Scrutinizing Tiers

Maxwell L. Stearns[*]

Abstract

People instinctively compare, sometimes using simplistic binary schemes, such as black versus white or male versus female, and other times with gradations, such as height or weight. Some comparisons combine considerations: Because larger objects tend to be heavier, we can rank a mouse, rabbit, and horse from left to right capturing size and weight. And yet, combining criteria that generally move in tandem can break down: Hot air balloons—massive, lighter-than-air objects—force splitting the dimensions of size and weight.

Supreme Court Justices examine challenged laws based on dimensions capturing constitutional values, including the relative importance of claimed fundamental rights and degrees of invidiousness of challenged classifications. Cases arising under equal protection sometimes implicate more than a single dimension. The difficulty is not the three-tier system of strict, intermediate, and rational basis scrutiny, but rather is failing to align these tests based on the underlying dimensionality of the case law. Just as ranking a hot air balloon along a single dimension combining size and weight fails, so too does not recognizing when challenged laws implicate two dimensions rather than one, a problem endemic to benign racial preferences.

By recasting tiers of scrutiny in terms of dimensionality, this Article offers a more fluid yet elegant approach within the context of existing doctrine. It reveals that the problem is not the number of tiers, as other scholars have argued. Rather, it is not appreciating that different bodies of equal protection law—race, gender, and sexual orientation—differently implicate dimensionality.

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INTRODUCTION

People instinctively compare. Sometimes we use simple binaries—black or white, male or female—even knowing that for race and sex such simple schemes are prone to fail. Other times, we apply nuanced, continuous gradations as with height or weight. Comparisons can also include multiple considerations at once; larger objects tend to be heavier. We can thus envision a continuum, starting from the left that includes a mouse, a rabbit, and a horse with size and weight incrementally increasing to the right. And yet, combining criteria that generally move in tandem can also break down. Hot air balloons—massive, lighter-than-air objects—force the need to split consideration of size and weight. These examples, and countless others, rest on an implicit understandings about the dimensions along which people rank virtually everything.[1]

Supreme Court Justices likewise rest cases on intuitive understandings of how challenged laws relate to one another based on dimensions that capture constitutional values. Fourteenth Amendment dimensions, for example, include degrees of invidiousness of challenged classifications and the relative importance of claimed fundamental rights. The Court has long evaluated such laws based on its three-part system of tiers of scrutiny: strict, intermediate, or rational basis. The system pleases no one, least of all the justices themselves. The framework can no longer bear the weight of its own internal inconsistencies.

The difficulty is the Court's failure to recognize that for the system of tiers to function properly, the tiers must reflect the underlying dimensionality of the constitutional case law. Failing to recognize when challenged laws implicate two dimensions rather than one will no more succeed than seeking to rank a hot air balloon along a single scale that combines size and weight. The problem is not the number of tiers; rather, it is failing to relate tiers to the underlying dimensionality of the laws subject to constitutional challenge. This is most notably true in the prominent equal protection cases affecting race, gender, and sexual orientation.

This Article recasts tiers of scrutiny in a more fluid yet elegant analysis that draws upon dimensionality. This framework is offered for its analytical rigor, yet it also has a salutary practical pay-off: Dimensional analysis informs tiers of scrutiny without displacing them. Radical and conservative at once, the analysis affords a richer and more nuanced analysis without having to discard an entrenched jurisprudence. In doing so, it brings clarity and predictability in place of disingenuousness and confusion, and it accomplishes this within the framework of existing doctrine.

Important recent Supreme Court cases poignantly illustrate the analytical difficulty along with the force of the dimensionality insight. With the entire country watching, the Justices could not effectively resolve landmark cases related to race and same-sex marriage using the traditional

[1] For an introduction of dimensionality and related concepts, see *infra* part II, and cites therein.

tiers-of-scrutiny framework. Perhaps the most intriguing aspect of the affirmative action case, *Fisher v. University of Texas at Austin*,[2] is what Justice Kennedy, writing for the majority, did *not* say. Instead of conceding the failure of the traditional two-tiered approach in the affirmative action context, he chided the lower court, which had relied on the *Grutter v. Bollinger*[3] strict scrutiny formulation to sustain the challenged program, for failing to apply stricter strict scrutiny.[4] In *United States v. Windsor*,[5] by contrast, in which Justice Kennedy, once more writing for the majority, struck down § 3 of the Defense of Marriage Act ("DOMA"), nominally applying rational basis review. Consistent with his prior analyses in *Romer v. Evans*[6] and *Lawrence v. Texas*,[7] Kennedy accomplished this result without formally elevating that traditionally deferential standard. And yet, if Kennedy is correct that *Grutter* rendered strict scrutiny "feeble," his *Romer*/*Lawrence*/*Windsor* trilogy somehow rendered rational basis fatal.

