to assessing governmental classifications that required determinations of suspectness and imposing different levels of judicial review, a few consistent voices on the Court cautioned against the entry into new and complicated terrain. Rather than dividing the analytic field into classifications, these jurists, representing a broad philosophical spectrum,

135. Much scholarship examines strict scrutiny and suspect classification in the context of race-based affirmative action and redistricting classifications. *See generally* Karlan, *supra* note 25 (criticizing the application of strict scrutiny to affirmative action programs); Rubenfeld, *Affirmative Action*, *supra* note 13 (same); Rubin, *supra* note 25 (same). Because this scholarship focuses largely on correcting perceived problems within the confines of a heightened scrutiny approach, it is not as pertinent to this Article's project of collapsing the three-tiered structure back into its original unitary analytic mechanism. Thus, it will not be addressed in depth here. It does, however, reinforce the timeliness of reconsidering the tiered framework.

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suggested that the multiple tiers might be more trouble than help and might distort the fair application of equal protection values.[136]

From among the members of the Court, Justice Marshall engaged in the most detailed effort to flesh out a unitary standard. Instead of proposing adjustments to the criteria forming the Court's test, Justice Marshall explained in *Cleburne* that the Court's overall approach was in error:

> The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's freewheeling, and potentially dangerous, "rational-basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together.[137]

Moreover, Justice Marshall observed that these formal distinctions in review were not as neat as they purported to be. Condemning the Court's effort to shore up differences between rational basis review and heightened scrutiny, he wrote, "this Court's decisions in the field of equal protection defy such easy categorization."[138]

Justice Marshall also took specific issue with the framework that the Court had developed to identify suspect classifications, with the immutability and political power inquiries receiving his particular condemnation: "No single talisman can define those groups likely to be the target of [constitutionally offensive] classifications . . . . [E]xperience, not abstract logic, must be the primary guide."[139] He observed, for example,

136. *See infra* notes 137–62 and accompanying text.

137. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 478 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part). The following year, in dissent from the Court's approval of a restrictive food stamp provision, Justice Marshall reiterated his concern with "the lack of vitality in this Court's recent equal protection jurisprudence." Lyng v. Castillo, 477 U.S. 635, 643 (1986) (Marshall, J., dissenting) (citations omitted).

138. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

139. *Cleburne Living Ctr.*, 473 U.S. at 472 n.24 (Marshall, J., concurring in the judgment in part and dissenting in part).

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that "[t]he 'political powerlessness' of a group may be relevant, but that factor is neither necessary . . . nor sufficient."[140] Likewise, he acknowledged that immutability "may be relevant, but many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances."[141]

With his criticism of the formalistic distinctions in suspect classification analysis, Justice Marshall offered a balancing test as an alternative, seeking to focus the Court's attention on the relationship between the government interest at issue and the level of societal condemnation of the classification. His proposal maintained that "concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[142] Justice Marshall also maintained that the Court was already engaged in this flexible approach, notwithstanding its creation of multiple tiers for review. Critiquing the Court's approach, he commented, "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."[143]

Justice Stevens also strongly opposed the Court's foray into multiple tiers. Agreeing with Justice Marshall that only a single standard should be applied, Justice Stevens proposed a somewhat different formulation for equal protection review. As he famously observed in *Craig v. Boren*,

140. *Id.* (Marshall, J., concurring in the judgment in part and dissenting in part) (citation omitted).

141. *Id.* (Marshall, J., concurring in the judgment in part and dissenting in part) (citation omitted).

142. Dandridge v. Williams, 397 U.S. 471, 520–21 (1970) (Marshall, J., dissenting). In *Cleburne*, Justice Marshall described the balancing proposal this way: "I have long believed the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'" *Cleburne Living Ctr.*, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part) (quoting *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting)) (citation omitted). In *Richardson v. Belcher*, a due process case, Justice Marshall added that

> it is necessary to consider more than the character of the classification and the governmental interests in support of the classification. Judges should not ignore what everyone knows, namely that legislation regulating business cannot be equated with legislation dealing with destitute, disabled, or elderly individuals. . . . [T]he Court should consider the individual interests at stake.

Richardson v. Belcher, 404 U.S. 78, 90–91 (1971) (Marshall, J., dissenting).

143. *Rodriguez*, 411 U.S. at 98–99 (Marshall, J., dissenting). Justice Marshall continued, "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." *Id.* at 99 (Marshall, J., dissenting).

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"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."[144] Like Justice Marshall, Justice Stevens contended that the tiers did not actually guide the Court's analysis, though he identified a single standard rather than a sliding scale as the underlying key to the Court's approach:

> I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.[145]

Proposing an alternative method of assessing equal protection challenges, Justice Stevens explained that "[i]n my own approach to these cases, I have always asked myself whether I could find a 'rational basis' for the classification at issue."[146] He then explicated how the rationality inquiry could proceed, emphasizing the importance of an unbiased legislature and a legitimate public purpose for a classification:

> The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.[147]

To reinforce that no need for multiple standards of review exists, Stevens observed,

> It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.[148]

144. Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).

145. *Id.* at 212 (Stevens, J., concurring).

146. *Cleburne Living Ctr.*, 473 U.S. at 452 (Stevens, J., concurring).

147. *Id.* (Stevens, J., concurring) (footnotes omitted).

148. *Id.* at 452–53 (Stevens, J., concurring). For a detailed discussion of Justice Stevens's approach to equal protection review, see generally, Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987) [hereinafter *Justice Stevens*].

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Then-Justice Rehnquist also proffered a generalized critique of multi-tiered review couched within his objection to the Court's creation of the quasi-suspect tier in *Craig*:

> I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved—so as to counsel weightily against the insertion of still another "standard" between those two.[149]

Later, in *Rostker v. Goldberg*, Justice Rehnquist reiterated his concerns about the tiers, observing that "levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result."[150]

Justice Powell also spoke out in *Craig* against the "further subdividing of equal protection analysis."[151] Pointing to the Court's equal protection jurisprudence, Justice Powell suggested that the tiered system might have emerged from the Court's inability to agree on a universally applicable standard for equal protection analysis.[152] Conceding that "substantial precedent" supported the use of an upper tier, Justice Powell then highlighted a "valid" criticism of strict scrutiny "as a result-oriented substitute for more critical analysis,"[153] suggesting his preference for a standard that would apply across the full range of possible classifications.[154]

149. *Craig*, 429 U.S. at 220–21 (Rehnquist, J., dissenting).

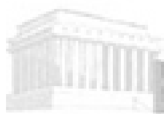
150. Rostker v. Goldberg, 453 U.S. 57, 69–70 (1981).

151. *Craig*, 429 U.S. at 210 n.* (Powell, J., concurring).

152. *Id. See also* Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1090–92 (1982) (cautioning that the Court's discussion in *Carolene Products* of classifications warranting close judicial review does not offer a "neat formula for constitutional adjudication").

153. *Craig*, 429 U.S. at 211 n.* (Powell, J., concurring). During the Court's conference regarding *Cleburne*, Justice Powell has been quoted as saying that "'I hesitate to go to heightened scrutiny, which I've never favored. I'm not sure even race or gender needs more than rational [basis review].'" BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 251 (1990).

154. Several states have also avoided embracing the tiered framework in reviewing equal protection challenges based on state constitutional guarantees. The New Jersey Supreme Court, for example, takes an approach similar to that advocated by Justice Marshall above. *See* McCann v. Clerk of Jersey City, 771 A.2d 1123, 1131 (N.J. 2001) ("We have rejected the federal multi-tiered approach in favor of a less rigid balancing approach in which we consider 'the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.'") (quoting Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985)). Likewise, in Alaska, the state supreme court applies "a sliding scale under which '[t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme.'" Dep't of Revenue v. Cosio, 858 P.2d 621,



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However, although each proposal contains interesting elements, none provides a comprehensive solution to the problems inherent in all levels of the tiered framework. For example, while Justice Marshall's proposal offers the appeal of a flexible, context-sensitive approach, his balancing test provides little guidance to lower courts regarding how to assess the importance of the interest infringed and then strike the balance between interests and equality. Further, because relatively minor deprivations can cause significant harm to the status, if not the actual access to resources of trait bearers, consideration of the infringed interest's importance may not be useful and could possibly be detrimental to enforcement of the equal protection guarantee.[155]

Justice Stevens's single standard, while likewise desirable in theory, also gives rise to difficulties in application. By insisting that the government's interest in classifying be legitimate, which is a concern at all levels of review, implementation of this standard could largely follow existing law.[156] However, the additional requirement that government make decisions impartially and with neutrality presents greater challenges. The impartiality approach, like Cass Sunstein's proposal that decisions must be made based on public values rather than "naked preferences,"[157] does not account for the pluralist nature of the American political process, which responds to constituent and other politically relevant pressures and can be characterized as anything but neutral.[158] Further, to the extent that Justice Stevens's neutrality requirement mirrors in the legislative context Herbert Wechsler's proposal that courts decide cases according to neutral principles, it, like Wechsler's, contains few substantive limitations on the types of principles that may be the basis for line drawing.[159] Thus, it would

629 (Alaska 1993) (quoting State v. Ostrosky, 667 P.2d 1184, 1192–93 (Alaska 1983)). A comprehensive critical comparison of state approaches to equality analysis, although beyond the scope of this Article, could usefully illuminate the utility of these and other analytic frameworks.

155. For this reason, the proposed single standard differs from Justice Marshall's test by requiring the same intensity of review regardless of context. *See infra* Part IV.

156. *See Craig*, 429 U.S. at 211–12. *See also supra* notes 118–25 and accompanying text (demonstrating that both low and high levels of review have fundamental concerns with the legitimacy of government action); *infra* notes 398–401 and accompanying text (same). For a discussion of Justice Stevens's methodology, see generally *Justice Stevens*, *supra* note 148.

157. *See* Sunstein, *Naked Preferences*, *supra* note 40, at 1713.

158. *See infra* notes 294–97 and accompanying text.

159. *Compare* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) (explaining that equal protection review should ensure government's impartiality), *and* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16–17 (1959) (arguing that judicial review of legislation must be concerned with neutrality), *with* Michael Wells, *Busting the Hart & Wechsler Paradigm*, 11 CONST. COMMENT. 557, 576–79 (1994–95) (critiquing Wechsler's neutral principles arguments).

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allow arbitrary lines to be drawn, so long as the arbitrariness was applied neutrally. On the other hand, if non-neutrality and partiality are treated simply as stand-ins for the legitimacy requirement, Justice Stevens's theory would do little more than restate, as a single standard, the contours of current rational basis review.

Justice Rehnquist's suggestion to abandon the middle tier has, relative to the others, the appeal of simplicity—the bare minimum scrutiny applies to every classification that is not suspect.[160] However, it does not allow for context-sensitive evaluations of race-based distinctions.[161] Nor, in Justice Rehnquist's conception of rational basis, would judicial skepticism toward nonsuspect classifications ever be appropriate.[162]

Still, notwithstanding the differences and possible deficiencies of the suggested standards, together they illustrate a strong collective interest in steering the Court away from its current tack.

B. RELUCTANCE TO RETHINK THE TIERED APPROACH

Despite these justices' advocacy, a single review standard has not emerged as the consensus view of the Court. Nor have equal protection scholars or advocates taken up the charge for a unitary review. Instead, the widely acknowledged problems with rational basis review have led many scholars to offer undergirding theories for the Court's rational basis cases, but only a few to argue that the tiered framework might be partly responsible for those problems.[163] Likewise, litigators of equal protection cases before the Court have not generally pressed for anything other than standard application of the three tiers.[164] Even those whose clients suffer discrimination based on a trait falling outside the current parameters of

160. *See Craig*, 429 U.S. at 220–21 (Rehnquist, J., dissenting).

161. *See id.* (Rehnquist, J., dissenting).

162. *See id.* at 221–22 (Rehnquist, J., dissenting).

163. *See infra* notes 296–97, 308, 315 and accompanying text. Even scholarship raising questions about the tiers has largely refrained from developing an alternative approach. *See generally, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951 (2002) (critiquing the indicia of suspectness and advocating that the Constitution's text supports heightened review of classifications based on certain traits); Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 371 (2002) (criticizing the tiered framework's results, but arguing that "[t]he problem . . . is not with the [three-tiered] theory").

164. Although the application of strict scrutiny to all race-based classifications has generally worked against the interests of communities of color seeking to sustain affirmative action programs, a political assessment may have been made that losing close review of other types of racial classifications presents an unacceptable risk. However, that risk may be overrated in light of the regular invalidation of invidious racial classifications under rational basis review prior to *McLaughlin*. *See supra* note 67 and accompanying text.

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heightened judicial review have sought to satisfy the test for suspect classification rather than urging a new construct that might create more room for the invalidation of discriminatory classifications.[165] This section will consider the Court's reluctance to revisit the multi-tiered framework, which has remained largely unchanged for more than a quarter century.

Although any explanation is conjectural, because a majority of the Court has never addressed the anti-tier arguments, several reasons might account for the Court's inaction. First, the lingering effects of *Lochner*'s substantive due process regime and its spillover into equal protection jurisprudence[166] almost certainly play a role in inhibiting contemplation of any test that would allow rigorous judicial review to reach a broader range of government action.[167] The severe criticism aimed at the Court's practice of replacing the state's "reasonableness" assessment with its own, as in *Lochner*'s invalidation of New York's restriction on bakery employees' hours,[168] helps explain the Court's tentative approach to equal protection review after that era ended.[169] When the Court reversed course in the mid-1930s in *West Coast Hotel Co. v. Parrish*, it handed back power over determinations of rationality to the legislatures: "Even if the wisdom of [a] policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment."[170] By imposing rigorous judicial

165. *See, e.g.*, Brief of the Human Rights Campaign Fund et al., as Amici Curiae in Support of Respondents, Romer v. Evans, 517 U.S. 620 (1996), *available at* 1995 WL 782809 (advocating strict scrutiny based on sexual orientation); Brief of the American Association on Mental Deficiency et al., as Amici Curiae in Support of Respondents, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985), *available at* 1985 WL 669784 (arguing for heightened scrutiny of legal distinctions based on mental retardation).

166. *See, e.g.*, Klarman, *supra* note 52, at 248–52 (analyzing the danger of "reinvent[ing] *Lochner* under the Equal Protection Clause"); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 991–93 (1979) (stating that the Warren Court's equal protection decisions "never quite escaped the charge that [they were] Lochnerism reincarnated"); Sunstein, *Naked Preferences*, *supra* note 40, at 1692, 1697, 1700–03, 1717–19, 1728–32 (comparing modern equal protection with the *Lochner* era). *See generally* Sunstein, Lochner*'s Legacy*, *supra* note 55.

167. For example, in accusing the Court of not exercising sufficient deference with respect to a legislative classification of nonmarital children, Justice Rehnquist reminded the Court of its historical, but since condemned, overreaching via the Fourteenth Amendment during the *Lochner* era. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 179–85 (1972) (Rehnquist, J., dissenting). Justice Rehnquist stated that "the Court's opinion . . . is an extraordinary departure from what I conceive to be the intent of the framers of the Fourteenth Amendment and the import of the traditional presumption of constitutionality accorded to legislative enactments." *Id.* at 181 (Rehnquist, J., dissenting).

168. Lochner v. New York, 198 U.S. 45, 64–65 (1905).

169. *Cf.* Sunstein, Lochner*'s Legacy*, *supra* note 55, at 875 (suggesting that *Lochner*-like review continues to operate today).

170. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937) (upholding a Washington State minimum wage law). In *Nebbia v. New York*, the Court similarly articulated its chastened approach to

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review only under limited conditions that are narrowly circumscribed by the heightened scrutiny criteria, the three-tiered system neatly complements the deferential review of most governmental discrimination post-*Lochner*.[171]

Second, the suspect classification tier gained its early foothold at a time when a majority of the Court and significant sectors of society at large had begun to accept as a matter of course that racial classifications typically lacked legitimacy.[172] As a streamlined process facilitating the invalidation of race-based distinctions, presumptive strict scrutiny of suspect classifications could have appeared to be, and perhaps actually was, a sensible approach.[173] The automatic rigorous review sent a clear message to errant legislatures that race-based lawmaking would receive skeptical examination.[174] Similar social recognition of the problems inherent in sex-role stereotyping, while not universal,[175] likewise laid the groundwork for a

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judicial review in a statement regarding due process that characterized its newly restrained equal protection review as well:

> So far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . . [I]f the legislative policy be to curb unrestrained and harmful competition by measures which are not arbitrary or discriminatory it does not lie with the courts to determine that the rule is unwise.

Nebbia v. New York, 291 U.S. 502, 537 (1934).

171. As Gerald Gunther observed about equal protection review at least up to the early 1960s, "judicial intervention under the banner of equal protection was virtually unknown outside racial discrimination cases." Gunther, *supra* note 17, at 8.

172. *See* Perry, *supra* note 62, at 1065–67. The passage of Title VII of the Civil Rights Act of 1964, for example, can be seen as a societal commitment, albeit a contested one, to the irrelevance of race in the workplace. *See* Klarman, *supra* note 52, at 297.

173. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432, 434 (1984) (striking down race-based legislation after applying "the most exacting scrutiny"); Hunter v. Erickson, 393 U.S. 385, 392–93 (1969) (invalidating race-based legislation by applying "'the most rigid scrutiny'") (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (same); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (same). Gunther's formulation of strict scrutiny for suspect classifications as "'strict' in theory and fatal in fact" well captures the predictable nature of this review. *See* Gunther, *supra* note 17, at 8. *But see* Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it."). *See also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' . . . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases.") (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (Marshall, J., concurring)).

174. The relatively formulaic method for striking down racially discriminatory classifications also served institutional interests in judicial economy.

175. Unlike racial discrimination, Title VII's legislative history does not reflect societal condemnation of sex discrimination comparable to its opposition to race discrimination. *See* Price

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tougher, more streamlined process for invalidating sex-based classifications.