This Article demonstrates the importance of dimensionality in making sense of the menu of tiers and in explaining why the doctrines are often applied in a seemingly contorted manner. Doctrinal confusion inevitably arises in the following circumstances. First, problems arise when the Supreme Court use a test designed to capture data resting along a single dimension instead to capture data implicating multiple dimensions. Second, problems also arise when the Court employs a test designed to capture multiple dimensions to instead sort data resting along a single dimension. The analysis reveals why criticisms of the number of tiers misconceive the problem. The difficulty lies not in the absolute number of tiers, but rather in the mismatch of existing tiers with challenged laws based on the underlying dimensionality of doctrine.

This Article reveals that the traditional binary scheme—strict or rational basis scrutiny—generally succeeds in sorting relevant bodies of constitutional case law based upon whether the line of constitutional permissibility tends to be either highly restrictive (strict scrutiny) or broadly inclusive (rational basis). For this reason, borrowing Justice Kennedy's terminology, these respective tiers of scrutiny are typically "fatal" or "feeble." And yet, some constitutional classification schemes cannot be so neatly sorted. When the relevant body of case law implicates more than one dimension, no clever tweaking—rational basis *plus*, strict scrutiny *lite*—can truly solve the problem. Because the analytical difficulty involves a separate dimension rather than gradations along a common measurement scale, such cases call for a third tier. Although the third tier has been labeled "intermediate scrutiny," the naming is less important than is ensuring that it functions differently from the other two.

The failure to recognize the implications of dimensionality has resulted in problematic applications of tiers of scrutiny within the three main bodies of equal protection doctrine: race,

[2] Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013).
[3] Grutter v. Bollinger, 539 U.S. 306 (2003). In *Grutter*, which sustained the University of Michigan School of Law's affirmative action program, Justice O'Connor gave content to her earlier admonition that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'" Id. at 326.
[4] For a more detailed analysis of *Fisher*, see *infra* at II.F.2.a.
[5] 133 S. Ct. 2675 (2013).
[6] 517 U.S. 620 (1996).
[7] 539 U.S. 558 (2003).

gender, and sexual orientation. Recognizing the relationship between dimensionality and tiers of scrutiny yields three main takeaway points. First, for peculiar historical reasons,[8] the possibility of sustaining benign race-based classifications invites a second dimension, thus inviting either the need to apply the third tier, intermediate scrutiny, or to apply strict scrutiny in a counter-intuitive manner. Second, despite the nominal application of intermediate scrutiny to gender classifications, the cases generally rest along a single dimension, thus subdividing applications into de facto versions of either strict scrutiny or rational basis review. Third, in striking down laws implicating sexual orientation, the Court must ultimately choose between applying rational basis scrutiny in an unconventional manner or in raising the level of scrutiny applicable to such cases.

This Article proceeds as follows. Part I provides an overview of tiers of scrutiny. After reviewing the essential functions of the existing scheme, this part presents several anomalies and considers various approaches to improving tiers of scrutiny offered by jurists and scholars. Part II introduces and illustrates the dimensionality framework. That part demonstrates how the traditional two-tier system properly handles an infinite array of classifications assessed along a common normative scale, and conversely, how even a small sampling of cases implicating multiple dimensions thwarts the traditional two-tier scheme. It then relates this analysis to race, gender, and sexual orientation. Part III surveys several doctrinal anomalies introduced in part I along with some new ones, offering insight into past and present case law in each of these doctrinal areas.

I. TIERS OF SCRUTINY: A VIEW FROM THE TRENCHES

We begin by viewing tiers of scrutiny from the trenches. Imagine yourself as lower federal court judge trying to decipher the Supreme Court's often confusing commands respecting tiers of scrutiny.

A. . . . *Those who Dichotomize and Those Who Don't*[9]

Although the Supreme Court planted the seed for two levels of scrutiny at least as early as *Korematsu v. United States*,[10] the infamous Japanese internment case, and arguably earlier,[11] Professor Michael Klarman has identified *McLaughlin v. Florida*,[12] a case involving a law banning interracial cohabitation, as the first time the Supreme Court applied strict scrutiny to

[8] *See infra* Part III.D.
[9] Although often expressed as, "There are two kinds of people in the world, those who dichotomize and those who don't," the actual quotation is: "There may be said to be two classes of people in the world; those who constantly divide the people of the world into two classes, and those who do not." ROBERT C. BENCHLEY, *The Most Popular Book of the Month*, *in* OF ALL THINGS 187 (1921).
[10] 323 U.S. 214 (1944).
[11] *See* Slaughter-House Cases, 83 U.S. 36 (1873) (distinguishing claims arising under the Fourteenth Amendment based on race from those implicating other interests).
[12] 379 U.S. 184 (1964).

strike down an invidious race-based classification.[13] The conventional understanding is clear: strict scrutiny is almost always fatal to adverse racial classifications. More recently, the Court has applied this test to laws designed to benefit African Americans. With notable exceptions that include *Grutter v. Bollinger*,[14] the University of Michigan Law School affirmative action case, the result has generally been to strike such racial preferences down or at least to call them into question.[15] As a doctrinal matter, therefore, lower federal courts are expected to subject all laws drawing express racial classifications, whether intended to harm or to help African Americans, to the two-part strict scrutiny test under which the laws are presumed invalid.

Strict scrutiny demands that the government prove that the chosen classification serves a compelling governmental interest and that the selected means are narrowly tailored to further that interest.[16] The two critical features of this test are, first, that the burden is placed on the government once the claimant identifies the trigger for strict scrutiny, and second, that the test can be overcome if two conditions—a compelling governmental interest and narrow tailoring—are satisfied. In conventional tiers of scrutiny analysis, strict scrutiny is the exception; rational basis is the rule. To apply strict scrutiny, and thus to place the burden on the state to defend its laws, the challenger must put forth a specific justification. Typically, the justificatory trigger takes the form of an illicit classification, with race serving as the paradigmatic case,[17] or a fundamental right, for example, the right to use contraceptives,[18] or to terminate an unwanted pregnancy, at least prior to viability.[19] Absent such a trigger, the presumptive, or baseline, level of scrutiny, rational basis, applies.

Rational basis scrutiny, unlike strict scrutiny, leaves the burden of proof on the challenger, who, to have a law struck down, must demonstrate the absence of a legitimate governmental interest or of means that rationally further that interest.[20] Under traditional rational-basis review, sometimes called the straight-face test, nearly any purpose counts as

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[13] *See* Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991).
[14] 539 U.S. 306 (2003).
[15] This was, for example, true of *Gratz v. Bollinger*, 539 U.S. 244 (2003). For a discussion of cases treating race-based preferences under intermediate scrutiny, see *infra* Part I.C.1. Exceptions to this rule have been overturned, *see infra* Part I.C.1, or, in the case of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), largely incorporated into *Grutter*, 539 U.S. 306. For a discussion of the *Fisher* remand, 133 S. Ct. 2411 (2013), see *infra* part II.F.2.a.
[16] *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[Suspect] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.").
[17] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." (footnotes omitted)).
[18] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).
[19] Roe v. Wade, 410 U.S. 113 (1973). In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court downgraded abortion from a fundamental right to a liberty interest, and in *Gonzales v. Carhart*, 550 U.S. 124 (2007), it sustained a late term, partial-birth abortion ban that did not include a maternal health exception. These cases exemplify drawing a line-drawing exercise along one dimension—weak-to-strong abortion rights—separating procedures that are or are not protected. *See infra* Part III.
[20] *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 10 (1992) ("[U]nless . . . it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.").

legitimate provided that one can articulate it without physically belying sincerity. As demonstrated below, this is no longer literally true,[21] although it is most obviously so in the Court's never-ending willingness to accept creative defenses to rent-seeking legislation masqueraded as furthering the public interest.[22]

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

Despite its preliminary nature, stage one is profoundly important. Many constitutional cases involve disputed characterizations of fact that result in a kind of analytical grey zone. When this occurs, whoever bears the burden of proof—the state trying to defend its law against strict scrutiny or the challenger trying to invalidate a law under rational basis review—will lose, and the initial sort proves decisive.