Still another reason for the Court's reluctance to embrace a single standard approach might be the difficulty in conceiving a standard that could operate efficiently, incorporate the values reflected in the multi-tiered approach, and avoid an equal protection free-for-all in which deference to legislative decisionmaking and relative predictability of analysis and outcome would be lost entirely. Even the descriptions offered by individual justices of their proposed single standards, although useful in spirit, do not provide much in the way of specific guidance for implementation.[176] As illustrated above, the conceptual and practical challenges to a unitary standard, especially one that could maintain heightened scrutiny's commitment to filtering out prejudice and not result in undue judicial oversight of government action, are significant. Taking lessons from the tests of the individual justices, the existing literature, and the concerns raised above regarding the extant framework, the following part offers an alternative version of a unitary standard in an effort to uncomplicate and facilitate enforcement of the equal protection guarantee.

IV. ENVISIONING A SINGLE STANDARD

As the justices' individual standards suggest, any standard of equal protection review—including the single standard I propose—must occupy

Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989) (noting that sex was included as a protected class in the Title VII bill "in an attempt to *defeat* the bill"). *See also* CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–17 (1985). *But see* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14–25 (1995) (presenting context for the inclusion of sex in Title VII that demonstrates the existence of legislative intent to provide meaningful protection against sex discrimination).

But by 1963, the Equal Pay Act and other legislation prohibiting sex discrimination had been enacted, reinforcing the legislative and, by inference, popular view that sex was not typically a legitimate basis for government action. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994). *See also* Craig v. Boren, 429 U.S. 190, 204 (1976) (invalidating a statute that prohibited vendors from selling low-alcohol beer to young men but permitted sales to young women); Stanton v. Stanton, 421 U.S. 7, 14, 17 (1975) (striking down a statute that provided different ages of majority for girls and boys); Taylor v. Louisiana, 419 U.S. 522, 534–35, 538 (1975) (finding the systematic exclusion of women from juries unconstitutional); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (voiding a preference for men over women in appointments as administrators of estates). Similarly, in *Frontiero*, a plurality of the Court recognized that through "romantic paternalism" toward women, "our statute books gradually became laden with gross, stereotyped distinctions between the sexes" that gave rise to "pervasive" discrimination. *See* Frontiero v. Richardson, 411 U.S. 677, 684–86 (1973) (Brennan, J., plurality opinion).

176. *See supra* notes 155–62 and accompanying text.

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itself fundamentally with the central concern of the Equal Protection Clause. Therefore, this part will first isolate and examine that central concern, which equal protection jurisprudence expresses as a commitment to prohibiting class legislation. Against that background, I will propose, apply, and critique a three-part test that incorporates the class legislation concern together with the subsidiary concerns that are common to high and low levels of scrutiny within the current framework.

A. CLASS LEGISLATION AS EQUAL PROTECTION'S BASELINE CONCERN

In contrast to the variable way in which the Court has conducted its equal protection analysis,[177] statements of the clause's baseline concern have been surprisingly consistent.[178] Regardless of the level of scrutiny applied, this first principle is invariably identified as preventing enforcement of class legislation.[179] As the Court recently reaffirmed, opposition to legislation creating "classes among citizens" for non-neutral reasons lies at the heart of the equal protection guarantee:

> One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Unheeded then, those words now are understood to state a commitment

177. *See supra* Part II.

178. The Court's comments in *Plyler v. Doe* about the purpose of the Equal Protection Clause are illustrative:

> Classifications treated as suspect tend to be irrelevant to any proper legislative goal. . . . The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) (citation omitted).

179. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 623 (1996); The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting). The term "class legislation" first became widely used in the antebellum era, not to refer generally to classifying laws as in the *Lochner* era, but to condemn what were known as "partial or special laws" that "singled out certain persons or classes of persons for special benefits or burdens." *See* Saunders, *supra* note 48, at 252–53. Not until later did class legislation take on the meaning commonly associated with the Court's *Lochner* era interventions, when it provided a foundation for invalidating laws, including nonclassifying laws, that were thought to serve the interests of a particular class rather than the general public. *See id.* at 252, 301; Benedict, *supra* note 118, at 305–14 (discussing workplace regulations and protective tariffs, inter alia, as class legislation). The term is used here in the mid-19th-century sense described above, which most accurately reflects the original concern with "partial or special laws." *See* Saunders, *supra* note 48, at 292–93. Notwithstanding its complex history, class legislation remains the term of choice here because it, and not reference to partial or special laws, is the Court's most commonly invoked shorthand to explain the purpose of the Equal Protection Clause. Further, the Court's recent invocation of the class legislation concept in *Romer* affirms its continuing importance to the Court. *See Romer*, 517 U.S. at 635.

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> to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle . . . .[180]

This commitment to screening out and invalidating class legislation runs through much of the Court's equal protection jurisprudence.

Indeed, Justice John Marshall Harlan's concern with class legislation was well founded in the history of the Equal Protection Clause's enactment.[181] As one of the clause's leading advocates proclaimed in a Senate debate, the equality guarantee "abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."[182] The late 19th-century Court on which Justice Harlan sat was steeped in the contemporary debates.[183] Consequently, as the justices decided early equal protection cases, they were familiar with the process of drawing distinctions "between class legislation and legislation enacted for the purpose of benefitting the polity as a whole."[184]

The Court was highly focused on the threat that class legislation posed to liberty and equality.[185] Exploring the scope of the Fourteenth Amendment's equality guarantee shortly after its passage, Justice Harlan first condemned class legislation while dissenting from the Court's

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180. *Romer*, 517 U.S. at 623 (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)) (citation omitted).

181. *See generally* Saunders, *supra* note 48, at 268–92 (reviewing the legislative history of the Equal Protection Clause).

182. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard). Senator Jacob M. Howard of Michigan, who served on the Joint Committee on Reconstruction and as the Fourteenth Amendment's floor manager in the Senate, was instrumental in identifying and codifying the principle of equality from popular debates that focused on higher law and citizens' rights. *See* NELSON, *supra* note 62, at 48, 73, 117. In presenting the Fourteenth Amendment to the Senate, Howard advocated that it "'establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.'" *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766).

183. *See* Saunders, *supra* note 48, at 293–301.

184. NELSON, *supra* note 62, at 176–77. Senator Howard's statement remains vital today; the Court regularly invokes it as confirmation of the Equal Protection Clause's commitment to preventing arbitrary or hostile class legislation. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 214–15 (1982) (quoting Senator Howard's statement regarding class legislation); Jones v. Helms, 452 U.S. 412, 424 n.23 (1981) (same); Reynolds v. Sims, 377 U.S. 533, 600–02 (1964) (Harlan, J., dissenting) (same).

185. Disapproval of class legislation also has long been a part of American political sentiment. *See* Benedict, *supra* note 118, at 314 ("[T]he widespread acceptance [in the late 19th century] of laissez-faire notions of liberty must be attributed, at least in part, to the fact that its major thrust, hostility to 'special' and 'class' legislation, was already ingrained in American law and political theory."). The related concern of unequal enforcement—another form of class legislation—was similarly deeply rooted and also important to some of the drafters of the Reconstruction Amendments. *Id.* at 330–31.

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invalidation of an 1875 antidiscrimination prohibition.[186] Just a few years later in *Barbier v. Connolly*, the Court initiated a more extensive discussion of class legislation as it upheld, under the police power doctrine, a San Francisco ordinance limiting washing and ironing hours for public laundries.[187] Explaining that legislation may often "press with more or less weight upon one than upon another,"[188] the Court emphasized that these sorts of laws "are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good."[189] In contrast, the Court wrote, "[c]lass legislation, discriminating against some and favoring others, is prohibited."[190]

For the next quarter century and beyond, the Court repeatedly invoked *Barbier*'s prohibition of class legislation, enshrining it as the central tenet of equal protection.[191] Allegations that particular laws constituted impermissible class legislation surfaced regularly in plaintiffs' lawsuits,[192]

186. The Civil Rights Cases, 109 U.S. 3, 48 (1883) (Harlan, J., dissenting).

187. *See* Barbier v. Connolly, 113 U.S. 27, 32 (1884).

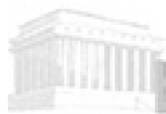
188. *Id.* at 31.

189. *Id.* at 31–32.

190. *Id.* at 32.

191. *See, e.g.*, Hayes v. Missouri, 120 U.S. 68, 72 (1887) (upholding a Missouri peremptory challenge rule that allowed a different number of challenges in capital cases depending on the size of the city where the indictment took place); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (invalidating a San Francisco laundry ordinance because of discriminatory enforcement). As noted above, *supra* note 179, the term "class legislation" was also used increasingly to describe burdens imposed by economic regulation. *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 332–34 (1921) (striking down a statute distinguishing between former employees and other tortfeasors for the purposes of remedies); Mountain Timber Co. v. Washington, 243 U.S. 219, 238–39, 243–44, 246 (1917) (upholding a Workmen's Compensation Act provision requiring periodic contributions from employers in extrahazardous industries); Atchison, Topeka & Santa Fé R.R. Co. v. Matthews, 174 U.S. 96, 104, 106 (1899) (upholding a Kansas statute requiring that a reasonable attorney's fee be made part of the judgment against a railroad company for damages caused by its trains); Gulf, Colo. & Santa Fé Ry. Co. v. Ellis, 165 U.S. 150, 165–66 (1897) (sustaining a railroad's challenge to a law mandating attorney's fee payments by railroads but not other defendants under specified circumstances); Marchant v. Penn. R.R. Co., 153 U.S. 380, 390 (1894) (rejecting an appeal by property owners seeking damages from a nearby railroad); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26, 30, 35–36 (1889) (upholding an Iowa statute that imposed liability on a railroad company whose failure to fence its tracks resulted in livestock deaths). Again, however, these references to class legislation extend beyond the use intended here.

192. *See, e.g.*, U.S. Mortgage Co. v. Matthews, 293 U.S. 232, 235 (1934); Herbring v. Lee, 280 U.S. 111, 115–17 (1929); Whitney v. California, 274 U.S. 357, 366, 369–70 (1927); S. Ry. Co. v. Clift, 260 U.S. 316, 320–21 (1922); Payne v. Kansas, 248 U.S. 112, 113 (1918); Farmers Irrigation Dist. v. Nebraska, 244 U.S. 325, 330–31 (1917); Rosenthal v. New York, 226 U.S. 260, 267 (1912); Muller v. Oregon, 208 U.S. 412, 417–18 (1908); Armour Packing Co. v. Lacy, 200 U.S. 226, 233 (1906); Swafford v. Templeton, 185 U.S. 487, 489 (1902); Cotting v. Kan. City Stock Yards Co., 183 U.S. 79, 112 (1901); Knoxville Iron Co. v. Harbison, 183 U.S. 13, 21 (1901); Williams v. Fears, 179 U.S. 270,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and the Court expressed its intent to ensure that no class legislation would survive its review.[193]

The Court's contemporary cases continue this focus on class legislation. For example, in rejecting an Alaska provision awarding residents dividends from a pipeline project based on duration of residence, then-Chief Justice Burger reiterated that legislation "permit[ting] the states to divide citizens into expanding numbers of permanent classes. . . . would be clearly impermissible."[194] Likewise, in *Plyler v. Doe*, the Court found Texas's ban on undocumented children attending public schools to be objectionable in part because it would create a permanent "subclass of illiterates."[195] Justice Brennan also explained that "[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[196]

But how does one discern what is class legislation and what is merely permissible and appropriate classifying by government? The Court has defined class legislation as "a classification of persons undertaken for its own sake,"[197] "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests,"[198] and a subjection of "one caste of persons to a code not applicable to another."[199] Although useful as further elaborations of the class legislation concept, these descriptions do not chart an analytic path for lower courts. Further complicating the effort to develop a test for class legislation are the Court's repeated reminders that "[a] law which affects the activities of some groups differently from the way in which it affects the activities of

274 (1900); Petit v. Minnesota, 177 U.S. 164, 165–66 (1900); *Gulf, Colo. & Santa Fé Ry.*, 165 U.S. at 152–53.

193. *See, e.g.*, Interstate Consol. St. Ry. Co. v. Massachusetts, 207 U.S. 79, 86 (1907) (describing a Massachusetts statute as falling between the "Scylla of unjustifiable class legislation" and "the Charybdis of impairing the obligation of a contract").

194. Zobel v. Williams, 457 U.S. 55, 64 (1982) (footnote omitted). See also *supra* notes 179–80 and accompanying text for a discussion of how the Court began the analysis in *Romer* by invoking Justice Harlan's condemnation of class legislation.

195. Plyler v. Doe, 457 U.S. 202, 230 (1982). *See also id.* at 213 ("The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.").

196. *Id.* at 217 n.14.

197. Romer v. Evans, 517 U.S. 620, 635 (1996).

198. *Id.*

199. *Plyler*, 457 U.S. at 215 (quoting Sen. Howard, CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866)).

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other groups is not necessarily banned by the Fourteenth Amendment."[200] Also adding to the challenge is the Court's view, as expressed in *Williamson v. Lee Optical of Oklahoma, Inc.*, that "it is for the legislature, not the courts, to balance the advantages and disadvantages" of differentiating between classes.[201]

B. DEVELOPMENT OF THE PROPOSED SINGLE STANDARD

Although plain reference to class legislation provides too little guidance to serve as a useful new equal protection test, the Court's strong rational basis cases articulate helpful, specific concerns. Their inquiries mesh neatly with some of those contained in the heightened scrutiny cases, which likewise concern themselves with screening out laws crossing the class legislation threshold. In particular, as shown below, the set of cases addressing classifications en route to heightened scrutiny—for example, sex discrimination cases prior to *Frontiero*,[202] race discrimination cases prior to *Korematsu v. United States*,[203] and cases involving discrimination against nonmarital children prior to *Clark v. Jeter*[204]—offers concrete guidance for discerning class legislation, perhaps because they simultaneously embody both the deferential commitment of rational basis review and the protective inclination of heightened scrutiny.[205]

The remainder of this section will develop the three central lines of inquiry that emerge from these cases. Each of the proposed inquiries is geared toward capturing impermissible class legislation while leaving in place the bulk of legitimate, permissible government classifications. These

200. Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947) (citation omitted). The Court continued,

> Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. For it is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public.

Id. (citation omitted).

201. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487 (1955).

202. Frontiero v. Richardson, 411 U.S. 677 (1973).

203. Korematsu v. United States, 323 U.S. 214 (1944).

204. Clark v. Jeter, 486 U.S. 456 (1988).

205. As discussed, *supra* notes 61–69 and accompanying text, for nearly twenty years after *Korematsu* first referenced the concept of suspect classification, the Court arguably did not deploy vigorous heightened scrutiny in race discrimination cases; instead, it performed ordinary deferential rational basis review. *See also* Klarman, *supra* note 52, at 232–36, 245–46, 255. On the other hand, as discussed above, *supra* note 84, others maintain that heightened scrutiny was effectively imposed, in deed if not in name, by the Court in reviewing classifications based on traits that had not yet been declared suspect or quasi-suspect. *See, e.g.*, Gunther, *supra* note 17, at 33–36 (discussing, inter alia, Reed v. Reed, 404 U.S. 71 (1971)).

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interrelated and complementary questions, taken together, comprise a unitary standard that may surpass the three-tiered approach in uncovering invidious or otherwise improper line drawing between classes. In addition, as the proposed standard draws from the batch of strong rational basis cases in which meaningful review was imposed, it also may serve as a theoretical tool for understanding the Court's inconsistent balancing between deference and review.[206]

Drawing from the extant jurisprudence, the discussion below will elaborate the following three inquiries to be made of any classification challenged on equal protection grounds, with the aim of preventing enforcement of impermissible class legislation as the backdrop:

(1) whether a plausible, nonarbitrary explanation exists for why the burdened group has been selected to bear the challenged burden in the context at issue;

(2) whether the justification offered for the line drawing has a specific relationship to the classification's context; and

(3) whether the classification reflects disapproval, dislike, or stereotyping of the class of persons burdened by the legislation.

Put another way, the first inquiry considers the reason for the classification's use in the regulatory context, the second considers whether that reasoning rests on broad generalizations about the trait at issue that lack a specific connection to the regulatory context, and the third considers whether the classification gives effect to an illegitimate government purpose.[207] For brevity's sake, they will be referred to respectively as the "intracontextual inquiry," the "extracontextual inquiry," and the "bias inquiry."[208] As shown below, if any one of these is not met, a classification cannot be sustained.[209]

206. *See* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 n.10 (1980) (recognizing a lack of consistency in the Court's rational basis jurisprudence).

207. Although other shared interests no doubt exist between the rational basis and heightened scrutiny cases, these three inquiries surface as the dominant analytic concerns, as shown below.

208. The latter two inquiries are arguably subsets of the first, because the demand for a plausible, nonarbitrary explanation likely will screen out classifications based on unduly broad or impermissible justifications. Indeed, the entire three-part inquiry could be collapsed into one, which would demand that a plausible, legitimate, and context-specific justification exist for all government distinctions between classes. However, separation into three inquiries not only fairly tracks the case law, as shown in Part IV.C–E, but also, if followed faithfully, constrains courts to reveal their reasoning on each point and discourages decisions that address challenges in simple, broad, and conclusory strokes.

209. The proposed standard, with its insistence on equal application to all classifications, runs contrary to the movement in antidiscrimination law to specify traits entitled to protection against discrimination. *Cf.* Romer v. Evans, 517 U.S. 620, 628 (1996) ("These [antidiscrimination] statutes and

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C. INTRACONTEXTUAL INQUIRY

The intracontextual inquiry demands that a plausible explanation exist for why a group has been singled out for burdensome treatment in a particular context. It asks, in other words, whether anything about the burdened group's relationship to the regulatory context would justify it being singled out from among others for the type of burden being imposed. This inquiry reflects the central concern of the strong rational basis cases and the heightened scrutiny cases with the classified trait's effect on an individual's ability to participate on the same basis as others in the regulated arena. It also evinces concern for the reasonableness of the burden that is imposed on particular trait bearers.[210]

Applied properly, this inquiry would also constrain courts from accepting *descriptions* of what legislation accomplishes in the place of plausible *explanations*. For example, the argument that restricting the scope of civil rights enactments will save money may accurately *describe* the effect of a ban on sexual orientation-based antidiscrimination protections, but it does not *explain* why those in need of sexual orientation-based protections were chosen from among others to shoulder the burden of conserving government funds.[211]

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ordinances . . . enumerat[e] the groups or persons within their ambit of protection. Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."). In contrast, the tiered framework, with its specification of particular suspect classifications, appears to be more consistent with prevailing legislative protections, albeit in a less generous way than most.