To illustrate, imagine that a state legislature reapportions its congressional districts following a decennial census. The legislators know that doing so will affect the racial composition of its districts, for example concentrating African American voters into a minority-majority district or, conversely, dispersing them across multiple majority-white districts, thus risking defeat of a representative from the minority demographic group. Further assume, however, that the actual redistricting goals are two-fold: first, to protect a nonminority functional incumbent, meaning a sitting representative serving a district that will no longer exist in its present form following reapportionment, and second, to avoid violating the non-retrogression principle under the Civil Rights Act of 1965.[23] If the government must prove that the prohibited factor, race, did not control its redistricting, it will lose because it relied on several considerations, and it is impossible to disprove controlling reliance on any single factor, including race. Conversely, if the challenger must disprove that the legislature was predominantly motivated by the non-racial factor of protecting a functional incumbent, she will lose for the same reason. When the legislature is motivated by several factors, one of which is

[21] *See infra* Part I.C.2.

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

[23] 42 U.S.C. § 1973c (2006). For a hypothetical based on *Shelby County v. Holder*, 133 S. Ct. 2612 (2103), which limited the force of the preclearance provision under this Act, see *infra* at 9-10.

impermissible and the others of which are permissible, whoever bears the burden of proof—meaning whoever is called upon to prove the negative—will fail. In such cases, the rough sort, or which bin the case is put in, controls the outcome.

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

B. *Running with the Red Queen*

> *"Well, in our country," said Alice, still panting a little, "you'd generally get to somewhere else — if you run very fast for a long time, as we've been doing."*
>
> *"A slow sort of country!" said the Queen. "Now, here, you see, it takes all the running you can do, to keep in the same place. If you want to get somewhere else, you must run at least twice as fast as that!"*[24]

The two-staged sorting system raises an obvious question: if stage-one sorting results from factors that correlate to either good or bad laws, why bother with stage two? The answer is that laws are enacted as part of a never-ending dynamic process, and thus against the backdrop of the very rules used to classify them. Lawmaking is a Red Queen game in which the judiciary devises rules to identify problematic laws; legislators respond by devising laws aimed at the same goals but that evade detection under those rules; the judiciary, once more, refines its rules to locate problematic laws that initially evaded detection; and so on.

To illustrate, consider a revised apportionment hypothetical inspired by the recent Supreme Court decision concerning the 1965 Voting Rights Act ("VRA"), *Shelby County v. Holder*.[25] In *Shelby County*, the Court struck down §4 of the VRA, which set out the formula for applying the preclearance provision in § 5 to covered jurisdictions. Chief Justice Roberts, writing for the majority, reasoned that since the original enactment, Southern states have had a better record of minority voter turnout than did their Northern counterparts. Writing in dissent, Justice

[24] LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 50 (Henry Altemus Co. 1897) (1871).
[25] 133 S. Ct. 2612 (2013).

Ginsburg argued that the reason for this improvement was the continuous evolution of legal responses to constantly changing discriminatory practices. Thus, she stated:

> Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place.[26]

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

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

Resolving such hypotheticals is unimportant for immediate purposes. The critical point is that the two-staged regime proves essential to preventing legislators from having the final word in an inevitable constitutional Red Queen game.[27] Fine sorting allows the judiciary to search beyond its initial classification (express use of race is presumptively bad), or even its later more refined initial sorting (neutral laws with the purpose and effect of adversely affecting African

[26] *Shelby County*, 133 S. Ct. at 2633 (Ginsburg, J., dissenting).
[27] For a discussion of Red Queen games in evolutionary biology, see generally MATT RIDLEY, THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE (1994).

Americans are presumptively bad). Neutral classifications can mask illicit purposes. Conversely, non-neutral laws can be coupled with benign motivations. The Court's two-part tests help locate laws that would readily slip past its inevitably—inevitable because of the Red Queen dynamic—overbroad initial sort, winding up in a pile for which the presumptive outcome should not control.

C. *Getting Beyond the Basic Tiers*

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

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

Although the Supreme Court applies strict scrutiny to any law that draws an express racial classification, whether intended to harm or to benefit minorities, this is a fairly recent doctrinal development. In the landmark 1978 case, *Board of Regents v. Bakke*,[28] Justice Powell, in his controlling opinion, the relevant parts of which no one else joined, argued for strict scrutiny in race-based affirmative action cases, but concluded that the interest in diversity in higher education was compelling. Powell further determined, however, that the medical school's reliance on a racial quota—setting aside 16 out of 100 seats for specified minorities—failed narrow tailoring. Justice Brennan, writing separately, argued that benign race-based classifications should be subject to intermediate, rather than strict, scrutiny. Under intermediate scrutiny, a challenged law will survive provided that there is an important governmental interest and that the selected means substantially further that interest.[29] Writing separately, Justice Stevens rejected reliance on race altogether in admissions, based upon his reading of Title VI of the Civil Rights Act of 1964.[30] The combined opinions rendered Justice Powell's opinion controlling under the narrowest grounds rule.[31]

Two years later, in *Fullilove v. Klutznick*,[32] Justice Brennan wrote a controlling plurality opinion applying intermediate scrutiny to sustain a federal program benefitting contractors who formed, or who employed, a minority-business enterprise ("MBE"). In the 1989 case, *City of Richmond v. J.A. Croson Co.*,[33] Justice O'Connor distinguished *Fullilove*, applying strict

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[28] 438 U.S. 265 (1978).

[29] *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part). It remains unclear who bears the burden of proof and how the test should be phrased. For a discussion of later doctrinal tweaks to intermediate scrutiny, see *infra* Part III.B.

[30] *Id.* at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

[31] The narrowest grounds doctrine selects that opinion consistent with the outcome that has the least impact on the law. Marks v. United States, 430 U.S. 188, 193 (1977); *see also* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 130-33 (2002) (analyzing *Bakke* under the *Marks* doctrine).

[32] 448 U.S. 448 (1980).

[33] 488 U.S. 469 (1989).

scrutiny to strike down a structurally parallel program benefitting minority businesses contracting for work performed for the City of Richmond, Virginia. O'Connor observed that whereas the Fourteenth Amendment empowered Congress to regulate matters affecting race, the same amendment stripped such power from state and local governments. One year later, in *Metro Broadcasting v. Federal Communications Commission (FCC)*,[34] Justice Brennan, for the first time, commanded majority support in applying intermediate scrutiny to sustain a racial preference for the issuance of broadcast licenses as applied to a challenge pursuant to the Equal Protection component of the Fifth Amendment Due Process Clause.[35]

Brennan's victory was short-lived. In the landmark 1995 decision, *Adarand Constructors v. Pena*,[36] Justice O'Connor, writing for a majority, struck down a federal MBE set-aside program under strict scrutiny, thus overturning *Metro Broadcasting*. Rejecting a broader position expressed in Justice Scalia's concurrence that would ban virtually all use of race, Justice O'Connor, writing a majority opinion that Scalia nonetheless joined,[37] reiterated her earlier refutation of Thurgood Marshall's claim that "strict in theory [is] fatal in fact."[38] Up to and including *Adarand*, Justice O'Connor had never voted to sustain a benign use of race,[39] raising the question as to what motivated O'Connor to insist that as applied to race, strict scrutiny is somehow not fatal. As was borne out eight years later, the critical remaining case involved affirmative action in higher education.[40] In what Justice Scalia described as the "split double header"[41] of *Grutter v. Bollinger*[42] and *Gratz v. Bollinger*,[43] the simmering dispute between these two justices came to a head.

In *Grutter*, Justice O'Connor essentially afforded Powell's controlling *Bakke* analysis majority-opinion status. Although *Gratz* held that the University of Michigan could not use a point system for its undergraduate admissions in which a substantial specified allocation attached to minority applicants, *Grutter* held that the law school could give added weight to race as part of

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[34] 497 U.S. 547 (1990).
[35] *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (applying equal protection component of the Fifth Amendment Due Process Clause to desegregate public schools in the District of Columbia thus avoiding anomaly that D.C., not a state and not subject to the Fourteenth Amendment, would not be subject to the requirements of *Brown v. Board of Education*, 347 U.S. 483 (1954)).
[36] 515 U.S. 200 (1995).
[37] For a discussion of Justice Scalia's apparently reluctant strategy in joining the majority opinion, see Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 334-35 (2000).
[38] *Compare* Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in the judgment) (arguing that strict scrutiny is "strict in theory, but fatal in fact."), *with Adarand Constructors*, 515 U.S. at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'") (majority opinion).
[39] Michael Klarman, *Are Landmark Court Decisions All That Important?*, CHRON. HIGHER EDUC., Aug. 8, 2003, http://chronicle.com/article/Are-Landmark-Court-Decisions/7437 ("Before Grutter, [Justice O'Connor] had never voted to sustain a race-based affirmative-action plan, though she had explicitly noted that such policies might be acceptable under certain stringent conditions.").
[40] *See id.* ("Grutter reveals that O'Connor probably changed her mind about affirmative action over the past two decades.").
[41] Grutter v. Bollinger, 539 U.S. 306, 348 (2003) (Scalia, J., dissenting).
[42] 539 U.S. 306.
[43] 539 U.S. 244 (2003).