However, notwithstanding the important parallels between legislative drafting and legal analysis in this area, *see* William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1237–42 (2001), different considerations cause the two approaches to diverge. The enumeration of particular traits for protection serves symbolic, educational, and deterrent functions that are of heightened importance in the legislative arena, which must guide not only those paying close attention to legal categories, but also the public at large. In contrast, the educational function of almost every constitutional test is much narrower, except in the rare instance where a test has a direct, widespread bearing on people's lives. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154, 164–65 (1973) (providing constitutional protection for women to terminate a pregnancy). *See also* Sullivan, *supra* note 91, at 747–50 (comparing the advantages and disadvantages of generality and specificity in antidiscrimination protection).

Although the proposed standard lacks the focused message of trait-specific legislation (or even the trait-specific tiers), it is not without symbolic power. Instead, it conveys the message that the Court will give meaningful consideration to all allegations of differential treatment, including those based on characteristics falling outside the preferred set of suspect classifications.

210. *See infra* notes 212–28 and accompanying text.

211. *See Romer*, 517 U.S. at 635 (finding the goal of "conserving resources to fight discrimination against other groups" inadequate to justify a Colorado state constitutional amendment precluding antidiscrimination protections for lesbians and gay men in light of "the breadth of the amendment"). *Cf.* Reed v. Reed, 404 U.S. 71, 76–77 (1971) (rejecting a cost-savings justification for a law favoring

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This concern with the existence of a meaningful explanation for the classification of a particular group also corresponds directly to the Court's overarching equal protection value. Where no reasonable explanation exists for the government's singling out of a trait in a given context, what remains "is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests"[212]—in other words, class legislation.

Several of the strong rational basis cases center their analyses on this intracontextual inquiry. For example, in reviewing Texas's ban on public school education for undocumented immigrants, the Court emphasized the need for a meaningful connection between the classified population and the context.[213] Striking down the ban, the Court stated that "even if improvement in the quality of education were a likely result of barring some *number* of children from the schools of the State, the State must support its selection of *this* group as the appropriate target for exclusion."[214] In assessing West Virginia's taxation scheme in *Allegheny Pittsburgh Coal Co. v. County Commission*, the Court similarly explained that "[a] State may divide different kinds of property into classes and assign to each class a different tax burden so long as those divisions and burdens are reasonable" in context.[215]

men as estate administrators as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment"). *But see* Mathews v. Lucas, 427 U.S. 495, 509–10, 516 (1976) (upholding a distinction between marital and nonmarital children regarding an entitlement to child survivor benefits based, in part, on the savings achieved by avoiding case-by-case determinations); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300 (6th Cir. 1997) (upholding a city charter amendment banning "protected status" for gay people "[b]ecause the valid interests of the Cincinnati electorate in conserving public and private financial resources is [sic], standing alone, of sufficient weight to justify [the measure] under a rational basis analysis").

With respect to the argument that Alabama's discrimination against out-of-state entities was justified by the state's desire to favor domestic enterprises, the Court observed that favoritism *describes* but does not *explain*, as required, the singling out of one group for a particular burden. Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 878, 882 & n.10 (1985).

212. *See Romer*, 517 U.S. at 635.

213. *See* Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

214. *Id.* at 229. Applying its inquiry to the case at bar, the Court concluded that "[i]n terms of educational cost and need, however, undocumented children are 'basically indistinguishable' from legally resident alien children." *Id.* (internal quotation marks omitted) (citation omitted). *See also Romer*, 517 U.S. at 632–33 (explaining that classifications are sustained where laws are "grounded in a sufficient factual context for us to ascertain [the existence of] some relation between the classification and the purpose it served").

215. Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344 (1989) (citation omitted). Likewise, in *Quinn v. Millsap*, the Court firmly rejected Missouri's real property requirement for service on a government board, finding that land ownership was unrelated to an individual's ability to participate in decisionmaking affecting the local community. Quinn v. Millsap, 491 U.S. 95, 108–09 (1989). Similarly, in *Williams v. Vermont*, the Court invalidated Vermont's use of a tax preference for

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Likewise, in *Cleburne*, after noting that the city's concerns with size and occupancy, which led to the denial of a special use permit for a group home for people with mental retardation, would not have been similarly imposed on other groups of people living together, the Court framed a context-focused inquiry:

> The question is whether it is rational to treat the mentally retarded differently. It is true that they suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the Featherston home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.[216]

And in *Romer* v. *Evans*, the Court offered a strong version of the demand for a genuine, reasonable connection between the classification and the government's goals.[217] The Court first set the amendment's classification in context, noting that "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies."[218] The Court then characterized Colorado's antigay Amendment 2 as drawing a status-based distinction utterly unrelated to the legislative context regulated by the measure.[219] Ultimately, this discontinuity led the Court to conclude that "Amendment 2 is [not] directed to any identifiable legitimate purpose or discrete objective."[220] As the Court wrote, "it is a

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in-state residents, holding that the plaintiffs "ha[d] not been 'accorded equal treatment, and the inequality is not because of the slightest difference in [Vermont's] relation to the decisive transaction.'" Williams v. Vermont, 472 U.S. 14, 24 (1985) (second alteration in original) (quoting Wheeling Steel Corp. v. Glander, 337 U.S. 562, 572 (1949)).

216. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 449–50 (1985). The Court in *O'Brien v. Skinner* followed an approach similar to that in *Cleburne*, first reviewing all the groups of New York citizens entitled to absentee registration and voting privileges—including those who were ill or physically disabled, those required to be out of their residential counties on election day for business reasons, and those detained in a jail in their home county—and then finding "wholly arbitrary" the state's singular denial of registration and voting privileges to those detained in county jails outside their home county. O'Brien v. Skinner, 414 U.S. 524, 530 (1974).

217. *Romer*, 517 U.S. at 620.

218. *Id.* at 627.

219. *See id.* at 632 (describing the amendment's "sheer breadth [as] discontinuous with the reasons offered for it").

220. *Id.* at 635.

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classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit."[221]

Within heightened scrutiny, the intracontextual inquiry emerges through one of the indicia used to identify suspect classifications: whether a trait that is the basis for a classification bears on a person's "ability to perform or contribute to" society.[222] That is, skeptical scrutiny will *not* follow if the trait plausibly can be the basis for differential treatment in a variety of contexts; but if the trait is so irrelevant to abilities that its use as the basis for differential treatment is likely to be arbitrary, regardless of the context, heightened scrutiny may be accorded.[223] In a challenge to sex discrimination in the distribution of military benefits to service members' spouses, for example, the Court commented that "what differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."[224] Similarly, the Court rejected a classification that burdened nonmarital children, partly because "illegitimacy, however defined, is like race or national origin, a characteristic . . . [that] bears no relation to the individual's ability to participate in and contribute to society."[225] As a case decided well before classifications of nonmarital children were formally designated quasi-suspect,[226] the focus in *Mathews v.*

221. *Id.* This conclusion illustrates the close connection between the intracontextual inquiry and the bias inquiry. Where no plausible link exists between the classified trait, the classification, and the context, the likely explanation for the line drawing at issue is impermissible bias regarding that trait. *See, e.g.*, *Cleburne Living Ctr.*, 473 U.S. at 450 (finding that, because no plausible explanation existed for denying a group home permit for the mentally retarded, the only possible explanation for the denial would have been the impermissible one of fear of, or discomfort with, people with mental retardation).

222. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion). *See also supra* note 82 and accompanying text.

223. *See Cleburne Living Ctr.*, 473 U.S. at 441 (quoting *Frontiero*, 411 U.S. at 686 (Brennan, J., plurality opinion)).

224. *Frontiero*, 411 U.S. at 686 (Brennan, J., plurality opinion) (footnote omitted). The Court has since backed away from this unequivocal endorsement of the irrelevance of sex in most settings. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 73 (2001) ("The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender."). *See also* Kahn v. Shevin, 416 U.S. 351, 356 n.10 (1974) ("Gender has never been rejected as an impermissible classification in all instances."). However, the Court also seems to believe that, in most circumstances, nothing about the status of being male or female would justify different treatment because of sex. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action.").

225. Mathews v. Lucas, 427 U.S. 495, 505 (1976). *See also* Reed v. Campbell, 476 U.S. 852, 854 n.5 (1986) (reiterating that nonmarital parentage has no connection to individual ability).

226. In *Mathews*, the Court specifically rejected the application of heightened scrutiny, holding that "the Act's discrimination between individuals on the basis of their legitimacy does not 'command

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Lucas on the irrelevance of illegitimacy to most regulatory contexts reinforces the importance of the intracontextual inquiry across levels of review.[227]

Likewise, at the most rigorous level of review of racial classifications, the Court's focus has been on the implausibility of any nonarbitrary connection existing between race and most contexts. As the Court has observed, racial classifications are "'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."[228]

Yet notably, the Court has also been willing to temper heightened scrutiny's acontextual insistence on rigorous review. In particular, in cases evaluating classifications based on alienage, which ordinarily receive strict scrutiny, the Court has determined "'that strict scrutiny is out of place when the restriction primarily serves a political function.'"[229] In these cases, rather than taking a categorical approach to alienage-based distinctions, the Court has engaged directly with the question of the relationship between citizenship status and the regulatory context. In *Foley v. Connelie*, for example, the Court held that rational basis review should apply to a citizenship requirement for police officers because of the nature of the position,[230] which authorizes officers "to exercise an almost infinite variety of discretionary [governmental] powers."[231] In *Bernal v. Fainter*, on the other hand, the Court applied strict scrutiny to a citizenship requirement for notaries public,[232] who are not "invested either with policymaking responsibility or broad discretion in the execution of public policy that requires the routine exercise of authority over individuals."[233] This

extraordinary protection from the majoritarian political process,' which our most exacting scrutiny would entail." *Mathews*, 427 U.S. at 506 (footnote and citations omitted). However, just over a decade later, the Court explicitly subjected classifications based on illegitimacy to heightened scrutiny and acknowledged that prior cases decided on rational basis grounds actually had applied heightened review as well. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (emphasizing that it "'is illogical'" to classify based on illegitimacy) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

227. *Mathews*, 427 U.S. at 505.

228. McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)). *Cf.* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (emphasizing that a race-based classification may be necessary to further a compelling governmental interest).

229. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (citing Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).

230. *See* Foley v. Connelie, 435 U.S. 291, 300 (1978).

231. *Id.* at 297.

232. *See* Bernal v. Fainter, 467 U.S. 216, 228 (1984).

233. *Id.* at 226–27. Although useful for illustrating the Court's ability to shift away from categorical review of a traditionally suspect classification, the Court's adjudication of the political function cases has been subject to criticism. *See* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 65 (2000) ("Lest you think this organizing concept sorts the cases in a

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context-dependent adjustment of the standard reinforces the value and viability of context-sensitive review as provided by the single standard proposed here.

Certainly, the way in which the Court typically reviews justifications for classifications subject to heightened scrutiny is not identical to its approach under rational basis review.[234] For example, among the subrules of the tiered scrutiny framework is the mandate that a classification's defender need not offer justifications for a classifying measure under rational basis review, unlike under heightened scrutiny, where the government must specify and defend, with evidence, its justifications for differential treatment.[235] In addition, heightened scrutiny demands that a

rational way, note also that the Court has held that a probation officer and a public school teacher fulfill important political functions fairly entrusted only to citizens, but a lawyer does not.") (footnotes omitted); Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1438 (1995) (reviewing criticisms of the political function exception).

234. *See* Nguyen v. INS, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting) (reviewing the distinctions between the tiers of review and noting that "[t]he most important difference between heightened scrutiny and rational basis review is . . . the required fit between the means employed and the ends served").

235. *Compare* United States v. Virginia, 518 U.S. 515, 533 (1996) (stating that the "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"), *with* Heller v. Doe, 509 U.S. 312, 320–21 (1993) ("A statute is presumed constitutional and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record.") (citations omitted) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)) (alteration in original).

Whether courts *should* engage in imagining justifications not proffered by a classification's defender has been the subject of some debate on the Court and among scholars. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 244–45 (1981) (Powell, J., dissenting) ("[T]he Court should receive with some skepticism *post hoc* hypotheses about legislative purpose . . . . [Otherwise] equal protection review [is no] more than 'a mere tautological recognition of the fact that Congress did what it intended to do.'") (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring)); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting) ("[T]his Court has frequently recognized that the actual purposes of Congress, rather than the *post hoc* justifications offered by Government attorneys, must be the primary basis for analysis under the rational-basis test."); Gunther, *supra* note 17, at 20–21, 44–48 (proffering a model for equal protection review that would foreclose judicial hypothesizing of justifications for classifications, and addressing potential difficulties with that prohibition). *But cf.* McGowan v. Maryland, 366 U.S. 420, 426 (1961) (finding that legislation is constitutional "if any state of facts reasonably may be conceived to justify it"); ELY, *supra* note 13, at 129 ("I'm skeptical that a method of forcing articulation of purposes can be developed that will be both workable and helpful."); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222, 233–35 (1976) (arguing that post hoc government justification should be permitted given the nature of the lawmaking process).

However, the freedom to hypothesize may be more significant in theory than in fact. Among the full set of cases analyzed in this Article in which the Court invalidated a classification under rational basis review, the Court never once invented its own justification, but looked only to those justifications proffered by the classification's defenders. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632, 635 (1996);

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justification be of greater significance and more closely related to the government's classification than is required by rational basis review.[236] These distinctions are not insignificant.[237] However, they also are not fatal to this part's argument that the core concerns of rational basis and heightened review overlap in certain important respects, including their shared commitment to assessing the relationship between potential justifications for a classification and the classification itself.[238]

One additional potential difficulty with this inquiry and with the extracontextual inquiry that follows is that "context" is not self-defining; courts have full discretion to determine the contours of the context in which the classification should be assessed.[239] For example, if the argument is that the government's preference for minority-owned subcontractors aims to redress past discrimination in the construction industry, the plaintiffs in *Adarand* could argue that it is the context of highway guardrail manufacture that is relevant, and not the context of the construction industry as a whole against which the remedial justification must be measured. Issue would thus be joined on this question of the context's scope, just as it would be on the question regarding the justification's plausibility. These struggles over the scope of review and the plausibility of a given justification, however, are no different from the struggles prompted by analysis under the three tiers, where, in each instance, the Court must determine the contextual parameters before assessing how the

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448–50 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973).

236. *Nguyen*, 533 U.S. at 76–78. *See also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (noting that strict scrutiny requires a classification to be narrowly tailored to further a compelling government interest); Shaw v. Reno, 509 U.S. 630, 643–44 (1993) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.") (internal quotation marks omitted) (citation omitted) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979)). Mere "plausibility" and "legitimacy" are essential, as they are under rational basis review, but they are not sufficient to satisfy the standard.

237. *See Nguyen*, 533 U.S. at 77–78 (O'Connor, J., dissenting). *See also supra* note 235 and accompanying text.

238. Further, in adopting the rational basis presumption of constitutionality, which is applied to almost all equal protection classifications, the proposed standard keeps with this Article's drawing from, rather than transforming of, extant doctrine to demonstrate the immediate need to change the tiered framework. In addition, the presumption's relative noninvasiveness minimizes the countermajoritarian difficulty and helps address the contention made in Part II.C: that heightened scrutiny's inflexibility has resulted in some of the problems now associated with the tiers. Moreover, as discussed below, *infra* text accompanying note 282, the common considerations of all levels of review would allow evidence to be introduced in response to the bias inquiry, so the value of an evidentiary analysis that comes with heightened scrutiny is not entirely lost in the proposed standard.

239. *See generally* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990) (analyzing the meaning of context in legal and theoretical debates).

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proffered justifications relate to those parameters.[240] Thus, while the proposed test does not resolve these judgment calls, it also does not exacerbate the need for the courts to exercise discretion. Further, by separating the intracontextual and extracontextual inquiries, the proposed standard actually may supply some guidance to constrain courts, which the current standard does not offer.[241]

D. EXTRACONTEXTUAL INQUIRY

Although the intracontextual inquiry likely will screen out the bulk of impermissible classifications, an inquiry into a justification's breadth also emerges as important to high and low levels of scrutiny. Specifically, this proposed inquiry would seek to determine whether the government interest in maintaining the classification[242] is specific to the relationship between the trait and the regulatory context at issue. If the justification for official distinctions based on a trait is so general that it would support discrimination based on that trait in virtually any context, it risks being used to support sweeping, indiscriminate trait-based classifications that deny status and benefits to trait bearers across the board.[243]

The Court developed this inquiry in some depth in *Zobel v. Williams* as it reviewed Alaska's system for distributing dividends from the oil pipeline that particularly benefited long-term state residents.[244] Alaska sought to justify its dividing line between long- and short-term residents "to reward citizens for past contributions,"[245] a perfectly benign-sounding

240. *Compare Nguyen*, 533 U.S. at 62, 73 (affirming the significance of physical differences between men and women in the context of a sex-based immigration law addressing the naturalization of a child born abroad), *with* United States v. Virginia, 518 U.S. 515, 531, 533–34 (1996) (finding that "[i]nherent differences between men and women" did not provide an "exceedingly persuasive justification" for discrimination based on sex in the school's admissions policy). *Compare Heller*, 509 U.S. at 314–15 (upholding a rule requiring a lower standard of proof for the involuntary civil commitment of individuals with mental retardation than for individuals with mental illness), *with Cleburne Living Ctr.*, 473 U.S. at 450 (rejecting a decision to impose different zoning rules on people with mental retardation than on others).

241. *See infra* note 323 and accompanying text (explaining that the inquiries' insistence on meaningful explanations for government action exposes courts' analyses to scrutiny in a way that the extant standard's emphasis on deference does not).

242. *See supra* note 235 and accompanying text (discussing judicial hypothesizing of justifications for classifications).

243. *See* Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 33 (1980) (arguing that "abstract goals defeat evaluative rationality"); Tussman & tenBroek, *supra* note 20, at 351–53 (analyzing overbroad classifications that burden individuals not associated with the "mischief" targeted by the law).

244. *See* Zobel v. Williams, 457 U.S. 55, 58–64 (1982).

245. *Id.* at 63.

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government interest. Rather than lauding Alaska's fair spirit, however, the Court examined whether the proffered justification was sufficiently and specifically connected to the context of the government line drawing at issue. If not, the Court explained, the reward-oriented justification could be used impermissibly to support different treatment of long- and short-term residents in other areas as well.