a holistic admissions process that treated each applicant individually. The Court maintained this distinction despite data demonstrating near-perfect precision in the ratio of minority-to-nonminority applicants, on the one hand, and the ratio of admitted minority-to-nonminority students, on the other.[44] Even though the point system appeared to formalize the functional algorithm operating in the law school admissions process on a smaller scale through the constant monitoring of daily admissions reports, O'Connor, like Powell before her, insisted that the form the affirmative action process took mattered as much as, if not more than, the substantive results obtained.

As previously discussed,[45] Justice Kennedy writing for the *Fisher* majority, remanded the University of Texas affirmative action program, holding that the Fifth Circuit's approach, which deferred to the university's holistic approach to ensuring a critical mass of minority students, risked rendering strict scrutiny "feeble." Given the similarities between the sustained Michigan Law School affirmative action program and the remanded Texas program, *Fisher* might be read to imply that *Grutter* somehow violated itself.[46]

While this doctrinal area remains unsettled, we know the following. First, in the context of benign race-based preferences, the Court has abandoned intermediate scrutiny in favor of strict scrutiny. Second, in the specific context of race-based affirmative action in state institutions of higher learning, strict in theory is not fatal in fact, but it is also not feeble in fact. And third, although sitting somewhere between fatal and feeble, the applicable test is not intermediate scrutiny.

2. Rational in Theory but Strict in Fact

Just as the Court has salvaged race-based affirmative action while nominally applying strict scrutiny, so too it has invalidated laws adversely affecting sexual minorities while nominally applying rational basis scrutiny.[47] Recall that absent a justificatory trigger for strict scrutiny, the Court applies rational basis scrutiny under which it typically sustains the challenged law. The line of cases testing this intuition involves claims of animus against the adversely affected class. In *U.S. Department of Agriculture v. Moreno*,[48] the Court struck down the denial of benefits under the Food Stamp Act of 1964 under a provision banning households with nonrelated cohabitants from eligibility. The case involved highly sympathetic plaintiffs, including the mother of a hearing-impaired girl who had moved in with another woman on public assistance to provide mutual financial support while the girl attended a specialized school.

[44] *Grutter*, 539 U.S. at 383 (Rehnquist, J., dissenting) ("But the correlation between the percentage of the Law School's pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'") (alteration in original).
[45] *See supra* at 3.
[46] For a more detailed analysis of *Fisher*, see *infra* part II.F.2.b.
[47] For a discussion of the implications of dimensionality for same-sex marriage, see *infra* Part III.C.
[48] 413 U.S. 528 (1973).

Justice Brennan, writing for the majority, struck down this eligibility provision on the ground that it was premised on an animus against "'hippies' and 'hippie communes.'"[49] Brennan held that it is never rational to exhibit an animus against a politically unpopular group.[50] Then-Associate Justice Rehnquist dissented, arguing that the law satisfied conventional rational basis scrutiny by reducing the likelihood that cohabitants have come together for the purpose of receiving public benefits, thereby reducing fraud.[51]

Although Justice Brennan rejoined that the statute contained separate anti-fraud provisions,[52] under ordinary rational basis review, that would not have mattered. The test requires no more than one legitimate governmental interest and means that rationally further that interest. A set of cumulative anti-fraud provisions within an elaborate public-welfare scheme certainly seems to satisfy that test. The only way to hold that the cohabitation provision was motivated by an illicit animus—an obviously illegitimate purpose—was therefore to read out an otherwise legitimate justification.[53] But that is not standard rational basis review.

The Court extended its *Moreno* analysis in *City of Cleburne v. Cleburne Living Center*.[54] In that case, a city denied a special-use permit that would have allowed an investor to convert a building into a home for adults with intellectual disabilities.[55] The Court rejected several justifications for the denial,[56] and it concluded instead that it was based on an illicit animus against such persons, which, once more, was not a permissible basis in support of the law. Again, however, this is not conventional rational basis review.

However problematic normatively, it is not irrational to imagine that the permit denial resulted from community concerns that if approved, the plan would reduce property values. Preserving property values is not merely rational; it is a central function of local government. And this justification does not turn on animus, or at least not necessarily. A group of residents could readily argue that although they wish others in their community, or potential purchasers,

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[49] *Id.* at 534.

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

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

[52] *Id.* at 536-37 (majority opinion).

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

[54] 473 U.S. 432 (1985).

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

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

shared their unbiased views so that the proposed use would not adversely affect local property values, the unfortunate contrary reality explains their opposition.

To be sure, such arguments were rightly rejected in the context of restrictive covenants excluding, typically, African Americans and Jews. No one would defend such laws today on the ground that blatant racial or religious restrictive covenants preserve land values. But rather than helping the *Cleburne* majority, this merely underscores the analytical difficulty. State-supported restrictions based on race or religion trigger strict scrutiny.[57] Thus, even an arguably rational, albeit disturbing, justification related to property values as the basis for racial or religious exclusions thankfully will not suffice. Instead, the state would have to offer a compelling justification plus narrow tailoring. Preserving the value of real estate through racial or religious bigotry easily fails this stringent test.

Despite these analytical difficulties, explaining the Court's reliance on rational basis scrutiny in this context is not difficult. In other contexts, for example driving or being held responsible for contractual obligations, distinguishing adults with intellectual disabilities from the general adult population makes sense, as does the inclusion of cumulative anti-fraud provisions in a welfare law. The animus analysis is like a one-time ticket, invalidating each of the laws in question without calling the presumptive validity of future laws, for example, those affecting persons with intellectual disabilities or those imposing welfare-access restrictions, more generally, into question. And yet, applying rational basis scrutiny while striking down a challenged law produces an inevitable consequence, one that Robert Nagel has aptly labeled judicial "name-calling."[58] After all, the law is only invalid under this otherwise deferential standard if it was the product of an irrational animus.

This became apparent in *Romer v. Evans*.[59] In that case, the state of Colorado enacted Amendment 2 through a state-wide initiative. The amendment prohibited sexual orientation, or other sexual-minority status, from inclusion in state or local antidiscrimination laws. Prior to that amendment, various localities had amended their antidiscrimination laws, which typically included categories such as race, religion, and gender to also include sexual orientation or other minority-sexual status. Justice Kennedy, writing for the *Romer* Court, struck down Amendment 2, relying principally on the *Moreno/Cleburne* animus rationale.

Justice Scalia's vehement dissent maintained that because it was permissible to criminalize same-sex intimacy—*Romer* was issued before *Lawrence v. Texas*[60] overruled *Bowers v. Hardwick*[61]—it was, in his view, permissible to deny special benefits to individuals

[57] The Supreme Court relied upon a bootstrap analysis to render these devices constitutionally impermissible in *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[58] ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE, 124, 126 (1994) (positing that "sinister descriptions of 'the proponents'" proved relevant, perhaps necessary, to support the claim that the challenged law lacked a rational basis.).
[59] 517 U.S. 620 (1996).
[60] 539 U.S. 558 (2003).
[61] 478 U.S. 186 (1986).

with a "self-avowed tendency or desire" to engage in such intimacies.[62] Scalia further advanced a process-driven justification for Amendment 2 that did not appear to turn on animus against gays and lesbians, a characterization of Colorado voters that, Scalia claimed, was belied by Amendment 2's narrow passage.[63] In Scalia's analysis, it was not irrational in a multilevel democracy to take an issue about which gays and lesbians had scored local victories in municipal lawmaking processes, and ratchet upward the decision-making level state-wide for ultimate resolution. In fact, Scalia claimed, a right to retain victories secured at lower levels in a multilevel democracy was "unheard of."[64]

The relationship between *Romer*, an equal protection case, and *Lawrence*, a due process case, is important. In his *Romer* dissent, Justice Scalia relied in part on *Bowers*, a case that *Lawrence* later overruled, to defend as rational the systematic exclusion of minority sexual orientation from the list of protected statuses under state and local antidiscrimination laws. After *Romer*, *Lawrence* struck down a Texas consensual sodomy statute that, unlike the Georgia statute sustained in *Bowers*, specifically targeted same-sex intimacy. Justice Kennedy once again wrote the majority opinion, and, as in *Romer*, he declined to apply strict scrutiny. Although Kennedy's articulation of the selected tier of scrutiny is not precise, a fair reading supports rational basis scrutiny.[65]