> If the states can make the amount of a cash dividend depend on length of residence, what would preclude varying university tuition on a sliding scale based on years of residence—or even limiting access to finite public facilities, eligibility for student loans, for civil service jobs, or for government contracts by length of domicile? Could states impose different taxes based on length of residence? Alaska's reasoning could open the door to state apportionment of other rights, benefits, and services according to length of residency. It would permit the states to divide citizens into expanding numbers of permanent classes. Such a result would be clearly impermissible.[246]

Because the state's justification provided a near-universal reason to treat long- and short-term residents differently instead of offering a specific connection to the dividend distribution plan, it was held invalid.[247]

In *Metropolitan Life Insurance Co. v. Ward*, the Court similarly examined Alabama's contention that its different tax treatment of in-state and out-of-state insurers was justified by its interest in the "promotion of domestic industry."[248] Like *Zobel*, this justification appeared at one level to be perfectly reasonable and, indeed, responsible on the part of the state's government. In applying rational basis review, however, the Court found that the goal of promoting domestic industry would support discrimination in instances far beyond the specific regulatory context at issue.[249] Affirming the use of a generalized domestic preference, the Court wrote, would give way to class legislation and "eviscerate the Equal Protection Clause in this context."[250] The Court added that "[a] State's natural inclination frequently would be to prefer domestic business over foreign. If we accept the State's view here, then any discriminatory tax would be valid

246. *Id.* at 64 (footnotes omitted).

247. *Id.* at 64–65. Likewise, in *Hooper v. Bernalillo County Assessor*, the Court rejected New Mexico's statute favoring a set of long-term resident Vietnam veterans who had settled in the state prior to a certain date, holding that the statute effectively "create[d] two tiers of resident Vietnam veterans" and that those who arrived after the May 1976 cut-off were deemed "in a sense 'second-class citizens.'" Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985).

248. Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 882 (1985).

249. *Id.*

250. *Id.*

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if the State could show it reasonably was intended to benefit domestic business."[251] Thus, even in its most lenient category of review, the Court has screened for and rejected noncontext-specific explanations for different treatment that could justify sweeping trait-based distinctions.

The rational basis inquiry into the potential breadth of a justification is reminiscent of the heightened scrutiny inquiry into how closely a classification is tailored to the achievement of proffered government interests.[252] In reviewing suspect and quasi-suspect classifications, the Court has insisted that a classification must be, respectively, "narrowly tailored to further [a compelling government] interest,"[253] or "substantially related to the achievement of [important government] objectives."[254] This insistence that the justification and classification be closely related is likewise addressed through the proposed standard's inquiry into the existence of a context-specific connection between the classified trait and the regulatory context. A generalized justification that would also support extracontextual distinctions would necessarily be inadequate, as it could not show sufficiently why the trait had to be singled out in the context at issue.

Still, as discussed above, qualitative differences exist between the heightened scrutiny and rational review standards.[255] However, within the differences is the shared concern that a justification for a trait-based distinction not be so general as to support wide-scale, acontextual burdening of a classified trait. This overlapping commitment reinforces the extracontextual inquiry's use in the proposed single standard, which aims to capture the shared concerns of each review level. Moreover, under rational basis review, the Court applies the extracontextual inquiry with

251. *Id.* (footnote omitted).

252. Given that the strong rational basis cases insist on context-limited justifications, it may be that Justice O'Connor's recent observation that "[t]he most important difference between heightened scrutiny and rational basis review . . . is the required fit between the means employed and the ends served" is somewhat overstated. Nguyen v. INS, 533 U.S. 53, 77 (2001) (O'Connor, J., dissenting).

253. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995). *See also* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (explaining that racial classifications "must be 'necessary . . . to the accomplishment' of" the government's compelling interest) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)) (alteration in original); Graham v. Richardson, 403 U.S. 306, 374–76 (1971) (articulating the same standard of review for classifications based on national origin).

254. United States v. Virginia, 518 U.S. 515, 533 (1996) (internal quotation marks omitted) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (quoting Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980))). *See also* Pickett v. Brown, 462 U.S. 1, 8 (1983) (requiring that classifications of nonmarital children bear "'an evident and substantial relation to the particular . . . interests [the] statute is designed to serve'") (alterations in original) (quoting United States v. Clark, 445 U.S. 23, 27 (1980)).

255. *See supra* notes 234–38 and accompanying text.

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sufficient force, such as in *Zobel*, to suggest that the tailoring distinction, although important, may not be as dispositive as has been suggested.[256]

But, you might say, we *want* to treat certain groups in a distinct manner across several legislative contexts out of special solicitude for them. Consider, for example, the singling out of the elderly in measures regarding healthcare, antidiscrimination policy, and transportation. The extracontextual inquiry would not, as a general rule, forbid this sort of favorable treatment in different arenas. Instead, it would ask, with respect to the classification in each arena, whether some connection exists between the group classified, the type of treatment imposed, and the context for the group's different treatment. This is no different from what equal protection review, at all levels of review, already demands. An argument can be made that the elderly have unique needs in each of the areas specified, to which legislation may respond.

The extracontextual problem would arise with a measure unrelated to the group's particular needs in that context. So, for example, a measure that restricted voting rights of the elderly would lack the sort of context-specific justification that a measure providing transportation assistance to the polls might have. Or, to take the case of classifications imposing burdens, the extracontextual inquiry would allow government to classify based on a disability in a way that would limit the rights of individuals with that disability in a variety of arenas, so long as the disability bore a specific relationship to the context being regulated.

In sum, at all levels of review, there is a consistent, significant concern with screening out justifications for classifications that are so general and noncontext-specific that they could be invoked to justify burdening a trait in all settings, effectively allowing for the creation of superior and inferior classes. Thus, this concern belongs within any single standard.

E. BIAS INQUIRY

In addition to the means-focused intracontextual and extracontextual inquiries,[257] a third inquiry that delves into the nature of the government interests is deliberately ends-focused in its demand that government not give legal effect to bias based on outmoded stereotypes about a particular

256. *See* Zobel v. Williams, 457 U.S. 55, 61–64 (1982) (emphasizing the lack of a sufficiently tailored connection between Alaska's stated interest and its pipeline dividend classification).

257. The two are means-focused through their emphasis on the quality of the connection between legislative means and government ends.

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class.[258] As the Court recently reiterated in the context of rational basis review, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[259] Whether characterized as "animosity,"[260] "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable [in the relevant context],"[261] or "irrational prejudice,"[262] the Court has firmly singled out a set of government interests that are illegitimate and, thus, impermissible, even under the most lenient review.

Not surprisingly, this condemnation under the rational basis standard of government ends that give effect to bias and stereotyping reappears in the heightened scrutiny context. As the Court put it in overturning a state court determination altering child custody based on the race of the mother's new spouse,[263] "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns."[264] And, in addressing a sex-based classification, the Court reviewed and condemned the "gross, stereotyped distinctions between the sexes" embodied in the statute's differential treatment of women and men.[265]

As with the intracontextual and extracontextual inquiries, the bias inquiry does not mechanically direct or otherwise eliminate the exercise of judgment regarding which aims reflect bias or illegitimate stereotyping and which do not. Indeed, the three strong rational basis cases that rest in part on the condemnation of bias offer only a minimalist roadmap for discerning improper purposes.[266] In *Romer*, for example, the Court discerned the

258. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634–35 (1996) (stating that imposing a "disadvantage . . . born of animosity toward the class of persons affected" offends the concept of equal protection of the law); J.E.B. v. Alabama, 511 U.S. 127, 138 (1994) ("We shall not accept as a defense to gender-based [differential treatment] the very stereotype the law condemns.") (internal quotation marks and citation omitted) (quoting Powers v. Ohio, 499 U.S. 400, 410 (1991)); *Palmore*, 466 U.S. at 433 ("The Constitution cannot control [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

259. *Romer*, 517 U.S. at 634 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (emphasis added) (brackets in original) (internal quotation marks omitted).

260. *Id.*

261. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985).

262. *Id.* at 450.

263. *Palmore*, 466 U.S. at 434.

264. *Id.* at 432.

265. Frontiero v. Richardson, 411 U.S. 677, 685 (1973) (Brennan, J., plurality opinion).

266. *See* Sunstein, *Leaving Things Undecided*, *supra* note 121, at 59–64 (discussing the Court's analysis of animus in *Moreno*, *Cleburne*, and *Romer*). Once an improper purpose is discerned, however, the Court will not engage in a process of conceiving justifications for a measure beyond those proffered by the government. *See* Romer v. Evans, 517 U.S. 620, 632–36 (1996) (considering only the

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presence of impermissible animus not from the social history surrounding the passage of Colorado's antigay amendment,[267] but from the utter lack of connection between the sweeping restriction on antidiscrimination measures protecting gay people and the justifications proffered for it.[268] In *Cleburne*, explicit evidence demonstrated consideration of improper purposes—unjustified negative attitudes toward or fear of those with mental retardation—but the Court's finding of "irrational prejudice" came only after its determination that none of the proffered rationales explained the permit denial.[269] The Court also had explicit evidence that the food stamp provision at issue in *U.S. Dep't of Agriculture v. Moreno* was aimed to keep "hippies" from participating in the food stamp program, which led it to condemn as impermissible the purpose "to harm a politically unpopular group"; however, it did not offer additional explanatory analysis for future cases.[270] The sole practical instruction to be drawn from these cases, then, is that although improper purposes are sometimes found because the classification lacks any meaningful connection to the justifications proffered, in some instances, as in *Moreno*, improper purposes may also be discerned from the legislative history or the context of a measure's passage.

The Court's heightened scrutiny decisions generally do not provide much additional guidance to distinguish impermissible stereotyping from permissible generalization, in part because the presence of bias is presumed or suspected whenever a suspect classification is made.[271] Some of the

justifications that were actually proffered by the government defending the classification); *Cleburne Living Ctr.*, 473 U.S. at 448–50 (same); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–38 (1973) (same). *Cf.* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977) ("When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference [ordinarily accorded government action] is no longer justified.") (footnote omitted); McGinnis v. Royster, 410 U.S. 263, 277 (1973) (considering the stated justifications for the legislative classification and noting that the Court itself had "supplied no imaginary basis or purpose for this statutory scheme").

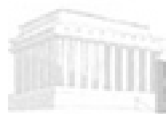
267. *See generally* KEEN & GOLDBERG, *supra* note 102 (detailing the social and cultural context in which antigay amendments passed in Colorado and elsewhere); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (analyzing the rhetoric used to promote antigay measures).

268. *Romer*, 517 U.S. at 632.

269. *Cleburne Living Ctr.*, 473 U.S. at 448–56.

270. *Moreno*, 413 U.S. at 534 ("The legislative history . . . indicates that [the] amendment was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program.") (citation omitted).

271. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion) ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."). *See also Cleburne Living Ctr.*, 473 U.S. at 441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cases, however, at least amplify the concern with stereotyping in ways that may provide guidance for the single standard's inquiry. For example, the Court has offered a variety of definitions of "stereotype" ranging from "a frame of mind resulting from irrational or uncritical analysis,"[272] to "mistaken beliefs" and manifestations of "society's accumulated myths and fears,"[273] to "generalizations about groups of people."[274] The case law also explains that some empirical support for a stereotype about a group does not necessarily justify the use of that generalization.[275] Beyond that, little is available to guide the assessment of a challenge to governmental stereotyping.

Instead, the Court's most extensive explanation of the improper purpose inquiry appears not in the rational basis or heightened scrutiny cases, but in the cases that screen facially neutral classifications for the element of improper motive required to make out an equal protection claim.[276] In explicating this discriminatory purpose requirement, the Court

("[S]tatutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women."). *Cf. id.* at 440 ("[Classifications] by race, alienage, or national origin. . . . are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . .").

272. Nguyen v. INS, 533 U.S. 53, 68 (2001).

273. Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999) (quoting Sch. Bd. v. Arline, 480 U.S. 273, 284 (1987)). The Court also acknowledged that "misperceptions often 'resul[t] from stereotypic assumptions not truly indicative of . . . individual ability.'" *Id.* (quoting 42 U.S.C. § 12101(a)(7) (1994)) (alteration and omission in original).

274. Miller v. Albright, 523 U.S. 420, 452 (1998) (O'Connor, J., concurring). For additional discussion of stereotypes, see *J.E.B. v. Alabama*, 511 U.S. 127, 142 n.14 (1994) ("intuitive and frequently erroneous biases"), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516 (1989) (Stevens, J., concurring in part and concurring in the judgment) (presumptions that are not "facts" or based in "reason"), *Cleburne Living Ctr.*, 473 U.S. at 441 ("outmoded notions of the relative capabilities of [a population]"), *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (perceptions lack "careful consideration of modern social conditions"), *Orr v. Orr*, 440 U.S. 268, 283 (1979) ("Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection.") (citation omitted); *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("[m]yths and purely habitual assumptions"), and *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam) (noting that the legislation in question did not embody stereotypes as an "'accidental byproduct of a traditional way of thinking about females'") (quoting Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)).

275. *See Nguyen*, 533 U.S. at 89 (O'Connor, J., dissenting) ("This Court has long recognized, however, that an impermissible stereotype may enjoy empirical support and thus be in a sense 'rational.'") (citations omitted); *J.E.B.*, 511 U.S. at 140 n.11 ("We have made abundantly clear in past cases that gender classifications . . . violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

276. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (elaborating on the test for discriminatory motive); Washington v. Davis, 426 U.S. 229, 240–42 (1976)

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in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* identified the following considerations, all of which emphasize the context in which the government decision is made and enforced: the effect of the official action,[277] the "historical background of the decision,"[278] "[t]he specific sequence of events leading up to the challenged decision,"[279] and "[t]he legislative or administrative history."[280]

These considerations allow not only inquiry into the presence of overtly hostile purposes, such as the anti-hippie statement in *Moreno*,[281] but also examination of the way in which the government reached its decision to classify. Thus, it is through the bias inquiry that a challenging party can introduce, for example, evidence demonstrating serious defects in the process that led to the classification's adoption, or evidence showing that a legislature could not reasonably have thought that a classification would serve its stated purpose.[282]

As with the intracontextual and extracontextual inquiries, the shared emphasis among all levels of scrutiny on rejecting classifications that serve hostile or bias-laden motives illustrates the centrality of this concern and, consequently, its importance to a unitary standard of review. Further, this focus on ferreting out illegitimate state interests complements the intracontextual plausibility inquiry and the extracontextual examination of a justification's breadth by allowing for assessment not only of the fit between the means and ends, but also of the ends themselves. In doing so, the three inquiries capture the multifaceted concerns with means *and* ends expressed at all points in the extant spectrum of equal protection review.

(setting forth the discriminatory motive requirement). See *supra* note 10 for critiques of the discriminatory motive requirement.

277. *Vill. of Arlington Heights*, 429 U.S. at 266.

278. *Id.* at 267.

279. *Id.*

280. *Id.* at 268. *See also* Reitman v. Mulkey, 387 U.S. 369, 373 (1967) (affirming that considerations of a measure's "'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment'" were appropriate in determining the presence of an improper purpose).

281. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (referencing the condemnation of hippies in the statute's legislative history).

282. As the Court has pointed out on numerous occasions, if a party demonstrates that the state's asserted justification is not credible, then that justification may be rejected. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 648 n.16 (1975) ("This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.") (citations omitted).

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F. THEORETICAL COMMITMENTS OF THE PROPOSED SINGLE STANDARD

A critical question remains regarding the type of equality that the proposed standard purports to deliver in the name of equal protection.[283] With this question in mind, this section will consider the standard's theoretical underpinnings. It will look first at the broader context of equality theory and then at several major theories regarding the purpose of rational basis review.

As an initial matter, the proposed standard embodies a view of the Equal Protection Clause as a principled constraint on a government's ability to differentiate between those within its jurisdiction.[284] For example, the intracontextual inquiry is fundamentally concerned with the comparative right of equality—that one should be subject only to restrictions also imposed on similarly situated counterparts.[285] Likewise, the bias inquiry forecloses a set of grounds for government action (i.e., the state may not give legal effect to popular dislike of a class of people).

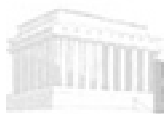
This commitment to ensuring comparative equality, however, does not necessarily locate the test in any particular place along the formal equality/antisubordination axis. Its inquiries share with formal equality theorists[286] the concern that explicit differential treatment of similarly

283. *See* Sunstein, *Sexual Orientation*, *supra* note 45, at 1174 (referring to different principles of equality). *Cf.* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1928–29 (2000) (commenting on the uncertain meaning of equality in history).

284. This premise implicitly rejects an argument advanced most prominently by Peter Westen, that equality "is an empty form having no substantive content." Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982).

285. *See* Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985) ("A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it."). Given the standard's insistence on nonarbitrary, nonbiased differentiations between classes, equality of respect would likely result from its application as well, although that is not the standard's central aim. *Cf.* C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983) (urging that the equality-of-respect model reflects the best substantive understanding of the equal protection guarantee); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 280–81 (1983) (maintaining that equality rhetoric has a substantive effect on legal rights and political culture).

286. For a general discussion of formal equality and other equality theories, see Hutchinson, *supra* note 13, at 619–27. For discussions of formal equality, see, for example, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979) (criticizing affirmative action initiatives as infringing the right to formal, equal treatment), Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 889–93 (1971) (making a formal equality argument in the context of support for the Equal Rights Amendment), Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1442–47 (2000) (defending the focus on formal equality violations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situated individuals, standing alone, may violate equality rights. Under the proposed standard, however, such a formal distinction could survive an equal protection challenge if plausibly explained by a context-specific and legitimate justification. This deliberate emphasis on contextualizing differential treatment has an affinity to antisubordination theory's concern with providing redress for substantive inequalities, even absent formal distinctions.[287] The bias inquiry, too, could be construed to find government action impermissible when it results in subordination of a socially vulnerable class. However, in keeping with this Article's aim to draw from, rather than transform, current doctrine,[288] the proposed test, like the Court's current test, does not take a position on a key question for antisubordination theorists: whether substantive inequalities give rise to actionable equal protection claims absent formal distinctions between classes.[289]

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in equal protection review of sex-based classifications), Robin L. West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 53–60 (1990) (discussing the rationality model of equality), and Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 328 (1984–85) (addressing formal equality arguments while defending the "equal treatment model," which would permit special treatment in response to unique needs to fulfill the equal protection guarantee).

287. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–45 (1987) (addressing the sameness/difference and dominance theories for analyzing discrimination). *See generally* Becker, *supra* note 69 (discussing the evolution of feminist thought regarding legal rights); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating an antisubordination analysis); Fiss, *supra* note 13, at 123 (arguing for a "group-disadvantaging principle," which would reconcile doctrinal conflicts in the affirmative action debate); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991) (examining the legal implications of women's systematic subordination). *Cf.* Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22 (criticizing liberal feminism and dominance feminism as "empty at their core").

288. *See supra* text accompanying note 13.

289. *See* Washington v. Davis, 426 U.S. 229, 237–39 (1976). *Davis* currently controls this question by requiring an equal protection claimant to prove discriminatory intent absent formal discrimination. *Id.* at 237–40. The tiered framework, however, neither requires nor forbids this approach, which has been broadly criticized. *See supra* notes 10, 276–80 and accompanying text. For purposes of evaluating the proposed single standard, I do not enter this debate, but simply work within the governing doctrine. With respect to the related issue of the level of government involvement required for an equal protection claim to be made, I similarly accept, for purposes of discussion here, the Court's current narrow construction of the state action requirement. *See* United States v. Morrison, 529 U.S. 598, 621 (2000) ("Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."). Extensive transformative critiques have been well advanced by others. *See, e.g.*, William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 171–74, 217–22 (2001) (advancing a broader interpretation of the state action requirement than is endorsed by the Court). *Cf.* The Civil Rights Cases, 109 U.S. 3, 46 (1883) (Harlan, J., dissenting). According to Justice Harlan,

> The citizenship thus acquired, by that race, in virtue of an affirmative grant from the nation, may be protected, not alone by the judicial branch of the government, but by congressional legislation of a primary direct character; this, because the power of congress is not restricted

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In addition to the formalist and antisubordination perspectives on equality, other significant equality theories have identified conditions to be considered in determining whether a particular classification violates the Equal Protection Clause. Suggestions have been made that equal protection violations should be found when nonpublic values are served,[290] where political representation of the burdened group is compromised,[291] or when government cannot plausibly explain the distinctions it has drawn.[292] The remainder of this section will consider whether the proposed standard does, or should, take these equality theories into account.[293]

The public-regarding values argument maintains that legislators can and should act in ways to serve general public goals, but may not, consistent with the Equal Protection Clause, act in an effort to reward or satisfy demands of an "interest group."[294] In other words, the argument is that the scope of permissible trait-based distinctions is limited to public-regarding values only. Conversely, naked preferences in lawmaking for the agendas of influential interest groups are impermissible, Cass Sunstein has argued, because action based on these preferences, without more, suggests the legislature's disregard for the need to be nonarbitrary and to consider the reasonableness of its acts in context.[295] While not specifically embracing the three tiers, Sunstein's argument also appears to accept the rationality/heightened scrutiny distinction as fitting "nicely with the requirement that a litigant show that the government decisionmaker acted out of an impermissible motivation."[296] Rather than objecting to the

> to the enforcement of prohibitions upon State laws or State action. . . . It is, therefore, a grave misconception to suppose that the fifth section of the amendment has reference exclusively to express prohibitions upon State laws or State action.

Id.

290. *See, e.g.*, Sunstein, *Naked Preferences*, *supra* note 40, at 1713.

291. *See* ELY, *supra* note 13, at 86–87, 160–70.

292. *See* Gunther, *supra* note 17, at 20–24.

293. As Tracy Higgins points out, these theories, including particularly those of Ely and Sunstein, presume that equality exists among individuals except in unusual circumstances, which the theories then seek to correct. *See* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1697–1702 (1997). As Higgins argues, this assumption of preexisting equality fails to recognize the negative effects of nonstate actors on access to power, individual autonomy, and the possibility of equality itself. *Id.* As this part discusses below, the proposed standard refuses to assume either that a particular class of individuals is uniquely at risk for equality injuries or that a preference for a particular interest group necessarily poses a danger to securing constitutional equality. Indeed, in attempting to ensure a contextualized inquiry for differential treatment, the proposed standard may be responsive to some of Higgins's concerns by leaving room for considering the setting in which the governmental distinction between classes occurs. *Id.*

294. *See* Sunstein, *Naked Preferences*, *supra* note 40, at 1691.

295. *See id.* at 1690–91, 1712–13.

296. *Id.* at 1714 (footnote omitted).

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differences in scrutiny, Sunstein sees in the three tiers a reflection of his core view that equal protection, like other constitutional doctrines, is fundamentally concerned with ensuring that government "classifications rest on something other than a naked preference for one person or group over another."[297] In contrast, while the proposed standard demands a plausible, context-specific, and nonbiased reason for a classification, nothing in the proposed test precludes legislators from enacting laws in response to interest group requests. All that is required is that the line relate in some legitimate, limited way to the trait that is the basis for the classification.

Consider the river pilots who challenged New Orleans's licensing system, which effectively disabled nonrelatives of current license holders from obtaining pilotage licenses.[298] The naked preferences theory suggests that the pilots should prevail in their challenge if they persuade a court that the nepotism system resulted from a legislative effort to preserve the rights of a small group of people.[299] Under the proposed single standard, the fact that the license distribution scheme might have been the product of a political favor would not play into a court's equal protection analysis. So long as no showing of bias toward the nonrelatives could be advanced, the critical questions would be whether the distinction between relatives and nonrelatives plausibly related to the safe operation of boats on the Mississippi River, and whether the justification for the distinction was context-specific. Similarly, a restriction forbidding opticians but not optometrists from replacing lenses in glasses would not fail because it lacked a "public" purpose; if a plausible connection could be found between the restriction and an optician's training, the restriction could stand.[300]

Although the proposed test does not embrace Sunstein's insistence on public-regarding values, it does share "the central constitutional concern of ensuring against capture of government power by faction"[301] in its

297. *Id.* at 1713.

298. *See* Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 555 (1947).

299. *See* Sunstein, *Naked Preferences*, *supra* note 40, at 1713–17.

300. Richard Klarman has suggested that *Lee Optical* illustrates the Court's rejection of a theory that public-regarding values must exist to support classifying legislation. *See* Klarman, *supra* note 52, at 249–50. Whether a relevant and nonoverbroad justification exists in either case is debatable, even under the single standard, which suggests that the unitary standard might not be of great predictive value in deciding borderline cases, even while it clarifies the inquiry. Questions regarding the proposed standard's utility will be addressed in greater depth in Part V.

301. *See* Sunstein, *Naked Preferences*, *supra* note 40, at 1690 (footnote omitted). *See also* THE FEDERALIST NOS. 10, 51 (James Madison).

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insistence on meaningful review of the link between the classification and its context.[302] Indeed, class legislation is the perfect legislative embodiment of factional control of government, with differential treatment imposed simply and freely at the will of the ruling class without the need for justification. Rather than serving as a rubber stamp for faction-led class legislation, the proposed single standard takes seriously the requirement that a legitimate government interest actually explain why a group has been singled out from among all others for the classification's burden, even while deferring, as a general matter, to the government's need to classify.

The representation-regarding theory, most prominently advanced by John Hart Ely, shifts focus away from the legislature's specific actions on behalf of particular interest groups to the legislative process itself.[303] This argument contends that inequalities result when a group's opportunity to participate in the political process is improperly barred or impeded in some fashion.[304] In such cases, legislation hostile toward the marginalized class can be promoted and passed without significant, effective opposition.[305] Ely has contended that where this type of process "failure" occurs, close scrutiny of legislative classifications affecting that class is necessary to ensure that the failure does not result in biased lawmaking.[306] In other words, the equal protection guarantee requires that "courts should protect those who can't protect themselves politically."[307]

This argument also embraces the concept that certain classifications be treated as suspect and others not; its critical focus aims instead at refining the jurisprudence related to each category. With respect to suspect classification, for example, Ely commented that "one set of classifications we should treat as suspicious are those that disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure."[308]

302. Like Sunstein's anticaste equality theory, which is concerned with legislatures systematically disadvantaging groups of individuals who share "highly visible and morally irrelevant differences" from the dominant class, the proposed standard shares a significant commitment to eradicating class-based prejudice. *See* Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994). Yet the proposed theory diverges from the anticaste principle in expressing concern not just with actual caste-like treatment of groups, but also with more limited distinctions between groups for generalized, noncontext-specific reasons.

303. *See* ELY, *supra* note 13, at 157–58.

304. *See id.* at 152–53.

305. *See id.*

306. *See id.* at 152–53, 157.

307. *Id.* at 152.

308. *Id.* at 153.

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As discussed at length above, the proposed test, unlike the representation-regarding theory, does not treat distinct levels of heightened scrutiny as essential to check against the importation of bias or arbitrariness into law. Nor does it look to inequities in representation as clues to violations. Yet the two are, in many ways, interrelated. Legislative burdens are far more likely to be imposed on classes that are marginalized in the political process simply because well-represented classes, and classes able to gain allies, can advocate successfully against being unduly burdened. Politically vulnerable classes, on the other hand, become saddled with burdens not related to their common trait's relevance to the legislative context, but to their lack of political power. Indeed, it is inequities in representation that lay the groundwork for class legislation in the first place.[309] Put another way, an improper process is unlikely to produce legislation that can satisfy the proposed standard's dual insistence on nonarbitrariness and absence of bias.[310]

Gunther's advocacy for consistent "bite" in rational basis review follows yet a different approach, pressing for more serious, less deferential review even at the lowest level of the three tiers.[311] His "intensified means scrutiny,"[312] for example, proposes that "the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends."[313] While pressing the Court to narrow the "wide gap" between minimal and strict scrutiny,[314] Gunther did not, however, support "abandoning the strict," and specifically reinforced that his "expanded reasonable means inquiry would not mean the end of strict scrutiny."[315] To realize this goal of regular, meaningful rationality review, Gunther proposed that the Court should no longer hypothesize government interests for classifications; instead, it

309. For a discussion of class legislation, see *supra* notes 193–96 and accompanying text.

310. As the Court itself has recognized, only absent "some reason to infer antipathy" can we assume that "improvident decisions will eventually be rectified by the democratic process." Vance v. Bradley, 440 U.S. 93, 97 (1979) (footnote omitted). In other words, a malfunctioning democratic process of the sort Ely feared would tend to produce classifying legislation benefiting the dominant class without regard to whether a meaningful, legitimate basis existed on which to burden that class's socially vulnerable counterparts. *See* ELY, *supra* note 13, at 152–79.

311. *See* Gunther, *supra* note 17, at 20–24.

312. *Id.* at 24.

313. *Id.* at 20.

314. *Id.* at 24. Under Gunther's model, "the Court would continue to demand that the means be more than reasonable," although Gunther suggested that strict scrutiny had likely reached the limits of its applicability. *Id.* ("The Burger Court is not likely to expand the list of such interests and classifications significantly.").

315. *Id.*

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should leave it to government to identify interests that classifying legislation might serve.[316]

The standard proposed here similarly seeks to achieve meaningful review of all classifications, including those traditionally assigned the weakest version of scrutiny, while encouraging appropriate legislative deference.[317] The proposed test, however, does not adopt Gunther's suggested ban on judicial hypothesizing of justifications for classifying legislation. This is not because the concept of the bar on judges conceiving justifications for challenged laws lacks merit. To the contrary, the bar could reinforce separation-of-powers ideals given the awkwardness of the judiciary conceiving justifications for legislation it is asked to invalidate. But the very nature of our political process, with legislative enactments frequently bearing little relation to input from constituents received by elected representatives, makes the entire process unsusceptible to accurate discernment of genuine legislative interests.[318] Further still, the political trading and compromise at the center of the political process make it unlikely at best that legislators themselves could regularly and honestly articulate their specific interests in enacting classifying legislation.[319]

Beyond these points of coherence and difference with existing theories, the basic question remains whether the proposed standard provides for any meaningful limits on the power of an unelected judiciary to review popularly approved legislation.[320] The standard, after all, does

316. *Id.* at 46–47. Gunther's "relatively vigorous scrutiny" would contrast with the "extreme deference" of the Warren era by having "the Court assess the means in terms of legislative purposes that have substantial basis in actuality, not merely in conjecture." *Id.* at 21.

> The model asks that the Court assess the rationality of the means in terms of the state's purposes, rather than hypothesizing conceivable justifications on its own initiative. . . . If the Court were to require an articulation of purpose from an authoritative state source, rather than hypothesizing one on its own, there would at least be indirect pressure on the legislature to state its own reasons for selecting particular means and classifications.

Id. at 46–47.

317. *See id.* at 24. Gunther, however, specifically accepted the inevitability of multiple review standards. *See id.* ("[R]easonable means inquiry would not mean the end of strict scrutiny. In the context of fundamental interests or suspect classifications, the Court would continue to demand that the means be more than reasonable—*e.g.*, that they be 'necessary,' or the 'least restrictive' ones.").

318. *See supra* note 235 and accompanying text (discussing the debate regarding post hoc justifications). *See also* Archibald Cox, *Democracy and Distrust: A Theory of Judicial Review*, 94 HARV. L. REV. 700, 712–13 (1981) (book review) (same).

319. Further, Ely's concern with judicial hypothesizing may present a greater worry in theory than in practice. In applying rational basis review, the Court generally has not been willing to conceive additional justifications or otherwise sustain a classification after finding that any of the justifications offered were either too attenuated or illegitimate. *See supra* note 235 (discussing the Court's reasoning in three such cases).

320. Regardless of the underlying theory, the Court historically has had little difficulty reviewing and invalidating both legislative and popularly initiated enactments, notwithstanding the

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not constrain the unelected judiciary to a mechanistic, predictable review. Instead, it calls for judgments about the plausibility and specificity of, and incorporation of bias or stereotyping into, proposed explanations for a classification.

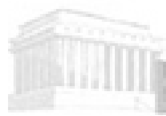
The single standard's acceptance of the exercise of countermajoritarian judicial power can be defended in two ways: as necessary to popular sovereignty, and as providing a stronger constraint on judges' passion choices than the current tiered structure. With respect to popular sovereignty, judicial intervention ensures at least the rudimentary equal treatment of similarly situated classes that is necessary whether one believes that equal citizenship is an essential precondition to healthy governance[321] or that a political system must offer equal treatment and opportunity for the mercenary purpose of maintaining legitimacy with its constituency.[322]

The single standard's demand for a context-specific justification would serve this legitimizing function both by invalidating broad exclusions of social groups that would directly cast doubt on a government's integrity and by striking down classifications that could be the seedbed for generalized trait-based differential treatment, such as the noncontext-specific justification for distinguishing between long- and short-term residents in *Zobel*. Similarly, the standard's insistence on a plausible, nonarbitrary and nonbiased justification for government action would protect against unwarranted exclusions of vulnerable groups from full civic and economic participation in a way that could negatively affect a

countermajoritarian difficulty. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 601–02 (2000) (striking down portions of the Violence Against Women Act, which was enacted by Congress); Romer v. Evans, 517 U.S. 620, 623–24, 635 (1996) (finding a statewide voter referendum unconstitutional because it classified lesbians and gay men so as to "make them unequal to everyone else"); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 483, 487 (1982) (voiding an initiative that sought to circumvent school desegregation); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 718–19, 739 (1964) (striking down a statewide voter referendum regarding a congressional reapportionment scheme that resulted in certain populations having unequal political representation). *See generally* BICKEL, *supra* note 12 (discussing the role and propriety of judicial review).

321. As used here, citizenship refers to the opportunity to participate fully in a society's political and social life; it does not refer to legal citizenship. The proposed theory, at a minimum, would require the absence of a fixed group of "secondary citizens." *See, e.g.*, *Romer*, 517 U.S. at 635 ("A State cannot so deem a class of persons a stranger to its laws."); Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982) ("Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish.").

322. *See* Abner S. Greene, *The Irreducible Constitution*, 7 J. CONTEMP. LEGAL ISSUES 293, 295 (1996) (elaborating on the different views of "rights-foundationalists" and Democrats with respect to the legitimacy of the American constitutional order).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government's credibility. In this regard, the proposed standard's scope of judicial oversight simply ensures the minimal protection necessary for a legitimate, functional popular sovereignty.

Indeed, the proposed standard's disinterest in the politics behind legislative action, absent a showing of bias, guards against undue invasiveness by the judiciary.[323] For example, although political preferences for particular groups might have prompted the residency-based restrictions in *Zobel* and the optician's restrictions in *Lee Optical*, the two cases have fundamentally different equal protection implications with respect to the countermajoritarian exercise of judicial power. It is not difficult to imagine the power of the optometrists' lobby in *Lee Optical*. It is also possible that in *Zobel*, even short-term Alaska residents might have favored the length-of-residency distribution system in a strictly political effort to curry favor for some other purpose. Yet, under the proposed standard, the Alaska restriction would warrant judicial intervention while the *Lee Optical* restriction might not—not because Alaska put into law the runaway private preferences of long-term residents, but because it had the underlying potential to support pervasive residency-based distinctions that could, in turn, either incapacitate the democratic process or at least undermine its legitimacy.

Beyond limiting incursions into government action to those implicating popular sovereignty theories, the proposed standard also imposes significant limits on the passion choices typically involved in judicial review. Although no test can completely remove the possibility of judges' personal preferences shaping their evaluations of challenged measures, the proposed standard seeks to force those preferences into the open by requiring that specific explanations for a classification be discussed explicitly. The preferences and passion choices, formerly cloaked in the garb of "deference to the legislature," must be disclosed and explained. To the extent that this increased exposure encourages more careful contextual reasoning, the single standard presents a potentially powerful constraint or, at a minimum, a sharply focused lens through which others can evaluate and critique a court's analysis.

323. The proposed standard could be said to allow intervention in spite of, rather than because of, popular support for a measure. *Cf.* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 267, 279–81 (1979) (upholding a veterans' preference on the rationale that the law was enacted in spite of, rather than because of, its negative effect on women's employment opportunities).

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V. APPLYING AND ASSESSING THE PROPOSED SINGLE STANDARD

Building on the groundwork laid above, this part will apply the proposed standard to equal protection case law to assess the standard's viability. One obvious question for this assessment is whether applying the single standard would so enhance the rigor of review as to require sweeping invalidations of rational basis classifications traditionally deemed to be constitutional. Another question is whether the standard would so weaken judicial review of traditionally suspect and quasi-suspect classifications as to allow historically invalid classifications to stand. And finally, assuming that the outcome, if not the precise analysis, of most equal protection cases would remain static, what value does the test bring as a new analytic tool?

To address these questions, this part will examine existing equal protection jurisprudence, applying the standard first to a selection of rational basis cases and then to a set of intermediate and strict scrutiny decisions. As the applications will demonstrate, the proposed test does not dramatically alter the outcomes of many cases, although it would revamp the analyses used and cause shifts where the Court, in the name of deference, did not carefully review classifications that, on closer look, would be impermissible. This result should not be surprising because the test encompasses elements already contained in rational basis review and heightened scrutiny. However, the proposed test's context sensitivity would have an effect on a particular subset of equal protection cases: those dealing with classifications created for remedial purposes.

The test would have the additional effect, identified above in Part IV, of forcing into the open, and possibly thereby constraining, judicial passion choices that are now easily masked by reference either to the deferential demands of rational basis review or the rigorous demands of strict scrutiny.[324] With its emphasis on a context-sensitive evaluation of *all* classifications, the proposed standard's attempt to cut a path between the heavy deference and close oversight currently practiced in the name of equal protection review offers some hope of escaping the extant mechanistic traps. Through its unified application to all classifications, the proposed standard also may realize equal protection's aim to screen out not

324. Again, of course, the effectiveness of any doctrinal test in constraining judicial passion choices depends on the willingness and ability of decisionmakers to work with the test instead of against it. No approach allowing any room for judgment can absolutely prevent a judge from disregarding the constraint and following his or her ideological agenda.

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only those classifications that impose wholesale disadvantage on a group, but also those less shocking measures, like Alaska's in *Zobel*, that quietly disadvantage a class of people in a way that has the potential to give rise to secondary citizenship categories.

A. THE RATIONAL BASIS CASES REVISITED UNDER THE SINGLE STANDARD

Because the vast majority of rational basis cases sustain the classification that is challenged, the pool of cases against which to test whether the proposed standard will lead to increased judicial intervention is large. Although this Article will not attempt to reconsider all of these cases, a few of the most deferential will be reviewed here. The single standard's application to the classifications at issue demonstrates that the proposal contains sufficient checks to allow for meaningful review, yet remains in balance with the Court's deferential stance regarding legislative action.

The most frequently cited of the weak rational basis cases, *Lee Optical*, provides a good starting point for the proposed standard's evaluation.[325] In *Lee Optical*, the Court upheld against equal protection and due process challenges an Oklahoma statute that effectively prohibited opticians from fitting and adjusting eyeglass lenses without a prescription from a licensed ophthalmologist or optometrist.[326] The opinion contains no references to articulated state interests; the Court simply hypothesized that the occasional need for prescriptions related to fittings of glasses or lens duplication "was sufficient to justify" the distinction between opticians and other eye care specialists.[327]

How would this differential treatment of opticians fare under the proposed single standard? The initial inquiry would be intracontextual:

325. *See* Sunstein, *Naked Preferences*, *supra* note 40, at 1713 (describing *Lee Optical* as "the most familiar example" of rational basis review).

326. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 484–85, 491 (1955). *Lee Optical* is perhaps not the ideal example of a deferential case because its deferential posture grew explicitly out of the shadow of *Lochner*. *See id.* at 488 ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.") (citation to numerous post-*Lochner* decisions omitted). Still, the case merits consideration here because the Court regularly relies on *Lee Optical*'s deferential formulation. *See, e.g.*, *Romer*, 517 U.S. at 632; FCC v. Beach Communications, Inc., 508 U.S. 307, 316 (1993); Vance v. Bradley, 440 U.S. 93, 111 (1979); Graham v. Richardson, 403 U.S. 365, 371 (1971); Dandridge v. Williams, 397 U.S. 471, 484 (1970).

327. *See Lee Optical of Okla.*, 348 U.S. at 487.

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whether the government interest can, with sufficient specificity, explain why opticians are singled out for the limitations imposed from among the set of professionals who work with eye wear.[328] The explanation accepted by the Court—that the expertise of an ophthalmologist or optometrist is required sufficiently often to ensure proper preparation and adjustment of eyeglasses—does explain the singling out of opticians in this context, as opticians have different and relatively less relevant specialized training than the other eyesight professionals identified in the statute.[329] Further, the training-related justification is not overly broad in a manner that would justify a generalized or across-the-board burdensome classification of opticians per the extracontextual inquiry. Absent an indication that bias, archaic stereotypes, or hostility motivated the classification,[330] the result under the new analysis, consistent with the result of the actual case, would be to uphold Oklahoma's classification no matter how "unwise, improvident, or out of harmony with a particular school of thought."[331] Thus, the single standard's insistence on meaningful review would not require the invalidation of a legislative distinction that did not amount to class legislation, even if the distinction largely served economic interests advanced by a particular influential sector of a community.

Dandridge v. Williams presents a more challenging case from humanitarian and theoretical standpoints.[332] The regulation at issue capped welfare benefits provided through the Aid to Families with Dependent Children program so that families with many children received the same grant as families with few children, leaving children in large families foreclosed from resources even though they fell below the "standard of need" established by the state.[333] With respect to government goals, the Court found that the state's "interest in encouraging employment and in avoiding discrimination between welfare families and the families of the

328. Although the statute formally distinguished ophthalmologists and optometrists from all others, in operation, the classification imposed its burden on opticians, who were the only other professional group licensed to deal with eye wear.

329. *See Lee Optical of Okla.*, 348 U.S. at 487.

330. It is possible that through the bias inquiry the plaintiffs in *Lee Optical* could have demonstrated that although the rationale was plausible as a formal, logical matter, the gross overinclusiveness of the classification strained the rationale's credibility and suggested that the legislature had acted with an improper purpose. However, the Supreme Court did not identify as significant any record evidence on this point. *See id.* at 489 ("For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch.").

331. *See id.* at 488 (citation omitted).

332. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

333. *Id.* at 473–75.

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working poor" justified the cap on grants.[334] Elaborating, the Court explained that

> [b]y combining a limit on the recipient's grant with permission to retain money earned, without reduction in the amount of the grant, Maryland provides an incentive to seek gainful employment. And by keying the maximum family AFDC grants to the minimum wage a steadily employed head of a household receives, the State maintains some semblance of an equitable balance between families on welfare and those supported by an employed breadwinner.[335]

Although the Court upheld the regulation, it explicitly reserved judgment regarding the law's wisdom and humanity.[336] Stressing that the legislature rather than the judiciary is best suited to resolve challenging societal problems,[337] the Court appeared to distance itself from the consequences of its ruling. Over a vigorous dissent by Justice Marshall, the classification was permitted to stand.[338]

As with *Lee Optical*, the analysis under the proposed standard would turn on whether a plausible, context-specific, and nonbiased explanation existed for Maryland's distinction in treatment of small families, which would receive funding to the full extent of their "standard of need," and large families, which would not. Instead of considering whether the grant limitation provided an incentive to seek gainful employment, the critical question would be whether the goal of encouraging employment could explain the different funding for small and large families. And with respect to the equitable balance argument, the proposed standard would again seek to determine whether that goal could plausibly *explain* the statutory distinction.

Viewed in this light, the state's justifications would face greater difficulty. As Justice Marshall focused the question,

> Persons who are concededly similarly situated (dependent children and their families), are not afforded equal, or even approximately equal, treatment under the maximum grant regulation. Subsistence benefits are

334. *Id.* at 486. The Court appeared to accept Maryland's contention that neither bias nor animus motivated the classification. *See id.* at 483 ("Maryland says that its maximum grant regulation is wholly free of any invidiously discriminatory purpose or effect . . . .").

335. *Id.* at 486 (footnote omitted).

336. *Id.* at 487 ("We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised.").

337. *See id.* ("But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.").

338. *See id.*; *id.* at 508–30 (Marshall, J., dissenting).

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> paid with respect to some needy dependent children; nothing is paid with respect to others. Some needy families receive full subsistence assistance as calculated by the State; the assistance paid to other families is grossly below their similarly calculated needs.[339]

Notwithstanding Justice Marshall's sharp picture of the classification, a majority of the Court accepted two nonresponsive justifications.[340] The first of the accepted regulatory rationales—providing welfare recipients with an incentive to seek gainful employment—may well be an important government interest.[341] However, it does not explain why families with several children would be so encouraged but families with fewer children would not. Without a rational basis test insistent on identification of a government interest that could explain why one group is being treated differently from another, the Court failed to see, or at least to be troubled by, the lack of connection between the justifications and the classification itself.[342] After all, the general goals of encouraging employment among unemployed heads of household and maintaining balance between the income of those receiving public assistance and those in the workforce do not explain why some families receive funds below their standard of need and others do not. Regardless of how laudable, this interest does not explain the line drawn by the state, as equal protection requires.

The state's other justification—creating some parity between those employed and those receiving public assistance—may be similarly flawed, though the analysis is somewhat more complex. Parity describes what the

339. *Id.* at 518 (Marshall, J., dissenting).

340. *See id.* at 486–87.

341. *Id.* at 486.

342. Perhaps if the case were relitigated, the state might identify distinctions between large and small families that would be meaningful in the context of public assistance and related legitimate state interests. One of the difficulties for the state is that the regulation was apparently conceived in an effort to save funds. *See id.* at 529 (Marshall, J., dissenting) ("[I]n the early stages of this litigation the State virtually conceded that it set out to limit the total cost of the program along the path of least resistance."). Although governments can certainly engage in line drawing in an effort to save funds, conservation of resources is rarely sufficient, on its own, to explain why government may burden one group rather than another. *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 506 (1999) (recognizing cost savings as a legitimate government interest, but not as a sufficient explanation for the infringement of rights); Graham v. Richardson, 403 U.S. 365, 375 (1971) ("The saving of welfare costs cannot justify an otherwise invidious classification.") (internal quotation marks omitted) (quoting Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (recognizing a valid state interest in fiscal integrity, but specifying that a state cannot preserve resources "by invidious distinctions between classes of its citizens")).

Alternatively, a distinction between large and small families in a government-sponsored program to provide support for dependent children simply may be the sort of class legislation that the Equal Protection Clause cannot tolerate, because no sufficiently specific and plausible justification can explain the different treatment.

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benefits cap achieved; it is not a statement of a government goal. In other words, the government achieved parity by roughly equalizing minimum wage earnings with the public assistance cap. The relevant equal protection question, however, concerns not what the government achieved, but the reason why the government chose to achieve parity in a way that burdened large families. An answer might be that the purpose of limiting benefits to the point of parity with minimum wage earnings is to discourage families from relying on benefits and encourage them to find employment. (If paid employment provides a greater level of support than public assistance, benefits recipients will presumably attempt to find work.) When the actual justification is disentangled from the parity description, it brings the analysis back to the flaw already identified: that the encouragement of employment does not explain why large families are singled out. Although traditional rational basis analysis, properly applied, should recognize the inadequacy of this justification, the tendency toward deferential embrace of government interests sometimes results in this type of imprecise analysis.

Returning from *Dandridge* to a more recent, and more typical, business classification, the Court's decision in *FCC v. Beach Communications, Inc.* illustrates that in the ordinary business regulation case subjected to rational basis review,[343] the proposed standard would not likely alter the outcome, even if it reshaped the analysis.[344] At issue in *Beach Communications* was the constitutionality of a regulation distinguishing between cable television systems that serve buildings under separate ownership and management, and those that serve buildings under common ownership and management.[345]

Here, the Court's analysis actually paralleled the analysis that would be required under the single standard.[346] In evaluating the classification, the Court considered potential explanations for the difference in treatment that had been developed from a regulatory efficiency model. The model maintained that commonly owned and managed buildings would likely be more limited in size, and that their residents would be more likely to negotiate effectively through the common management than residents of separately owned buildings, thereby avoiding situations in which operators monopolize control over access to cable television.[347] In this case, unlike

343. *See* FCC v. Beach Communications, Inc., 508 U.S. 307 (1993).
344. *Cf. id.*
345. *Id.* at 309.
346. *See id.* at 313–20.
347. *Id.* at 318–20.

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Dandridge, the Court's inquiry focused on the potential legitimate explanations for the classification that related directly to the differences between commonly and separately owned buildings.[348] By ensuring that the Federal Communications Commission could distinguish meaningfully between different types of cable operations to serve a plausible, context-specific goal, the Court applied essentially the same analysis that the single standard would require.[349] Moreover, analysis under the single standard similarly would proceed noninvasively, respectful of the deference value touted so highly by the Court in that case.[350]

These applications help make apparent that in the majority of equal protection cases involving distinctions that affect business operations, courts are already engaged in exploring whether the challenged differential treatment can be explained plausibly in context. Even where the discussion is less than precise and the decision is awash in the language of deference, the core equal protection analysis remains focused on the classification, which is likewise the focus of the proposed standard.

Still, the structure of the proposed standard helps ensure that courts consider whether a meaningful connection exists between governments' interests and actions, which the extant standard—with its prioritization of deference—sometimes elides. At the same time, in reinforcing judicial focus on the actual distinction being challenged, the single standard avoids taking on the trappings of heightened scrutiny that would render it unduly invasive and nearly impossible to satisfy.

At the same time, the test cannot provide sure answers to how courts will resolve the often fierce debate regarding whether a trait bears a sufficiently plausible relationship to a regulatory context to justify the differential treatment at issue. So, for example, this test will not magically bring unanimity to a court seeking to decide whether a state may maintain separate civil commitment rules for people with mental retardation and people with mental illness,[351] or even whether a health-related concern plausibly explains banning opticians from replacing lenses without a prescription.[352]

348. *Compare* Dandridge v. Williams, 397 U.S. 471, 518 (1970) (Marshall, J., dissenting) (noting that similarly situated people were being treated differently), *with Beach Communications*, 508 U.S. at 312, 316–20 (sustaining different rules because of differences between the regulated entities).

349. *See Beach Communications*, 508 U.S. at 316–20.

350. *See id.* at 313–16.

351. *See* Heller v. Doe, 509 U.S. 312, 333–34 (1993).

352. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955).

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This inability to provide a high level of predictability to courts engaged in review of legislative classifications need not be considered a fatal flaw. To the extent that courts exercise judgment about the reasonableness of legislative distinctions, no test could lead judges in lockstep to the same conclusion.[353] What distinguishes the proposed test from the current approach to rational basis review, as discussed above, is not an ability to remove all differences in judgment. Instead, it is the pressure that the proposed test places on courts to reveal their reasoning, rather than hiding these judgment calls behind the language of deference.

B. The Single Standard and the Heightened Scrutiny Cases

Application of the single standard to the heightened scrutiny cases presents somewhat different risks than application in the rational basis context. Because the test shifts away from the demanding requirement that compelling and important government interests be narrowly tailored or substantially related to a classification, its application might be expected to result in increased doctrinal turmoil. As the discussion below reveals, however, the test's incorporation of core concerns from the most rigorous levels of review leaves the doctrine largely where it began, with most, but not all, traditionally suspect and quasi-suspect classifications being invalidated. Still, the new test provides sharper focus to some of the analyses by facing directly the bottom-line equal protection question: whether plausible, context-specific, and nonbiased justifications ever exist for these distinctions.

As with the rational basis cases, far too many heightened review cases exist to test the single standard against all of them. The discussion below, therefore, engages with a select set of significant cases involving classifications based on race, alienage, sex, and nonmarital parentage in an effort to examine the proposed standard in context. After reviewing this central group of cases, the section will close with consideration of cases assessing programs involving the remedial use of race-based classifications. As the discussion will illustrate, the proposed single standard may provide a way out of the thorny analytic arena the Court has created in its efforts to consider these programs through its suspect classification framework.[354]

353. *See generally* Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1274–75, 1279 (2001) (observing the trend toward regular dissent on the Court).

354. Of course, strict scrutiny of affirmative action plans is not necessarily required by the equal protection framework, as demonstrated by the Court's own evolution in thinking about the appropriate

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One of the first race discrimination cases to engage in an extended discussion of the differences between strict scrutiny and ordinary rational basis review is *McLaughlin v. Florida*, which invalidated a statute providing criminal penalties for interracial couples who "habitually live in and occupy in the nighttime the same room."[355] Emphasizing that racial classifications "bear a far heavier burden of justification"[356] than other classifications and must be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy,"[357] the Court found that the state had failed to show that the statutory classification was necessary for any purpose, including as an "adjunct to the State's ban on interracial marriage."[358]

Review of the *McLaughlin* classification under the single standard would require a substantial shift in focus away from necessity and toward the simpler question of whether a plausible, context-specific, and nonbiased government interest could explain the different punitive treatment of interracial couples. According to the state, the statute aimed "to prevent breaches of the basic concepts of sexual decency . . . [such as] illicit extramarital and premarital promiscuity."[359] The analysis, then, would turn on whether this goal can meaningfully explain why one set of cohabitants is subject to this rule and another is not based solely on race. Because the goals of ensuring sexual decency and prohibiting promiscuity do not explain why the statute subjected interracial couples to punishment not imposed on intraracial couples engaged in the same activity,[360] the statute

standard of review. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 218–26 (1995) (reviewing the history of the Court's varied approaches to race-based remedial classifications). Instead, some have argued that the insistence on the highest level of review for remedial uses of characteristics such as race may reflect the Court's manipulation of the existing tiered structure to serve ideological opposition to affirmative action. *See* Rubenfeld, *Anti-Antidiscrimination Agenda*, *supra* note 12, at 1177 ("[T]he current Court's constitutional case law has to be understood less in terms of its ostensible doctrinal reasoning, and more in terms of an underlying agenda . . . ."); Spann, *supra* note 13, at 92 ("Benign accounts of the Supreme Court's motivation in adopting its *Adarand* opposition to affirmative action seem either disingenuous or unrealistic."). The unitary standard would not, by definition, share this susceptibility to misuse in the service of passion choices as the same inquiries are to be applied to any type of classification.

355. McLaughlin v. Florida, 379 U.S. 184, 184 (1964) (quoting FLA. STAT. ch. 798.05 (repealed 1969)).

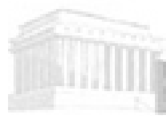
356. *Id.* at 194.

357. *Id.* at 196 (citation omitted). *See also id.* at 197 (Harlan, J., concurring) ("I agree with the Court that . . . necessity, not mere reasonable relationship, is the proper test.").

358. *Id.* at 196. The Court specified that it was not taking a position on the constitutionality of Florida's miscegenation ban. *See id.*

359. *Id.* at 193.

360. *Id.* at 196. The demand for basic reasonableness, rather than necessity, is not unknown to strict scrutiny cases. For example, in *McLaughlin*, even while highlighting strict scrutiny's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would fall under the single standard just as it had under more rigorous review.[361]

In *Loving v. Virginia*, the Court elaborated further the distinction between rational basis review and strict scrutiny,[362] making *Loving* another solid test of whether the proposed standard would wreak doctrinal havoc. In *Loving*, the Court emphasized that unlike cases in which "the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures,"[363] in cases involving racial classification the Court imposes a "very heavy burden of justification."[364] Yet in considering the government's "burden of justification,"[365] the Court did not rely on the extra rigor of strict scrutiny and concluded, instead, that "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[366]

Under the proposed single standard, just as under the extant one, the core inquiry would be whether any legitimate government interest could explain why a state punished individuals who married interracially but not those who married intraracially. The state had argued that "scientific evidence" supported the distinction.[367] Under the single standard, the mere

significance, the Court characterized its inquiry in terms used by both the proposed single standard and that of traditional rational basis review: "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded." *Id.* at 191.

361. *See id.* at 198 (Stewart, J., concurring) ("I cannot conceive of a valid legislative purpose under our Constitution . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense."). The state separately argued that the statute was justified "because it is ancillary to and serves the same purpose as the miscegenation law itself." *Id.* at 195. Because the Court did not address the purpose of the miscegenation law, it is not possible, based on the Court's opinion, to analyze whether the set of reasons offered might justify the singling out of interracial cohabitants for punishment. As the discussion below of *Loving* illustrates, however, the standard reasons that might be offered for such a law likewise do not survive review under the proposed standard. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967).

362. *Loving*, 388 U.S. at 8, 11.

363. *Id.* at 9.

364. *Id.* Virginia had attempted to defend the statutory classification by arguing that its equal application to white and African American spouses presented no equal protection problem—an argument that the Court soundly rejected. *Id.* at 8.

365. *Id.* at 9.

366. *Id.* at 11.

367. *See id.* at 8. With respect to the scientific evidence, the Virginia Supreme Court referenced social science texts provided by challengers of the law, not its defenders. *See also* Loving v. Commonwealth, 147 S.E.2d 78, 82 (Va. 1966), *rev'd sub nom. Loving*, 388 U.S. at 1. Therefore, the

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offering of evidence would not translate to approval of the classification; instead, the question would be whether the evidence could plausibly, specifically, and legitimately explain the state's line drawing based on race. Because, as was actually the case in *Loving*, both the evidence and the classification itself would easily be found to embody bias, the single standard would require invalidation of the Virginia law based on the bias inquiry alone. As the Court concluded, Virginia's targeted prohibition of "interracial marriages involving white persons demonstrate[d] that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy."[368]

In addition, however, the extracontextual inquiry would have doomed the classification, as the purported "proof" of African American inferiority used to justify the miscegenation ban could be invoked to support exactly the sort of class legislation that the Equal Protection Clause aimed to prevent.[369] After all, a broad statement of a racial group's inferiority would support official burdening of that group in contexts far beyond marriage.

The single standard similarly reshapes the reasoning although not the outcome of a case challenging a classification based on alienage that, like the race-based cases above, emphasized the distinction between rational basis review and "close judicial scrutiny."[370] Applying strict scrutiny in *Graham v. Richardson*, the Court rejected statutes that imposed durational residency requirements on noncitizens, but not on U.S. citizens, for the receipt of public benefits.[371] The Court held, in part, that concerns with fiscal integrity did not constitute a compelling government interest sufficient to justify the statutory discrimination at issue.[372]

Because the single standard does not distinguish between intensities of government interest, the inquiry would be reframed to ask whether concerns with cost savings can explain the burdening of benefits recipients according to citizenship status. Here, as in *Zobel*, *Hooper*,[373] and other cases that addressed overly broad justifications,[374] the fiscal integrity

discussion contained in the text regarding evidence is based on supposition about the nature of evidence likely to have been submitted by Virginia in defense of its discriminatory statute.

368. *Loving*, 388 U.S. at 11 (footnote omitted).

369. *Id.*

370. Graham v. Richardson, 403 U.S. 365, 372 (1971).

371. *Id.* at 376.

372. *Id.* at 374–75 ("The saving of welfare costs cannot justify an otherwise invidious classification.") (internal quotation marks omitted) (quoting Shapiro v. Thompson, 394 U.S. 618, 633 (1969)).

373. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623 (1985).

374. *See supra* notes 244–54 and accompanying text.

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defense would fail; not only is it not compelling under traditional strict scrutiny, but it is also too general and, therefore, insufficiently explanatory for purposes of the single standard.

Specifically, the government interest in saving money does not explain why noncitizens are singled out from those in need of benefits. Further, cost savings, if permitted to stand here, lacks any limiting principle. It easily could be relied on to justify across-the-board discrimination against noncitizens in a wide range of contexts far beyond the specific welfare programs at issue in *Graham*, effectively relegating noncitizens to permanent second-class status.[375]

Applying the proposed standard to intermediate scrutiny cases gives rise to a pattern similar to the one that emerges in reanalyzing the strict scrutiny cases. Some analytic shifts occur, but minimal destabilization of outcomes takes place. Particularly because sex-based and illegitimacy-based classifications were, for many years, assessed under rational basis review prior to being deemed quasi-suspect,[376] this stasis is not surprising.

Consider, for example, *United States v. Virginia*, in which the Court struck down the ban on matriculation of women students to the Virginia Military Institute ("VMI").[377] The Court framed its review as requiring an "exceedingly persuasive justification" for government distinctions based on sex.[378] While recognizing that "[t]he heightened review standard . . . does

375. Much has been written on the range of ways in which noncitizens are consistently the subject of discriminatory and unequal treatment, notwithstanding the promises of equal protection. *See generally* Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047 (1994) (surveying and analyzing a wide range of exclusionary measures targeted at immigrants); Kevin R. Johnson, *The End of "Civil Rights" as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002) (addressing the historical and current manifestations of bias toward immigrants). The question here, in the context of the single standard's application to *Graham*, is whether an interest in cost savings can ever provide a permissible basis for this differential treatment.

376. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 763, 766, 776 (1977) (striking down the Illinois Probate Act as lacking a rational purpose for an inheritance benefits scheme that differentiated based on parents' marital status); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972) (using rational basis review to invalidate a workmen's compensation statute that denied the same recovery rights to unacknowledged nonmarital children as were provided to other children); Reed v. Reed, 404 U.S. 71, 76–77 (1971) (voiding a fixed preference for men as estate administrators because no "rational relationship to a state objective" existed); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 75–76 (1968), *reh'g denied*, 393 U.S. 898 (1967) (finding no rational justification for the restriction of a parent's right to bring a wrongful death action for the death of a child if the child's parents were unmarried); Levy v. Louisiana, 391 U.S. 68, 71–72 (1968) (identifying no rational justification for the restriction of a child's right to bring a wrongful death action if the child's parents were unmarried).

377. United States v. Virginia, 518 U.S. 515, 558 (1996).

378. *Id.* at 531 (internal quotation marks omitted). In *Nguyen*, the Court stressed that the use of the exceedingly persuasive justification requirement in *Virginia* had not altered the traditional

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not make sex a proscribed classification,"[379] the Court added that recognition of differences between the sexes may not be treated as cause "for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[380]

Virginia had advanced two justifications for its policy: first, "single-sex education provides important educational benefits, and the option of single-sex education contributes to diversity in educational approaches," and second, VMI's "adversative approach [to education] would have to be modified were VMI to admit women."[381] The Court rejected each justification, finding that "[n]either recent nor distant history bears out Virginia's alleged pursuit of diversity through single-sex educational options,"[382] and that the concern about changing the adversative training program rested on overbroad generalizations about women's physical abilities and learning styles.[383]

Under the proposed standard, the analysis would proceed differently because the standard does not share the Court's near presumption that sex-based classifications are invalid.[384] Instead, review would focus on the connection between the sex-based distinction and the government's alleged goals. Taking first the concern with diversity in educational approaches, Chief Justice Rehnquist's concurrence tracks the way analysis under the single standard would assess the connection between the classification and

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intermediate review standard. *See* Nguyen v. INS, 533 U.S. 53, 70–72 (2001). *See also Virginia*, 518 U.S. at 531, 533, 535, 545–46, 556. In fact, that characterization of the standard had been invoked in several earlier cases addressing sex-based classifications. *See* J.E.B. v. Alabama, 511 U.S. 127, 136, 141 n.12 (1994); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724, 731 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

379. *Virginia*, 518 U.S. at 533.

380. *Id.* The Court added,

> Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Id. at 533–34 (citations, footnote, and internal quotation marks omitted) (alterations in original) (quoting Califano v. Webster, 430 U.S. 313, 320 (1977) (per curiam) and Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987)).

381. *Id.* at 535 (citations and internal quotation marks omitted) (quoting the Brief for Cross-Petitioners).

382. *Id.* at 536. *See also id.* at 539 ("[W]e find no persuasive evidence in this record that VMI's male-only admission policy is in furtherance of a state policy of diversity.") (internal quotation marks omitted) (quoting the court of appeals decision, United States v. Virginia, 976 F.2d 890, 899 (4th Cir. 1992)).

383. *See id.* at 541–45.

384. *See id.* at 531.

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the government's goals in context.[385] As Chief Justice Rehnquist explained, "The difficulty with [Virginia's] position is that the diversity benefited only one sex; there was single-sex public education available for men at VMI, but no corresponding single-sex public education available for women."[386] In other words, regardless of the type of review applied, the diversity goal could not meaningfully explain why the state had accorded greater educational opportunities to men than to women.

The state's second justification presents a more interesting challenge. Here, Virginia argued that the adversative training program was unsuitable for women because women and men have "important differences . . . in learning and developmental needs, [as well as] psychological and sociological differences [that are] real and not stereotypes."[387] Virginia maintained that accommodating these differences would require so dramatic a transformation of VMI's educational approach that the adversative training method would be destroyed.[388] Under the single standard, the intracontextual inquiry would ask whether these justifications plausibly explained VMI's categorical exclusion of women. The extracontextual inquiry would assess whether the developmental, psychological, and sociological justifications had any specific connection to the admission bar, or whether they reflected mere generalizations that could be used to support widespread classification of women beyond that regulatory context. And the bias inquiry would seek to determine whether the developmental differences proffered to support the sex-based admissions ban reflected hostility toward, or impermissible stereotyping of, women.

In this case, the extracontextual inquiry proves most helpful in revealing the policy's core flaws. The generic developmental differences between men and women relied on here, even if plausible, do not support an absolute bar on women's admission. Further, they would, if accepted, support women's exclusion not only from an institution like VMI, but also from a wide range of opportunities, both inside and outside educational environments.[389] This is the sort of noncontext-specific justification that

385. *See id.* at 558–66 (Rehnquist, C.J., concurring).

386. *Id.* at 562 (Rehnquist, C.J., concurring).

387. *Id.* at 549 (internal quotation marks omitted) (quoting the Brief for Respondents).

388. *Id.* at 540.

389. It was these sorts of general convictions regarding women's demeanor and development that, in an earlier era, led the Supreme Court to uphold exclusions of women from full societal and economic participation. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 465–67 (1948) (upholding the denial of a bartender license to a female tavern owner and her daughter), *disapproved by* Craig v. Boren, 429 U.S. 190, 210 (1976); Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring)

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could support broad legislation subjecting women to unfavorable sex-based rules, which would be precisely the sort of class legislation the Equal Protection Clause forbids. Thus, even under a less ostensibly rigorous single standard, the exclusionary policy would fall.[390]

In the context of distinctions based on parental marital status, the Court likewise has emphasized that intermediate scrutiny is critical to its analysis. As close attention to the cases shows, however, the Court is fundamentally concerned with whether a *legitimate* connection exists between the classification and its context, consistent with the terms of the rational basis standard.

In *Clark v. Jeter*, for example, the Court invalidated Pennsylvania's six-year limitations period for paternity actions by nonmarital children who had not previously received support.[391] Nonmarital children who had received support and marital children, whose paternity was presumed, were not similarly limited.[392] The Court performed a two-step analysis, considering first whether the six-year period provided a "reasonable

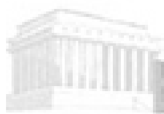
(approving the Court's decision to uphold a sex-based denial of a license to practice law on the ground that "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother").

390. If the intracontextual and extracontextual inquiries were satisfied, the single standard would also require examination of whether these justifications reflected bias or archaic stereotyping, contrary to Virginia's contentions. *See Virginia*, 518 U.S. at 549. Here, the analysis would depend on the showings made by both parties. In its opinion, the Court found that VMI's admissions policy rested on unacceptable "generalizations about 'the way women are,' [and] estimates of what is appropriate for *most women*, [that] no longer justify denying opportunity to women whose talent and capacity place them outside the average description." *Id.* at 550 (internal quotation marks omitted).

Whether VMI's policy would amount to undue stereotyping would be subject to debate under a single standard, just as it was between the majority and dissent under the stricter standard in place. *Compare id.* at 565–66 (Rehnquist, C.J., concurring) ("[T]he State should avoid assuming demand based on stereotypes; it must not assume *a priori*, without evidence, that there would be no interest in a women's school of civil engineering, or in a men's school of nursing."), *with id.* at 566–67 (Scalia, J., dissenting) (criticizing the "smug assurances" the majority offered when "explicitly reject[ing] the finding that there existe[d] 'gender-based developmental differences' supporting Virginia's restriction of the 'adversative' method to only a men's institution"). This same debate emerged under the tiered framework in *Nguyen*. There, the majority urged that "[m]echanistic classification of all our differences as stereotypes would . . . obscure those misconceptions and prejudices that are real." Nguyen v. INS, 533 U.S. 53, 73 (2001). The dissent, in turn, maintained that even if empirically true, the generalizations regarding women and their relationship to childbirth could not support a sex-based distinction "when more accurate and impartial functional lines can be drawn." *Id.* at 73, 90 (internal quotation marks and citation omitted) (quoting Miller v. Albright, 523 U.S. 420, 460 (1998) (Ginsburg, J., dissenting)).

391. Clark v. Jeter, 486 U.S. 456, 464–65 (1988). Although *Clark* is the first case addressing discrimination against nonmarital children explicitly to apply intermediate scrutiny, the Court recharacterized its prior cases reviewing classifications burdening nonmarital children as having applied intermediate scrutiny as well. *See id.* at 461. *See also supra* note 226 and accompanying text.

392. *Clark*, 486 U.S. at 464–65.



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opportunity" for seeking support, and then whether the "time limitation placed on that opportunity [was] substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims."[393] Through this analysis, the Court found that "six years does not necessarily provide a reasonable opportunity to assert a claim on behalf of an illegitimate child."[394] The Court rested its ruling on the conclusion that the six-year limitations period was not "substantially related to Pennsylvania's interest in avoiding the litigation of stale or fraudulent claims."[395]

Proceeding under the single standard, the inquiry would shift to whether the asserted interest in preventing fraudulent and stale claims plausibly explained why nonmarital children seeking child support for the first time faced a six-years-from-date-of-birth limitations period not imposed on other children. On the one hand, the distinction seems implausible because proof of paternity could be at issue in any support case, raising for all cases the same issues of fraudulent and stale claims. On the other hand, Pennsylvania could argue that a greater incentive might exist to file fraudulent claims in cases where parents were not married and no paternity presumption existed.

If the Court found the distinction plausible, a further question would remain before judicial approval could be given under the single standard. Not only must the government's goals plausibly relate to singling out nonmarital children for a different, more burdensome procedure, but they must also explain the selection of the particular burden imposed. So, for example, a government might plausibly have different rules regarding driving for those who are sighted and those who are blind, because vision is important to driving. But the government could not regulate based on that difference by tripling the price of a driver's license for people who are blind. Instead, the burden itself must be plausibly connected to the classification. Here, though some limitations period might be reasonable to prevent fraudulent actions, a reviewing court could find the six-year statutory period implausible, especially in light of the parenting challenges associated with young children that would raise an unduly and impermissibly high barrier to a support suit. That question, too, would

393. *Id.* at 462 (internal quotation marks omitted) (quoting Mills v. Habluetzel, 456 U.S. 91, 99–100 (1982)).
394. *Id.* at 463.
395. *Id.* at 464.

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remain a topic for debate, just as it was under a nominally higher standard.[396]

As the discussion above illustrates, the shifts required by the proposed standard would have relatively little impact on outcomes, although the analysis might be more straightforward and consistent than under the tiers. There is one set of equal protection cases, however, that has troubled the Court for nearly a quarter century and that continues to plague suspect classification analysis: the affirmative action cases. It is primarily with these cases that a shift not only in analysis but also in outcome would most likely occur.[397]

Before testing the proposed standard by applying it to extant case law, we must consider the possibility that the risk of abandoning strict scrutiny in favor of a single standard is simply too great. After all, the Court has suggested that the analytic shift would be devastating, pointing to the shame of *Korematsu* and insisting that "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future."[398]

In committing to the most rigorous review standard for all racial classifications, regardless of whether the distinction burdened members of a majority or minority race, the Court characterized imposition of the most rigorous scrutiny as essential to screening out potentially illegitimate classifications:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out"

396. Justice O'Connor's opinion for the unanimous Court suggested that members of the Court had serious reservations about the reasonableness of that limited period given the myriad difficulties that might interfere with a parent's pursuit of support on a child's behalf. *See id.* ("Not all . . . difficulties are likely to abate in six years. A mother might realize only belatedly 'a loss of income attributable to the need to care for the child.' Furthermore, financial difficulties are likely to increase as the child matures and incurs expenses for clothing, school, and medical care.") (citations omitted) (quoting Pickett v. Brown, 462 U.S. 1, 12 (1983)).

397. The redistricting cases would also present an opportunity for the Court to take a more contextualized view of race that would allow racial minorities to benefit from redistricting efforts. For a discussion of redistricting cases, see *supra* note 114.

398. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995) (discussing the Court's failure in *Korematsu* to reject the bias-infected classification at issue). The Court also supported the need for strict scrutiny by highlighting its view that all racial classifications, including remedial measures, have potentially grave consequences for society. *See id.*

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> illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.[399]

The majority's embrace of this perspective resolved the question debated in a series of splintered opinions[400] regarding whether remedial classifications might deserve more flexible consideration than strict scrutiny offered.[401]

Under the single standard, as noted above, no requirement that racial classifications "serve a compelling governmental interest, and . . . be narrowly tailored to further that interest"[402] would be imposed. Instead, the central question would be whether a plausible, context-specific, and nonbiased explanation exists for distinguishing based on race in the context at issue. If the reason for the line drawing were so general as to justify race-based distinctions outside the regulatory context, or if racial animus or stereotyping prompted the classification, the single standard would require the classification's rejection.

As shown above, however, the Court's concern with the damage caused by racial classifications does not itself compel the use of extra-rigorous review, as racial classifications were struck down for many years prior to the application of strict scrutiny.[403] Indeed, the Court's own language undermines its insistence that only strict scrutiny can capture invidious racial discrimination. In *Adarand*, for example, the Court's observation that "racial characteristics so seldom provide a *relevant* basis

399. *Id.* at 226 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J., plurality opinion)); Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) (same); Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003) (quoting *J.A. Croson*, 488 U.S. at 494). *Cf. Gratz*, 123 S. Ct. at 2445 (Ginsberg, J., dissenting) ("Close review is needed 'to ferret out classifications in reality malign, but masquerading as benign' . . . .") (quoting *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting)).

400. *See Adarand*, 515 U.S. at 218–21.

401. *Id.* at 223–26. The Court also resolved that it would conduct equal protection review in this context in the same manner under the Fifth and Fourteenth Amendments. *Id.* at 224. Reflecting ongoing disagreement with respect to this standard, Justice Ginsburg commented that *Grutter* did "not require the Court to revisit whether all governmental classifications by race, whether designed to benefit or burden a historically disadvantaged group, should be subject to the same standard of judicial review." *Grutter*, 123 S. Ct. at 2348 n.* (Ginsburg, J., concurring) (citation omitted).

402. *Adarand*, 515 U.S. at 235.

403. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526, 536–40 (1963) (using rational basis review to order the desegregation of city-owned or operated parks and recreational facilities); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding, without reference to heightened review, that segregated public schools violated the equal protection guarantee). *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 116–17 (1976) (striking down a civil service regulation that foreclosed resident aliens from civil service positions because no "acceptable rationalization" supported the law); Truax v. Raich, 239 U.S. 33, 39 (1915) (invalidating Arizona's Anti-Alien Labor Law as "repugnant" to the Equal Protection Clause).

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for disparate treatment"[404] embraces the basic rationality standard rather than the narrowly tailored requirement of strict scrutiny. Further, the Court's stated reason for requiring categorical application of strict scrutiny in every context was "to make sure that a governmental classification based on race . . . is *legitimate*,"[405] which is, again, the language of rational basis review[406] and not the "compelling interest" demand of strict scrutiny.[407]

By grounding its analysis in the core concerns of rational basis review, the Court acknowledged, perhaps unintentionally, that the task of distinguishing between benign and illegitimate racial classifications is not so difficult as to require a separate type of scrutiny. Against this background, the decision to require strict scrutiny of remedial race-based classifications must flow from the Court's intention to deploy strict scrutiny's rhetorical power or to enshrine in doctrine its substantive judgment that even well-intentioned racial classifications cause harm. Either way, it is difficult to conclude that the adoption of strict scrutiny grew out of a genuine fear that an impermissible use of race might actually survive a less rigorous form of review.

Viewed in this light, the single standard would not present a terrible risk of creating a hole through which pernicious racial classifications might slip. Again, as the Court has recognized on many occasions, race is not relevant to ability.[408] Even a test screening only for the plausibility, rather than the necessity, of race-based distinctions should have no problem capturing instances where the use of race reflects racial bias, stereotypes, or hostility. Further, the counterpoint concern—that race-based remedial

404. *Adarand*, 515 U.S. at 236 (emphasis added) (internal quotation marks omitted) (quoting Fullilove v. Klutznick, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting)). *Cf.* Dandridge v. Williams, 397 U.S. 471, 487 (1970) (upholding legislation under rational basis review after evaluating the state's "*relevant* social and economic objectives" for the legislation) (emphasis added).

405. *Adarand*, 515 U.S. at 228 (emphasis added).

406. *See, e.g.*, *Dandridge*, 397 U.S. at 486 (applying rational basis review to inquire into the state's "*legitimate* interest" in its regulation) (emphasis added).

407. The Court's opinions in *Grutter* and *Gratz* adhere more closely than *Adarand* to the language of strict scrutiny. *See supra* note 399 and accompanying text. However, in *Grutter*—the only decision to uphold the affirmative action plan at issue—the dissenters accused the five-justice majority of taking a deferential "approach inconsistent with the very concept of 'strict scrutiny.'" Grutter v. Bollinger, 123 S. Ct. 2325, 2350 (Thomas, J., concurring in part and dissenting in part). *See also id.* at 2366 (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."); *id.* at 2370 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.").

408. *See, e.g.*, Reed v. Campbell, 476 U.S. 852, 854 n.5 (1986); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).

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programs would be sanctioned to such an extent under the single standard as to injure the legitimate equal protection rights of whites—is likewise addressed by the single standard's prohibition against generalized justifications for line drawing. This intolerance toward nonspecific justifications for discriminatory class legislation, rooted in the Equal Protection Clause, extends to all individuals, regardless of race. Thus, for example, an affirmative action program intended to remedy generalized harms to people of color could not survive under the proposed standard because that nonspecific justification could support broad differential treatment based on race outside the regulatory context.[409] However, if a justification were tied sufficiently to the context at issue and not so broad as to support burdening the nonbeneficiary class in other contexts, it would withstand single standard review.

The plan at issue in *Adarand* provides a good scenario against which to evaluate how the proposed standard might reshape evaluation of remedial measures.[410] The Small Business Administration offered a program that provided favorable treatment to contractors who subcontracted with "disadvantaged business enterprises," including those owned by people of color.[411]

The question under single standard review would be whether the state can explain that the use of race in the subcontractor statute is plausible, context-specific (so as not to justify race-based distinctions in unrelated contexts), and free of bias or hostility toward the burdened class. In *Adarand*, the United States sought to justify the program by arguing that it "provid[ed] remedies for the continuing effects of past discrimination,"[412] and, in particular, "that discrimination in the construction industry had been subject to government acquiescence, with effects that remain."[413] This justification, specific to the construction context in which the program

409. *Cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("Nor is it necessary, in my view, to resolve the troubling questions whether any [raced-based] layoff provision could survive strict scrutiny or whether [such] layoff provision could, when considered without reference to the hiring goal it was intended to further, pass the onerous 'narrowly tailored' requirement.").

410. *Adarand*, 515 U.S. at 206–10 (describing Small Business Administration programs). The Court's recent opinions in *Grutter* and *Gratz* are somewhat less useful for evaluating the proposed test, in part because a majority of justices acknowledge their treatment of higher education admissions as distinct, suggesting that their acceptance of diversity as a compelling government interest may not extend outside the educational arena. *See supra* note 106. However, they will be addressed briefly below. *See infra* note 420.

411. *Adarand*, 515 U.S. at 206–10 (describing Small Business Administration programs).

412. *Id.* at 265–66 (Souter, J., dissenting).

413. *Id.* at 266 (Souter, J., dissenting).

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operated,[414] would sufficiently explain the government's use of a racial classification while not supplying a justification so broad as to support second-class status for the white-owned firms that contended they were burdened by the program's consideration of race.

The majority opinion in *Adarand* raises an additional concern for the single standard. The Court maintained that, without strict scrutiny, judicial review would not recognize the harm flowing from the perception that affirmative action measures benefit those "less qualified in some respect [who are] identified purely by their race," and, further, that "that perception . . . can only exacerbate rather than reduce racial prejudice."[415] The Court failed to explain, however, why strict scrutiny would be the only analytic approach sensitive to the potential backlash resulting from a race-based classification created for remedial purposes. As Justice Stevens pointed out in dissent, firms qualifying as disadvantaged business enterprises had not challenged the program, "perhaps because they [did] not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need."[416]

Moreover, if a minority-owned firm were to challenge the program at issue in *Adarand* and allege stigmatic harm, the analysis under both strict scrutiny and the single standard would not necessarily, or even likely, result in different outcomes. Preliminarily, under either standard, the Court would first have to be persuaded that the stigma creates an actionable classification, which would be difficult in the typical instance where the stigmatic effect would be the secondary and unintended consequence of an effort to remedy specific race-based discrimination.[417]

414. Issue would be joined over the scope of the context, as noted in Part IV. Because the government could point specifically to discrimination within the construction industry, this particular program should survive charges that the justification would support extracontextual distinctions based on race. On the other hand, the Court in *Adarand* might argue that the context at issue was a far more specific one (i.e., the particular type of work being subcontracted). The reviewing court would then have to determine the context's contours before making its judgment. In most cases, the legislative framework provides the context, and the classification can be assessed against that framework's scope. A party seeking to call the framework into question would need to show why that framework warranted narrowing or broadening before the single standard's inquiries are applied.

415. *Adarand*, 515 U.S. at 229 (internal quotation marks omitted) (quoting Fullilove v. Klutznick, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting)). These concerns, the Court said, "make a persuasive case for requiring strict scrutiny." *Id.*

416. *Id.* at 247 n.5.

417. *Cf.* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'[D]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (citations and footnotes omitted); Washington v. Davis, 426 U.S. 229, 240 (1976) ("[A] basic equal protection principle [is] that

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If the claim were permitted to go forward, review under strict scrutiny would ask whether the race-based remedial measure was narrowly tailored to serve a compelling government interest that justified the specific burden imposed—here, stigmatic harm. Assuming the same government interest in redressing the effects of race discrimination in the construction industry, the analysis would likely find that a race-based classification giving some preference to minority-owned business candidates in obtaining government-funded construction contracts was narrowly tailored to achieve a compelling government interest with the resulting rejection of the stigma claim.[418] This determination would not be a particularly difficult one given that the race-based preference would be limited and directly responsive to the particular problem of race-based disadvantaging in the construction industry. Indeed, if the government's stated goal is to redress racial discrimination, it is difficult to imagine what, other than a racial classification, the government might use more effectively to realize its aim. As a result, strict scrutiny's narrowly tailored inquiry would not necessarily lead to the invalidation of a race-based affirmative action program because of stigmatic harms to members of the beneficiary class. Thus, the Court's suggestion that concern with stigma mandates application of strict scrutiny does not bear up under close analysis.

Considering the same scenario under the proposed single standard, the Court would determine, as set forth above, whether the government could plausibly explain its use of a race-based distinction with a justification limited to the regulatory context. The single standard would then screen for unduly broad or general justifications for the differential treatment being challenged. Because the race-based classification in *Adarand* was highly focused on, and limited to, the particular industry where a problem of race discrimination had been identified, the explanation for the differential treatment would be both plausible and context-specific. As a result, the program could be sustained under single standard review as well, notwithstanding the potential for stigmatic harm.[419] Ultimately, it appears

the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

418. *See Adarand*, 515 U.S. at 237 (discussing the determination in *United States v. Paradise*, 480 U.S. 149, 167 (1987) (Brennan, J., plurality opinion), that eradicating race-based discrimination constituted a compelling government interest).

419. *See id.* at 206–08. The actual classification in *Adarand* required minority-owned enterprises to "opt in" to the preference program; the program did not automatically encompass nondisadvantaged minority-owned business candidates. *See id.* If this refinement were to survive the narrowly tailored inquiry, then strict scrutiny arguably would have succeeded in achieving a more refined classification than the single standard otherwise would have inspired. From a constitutional rather than political

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that under either standard of review, a context-sensitive use of race as a remedial measure could, conceivably, survive a challenge.[420]

In short, racial classifications, whether within or outside of the affirmative action context, do not absolutely compel the use of strict scrutiny as insurance against invidious forms of differential treatment. To the contrary, the Court has suggested repeatedly throughout the spectrum of cases reviewing race-based classifications that differentiation based on race is rarely legitimate or relevant. As shown above, even a unified standard has no difficulty identifying and rejecting the use of race for impermissible discriminatory purposes. Yet the single standard brings with it the additional advantage of context sensitivity. Therefore, in situations where race is used as a basis for remedying past discrimination, a reviewing court would possess not only the power to screen for the presence of prejudice or overly general justifications, but also the flexibility to consider whether, when analyzed in context, a legitimate explanation justifies the remedial use of a racial classification.

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standpoint, however, it is not clear that the opt-in provision was necessary for the classification to be sustained.

420. *Cf. id.* at 237. The Court in *Adarand* commented,

> [W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact. The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.

Id. (citation and internal quotation marks omitted) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

Application of the single standard to the use of race in admissions by the University of Michigan in its law school and undergraduate programs reinforces this conclusion. For both, the Court would examine the plausibility of the connection between the use of race in admissions and the university's goal of obtaining a diverse student body to serve its educational mission of preparing students for work and civic participation. The Court would also ask whether this justification would support widespread racial distinctions outside of the admissions process. And finally, the Court would inquire whether the university's reliance on race to achieve a diverse class embodies bias or outmoded stereotypes about race.

As with the cases discussed above, these questions could be answered in ways that would reach the same outcomes as the Court reached in *Grutter* and *Gratz*, with the law school's "holistic" admissions process avoiding the stereotyping and the class legislation-type problems that the undergraduate point system might encounter. On the other hand, the Court could find little functional difference between the two plans, as Justice Souter's dissent in *Gratz* maintained. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2441 (2003) (Souter, J., dissenting). In this instance, the single standard will not resolve the conflicts between the majority and the dissent in either case—that is something no standard could accomplish. Instead, the contribution of a single standard is in preventing a debate about the appropriate application of judicial scrutiny from obscuring the core equal protection inquiry into whether the classification amounts to class legislation based on race.

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VI. CONCLUSION: THE "TRAINING" TIERS GIVE WAY TO A SINGLE STANDARD

We began by considering whether the Court's current three-tiered framework for equal protection review requires reconsideration, and, if so, whether a single standard of review might provide an alternative approach that would respond to current problems without creating widespread doctrinal instability. Certainly, as addressed above, serious flaws associated with the tiers—including stagnation with respect to the set of suspect classifications, the categorical application of heightened scrutiny to classifications deemed suspect, and the unguided and unfocused doctrinal wavering between deference and meaningful review in the rational basis cases—suggest that the time for rethinking equal protection review is ripe.

Looking back, it appears that the emergence of multiple tiers represented an important milestone in the Court's response to increasing societal recognition that government action based on deep-rooted bias and archaic stereotypes takes multiple forms and causes serious harms. The development of a review mechanism aimed at unearthing and invalidating forms of racial bias previously not apparent or troubling to many in the judiciary or in society's dominant classes flowed almost naturally from the changes in cultural consciousness.[421]

With growing societal and judicial awareness of widespread prejudices based on other characteristics, the Court reasonably deployed the same type of review it used for race-based distinctions to screen this new set of impermissible classifications. Not surprisingly, the Court then modified the original review mechanism over a number of years to respond to evolving social perceptions about the relevance of various characteristics to government action.

Today, however, decades after the first pronouncement regarding extra-rigorous review for racial classifications[422] and over a quarter century after the Court's decree that sex-based distinctions also merit heightened judicial solicitude,[423] the analysis prompted by the tiers appears to be too

421. *See* James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 291–93 (1990) (proposing that social movements have a direct influence on "governmental and private institutions"); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 496–502 (2000) (discussing the interaction between social movements and constitutional jurisprudence in the 1960s).

422. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that racial classifications are "subject . . . to the most rigid scrutiny").

423. *See* Craig v. Boren, 429 U.S. 190, 197–98 (1976).

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simplistic. The tiered framework may have served its purpose, it turns out, as an unwitting training vehicle for the Court.[424] The tiers became the first post-*Lochner* era method by which courts could closely review legislative action for impermissible stereotyping or bias. They supported this heightened form of judicial review with specialized screening and streamlining techniques. In effect, the tiers became a tool for judicial education regarding identity-based discrimination by government. But in the 21st century, while education remains important, contemporary jurisprudence requires a more sophisticated and sensitive response to the complexities of a changed world.[425]

This view of the tiers as a transitional analytic tool rather than a fixed, necessary format dovetails with the existence of common core concerns shared by rational basis and heightened scrutiny cases. In particular, a baseline commitment to ensuring the existence of a plausible, contextual, and nonbiased explanation for a classification and, relatedly, to preventing the enforcement of class legislation, surfaces throughout the Court's equal protection jurisprudence. The proposed single standard, by reflecting these shared concerns, helps to illuminate the close relationship between the different levels of review. In addition, its distillation of these core concerns into a unified review mechanism helps to stabilize and explain what otherwise appears to be significant confusion within the rational basis cases. Regardless of whether it is the standard proposed here or a variation on the standards proposed in the past by individual justices that takes hold, it is critical at this juncture that the framework of equal protection review itself face ongoing review to ensure that the Constitution will continue to "neither know[ ] nor tolerate[ ] classes among citizens."[426]

424. This is not to suggest that the federal judiciary has achieved consensus or become fully or even largely sensitized to all the diverse manifestations of official bias. The argument here is more limited: at this point in time, a single standard of review may be as effective in ferreting out impermissible government action as the three-tiered approach, which, in all of its years of application, has not brought about consensus on the question of when impermissible bias (as opposed to a reasonable consideration) prompts trait-based differential treatment. Further, for the reasons addressed above, the single standard fine tunes the standard of review in a way that the tiered system does not effectively or consistently allow.

425. As discussed earlier, the predominant use of strict scrutiny for racial classifications in recent years has been to invalidate affirmative action and redistricting measures intended to take remedial account of past or present racial bias, rather than to invalidate new forms of racial bias. This dramatic shift in the use of suspect classification analysis raises doubts about the continuing viability of the current tiered approach.

426. Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

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