Kennedy reasoned that the historical analysis on which the *Bowers* majority relied was deeply flawed, and that when sexual activity is not viewed as an isolated event, but rather as part of a defining bond between committed partners, it became evident that there was no substantial justification for singling out the particular intimacy of consensual same-sex partners for treatment as a criminal act.[66] This analysis would have been more easily achieved had the Court identified same-sex intimacy as a fundamental right triggering strict scrutiny, as it had the right to birth control[67] and to terminate pre-viability pregnancies.[68] The Court was not willing to do that, perhaps to avoid signaling a likely resolution to the question of same-sex marriage. In avoiding this issue, the *Lawrence* Court demonstrated that rational in theory is sometimes strict, perhaps even fatal, in fact.

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[62] *Romer*, 517 U.S. at 642.
[63] *Id.* at 652.
[64] *Id.* at 639 (Scalia, J., dissenting). One notable difference between the striking the challenged laws using rational basis *Moreno* and *Cleburne*, on the one hand, versus in *Romer*, on the other, is that the neutral justifications set aside to claim the former set of challenged laws irrational go to the substantive merits, whereas the neutral justification claimed to be set aside in *Romer* goes to the process of enactment.
[65] Although Kennedy employed the term "substantial" at various points in his opinion, the overall opinion does not appear to rely on either intermediate or strict scrutiny. Most notably, Justice Kennedy did not refute Scalia's observation that the majority had applied rational basis review. Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting).
[66] *Id.* at 567 (majority opinion) (describing sexual intimacy as part of "personal bond that is more enduring").
[67] Griswold v. Connecticut, 381 U.S. 479 (1965).
[68] Roe v. Wade, 410 U.S. 113 (1973); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality) (classifying woman's interest in abortion as a liberty interest rather than a fundamental right).

Although the Court did not reach the ultimate question of same-sex marriage, it relied on the same animus rationale when striking down § 3 of DOMA in *United States v. Windsor*.[69] After citing the animus line of cases, Justice Kennedy stated:

> The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[70]

Writing in dissent, Justice Scalia maintained that the majority opinion had not resolved what he viewed as the central issue in the case:

> The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.[71]

Scalia's observation remains correct; although Kennedy has shown that rationality review can prove fatal, we still do not know the ultimate test to be applied to same-sex marriage.

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

The final complication for tiers of scrutiny analysis involves so-called intermediate scrutiny in gender- or sex-based classifications. The history of such classifications is well known.[72] What started as a more piercing rational basis scrutiny quickly emerged a formal third tier. That tier requires proof of an important governmental interest and means substantially in furtherance of that interest.[73] The results have been mixed. The Court has not systematically struck down gender classifications, although it has struck down some. The dividing line appears to be that the Court sustains policies based on real differences between the sexes or that seek to overcome the present effects of historically adverse treatment of women, primarily in workplace settings. Conversely, the Court strikes down policies reflecting "overbroad generalizations" about the sexes,[74] sometimes called "old fogyism."[75] Two relatively recent cases highlight the difficulties that intermediate scrutiny has posed for sex-based distinctions.

In *United States v. Virginia*,[76] Justice Ginsburg, writing for a majority, struck down the exclusion of women from the Virginia Military Institute (VMI), a state military-style academy that prided itself on the adversative method of training and its spartan barracks life and dining arrangements, especially for first years, affectionately referred to as "rats." Under standard intermediate scrutiny, the exclusion of women was arguably justified by the requisite

[69] 133 S. Ct. 2675 (2013).
[70] *Id.* at 2693.
[71] *Id.* at 2706 (Scalia, J., dissenting).
[72] As is the history of substituting the grammatical term "gender" in place of the anatomical term "sex." *See* Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court and Vice Versa*, N.Y. TIMES, Apr. 11, 2009, at A14 (crediting Ginsburg's secretary, who was concerned with improper connotations of "sex," with the substitution).
[73] Craig v. Boren, 429 U.S. 190, 197 (1976).
[74] United States v. Virginia, 518 U.S. 515, 533 (1996).
[75] *Id.* at 543 (citation omitted).
[76] 518 U.S. 515 (1986).

accommodations respecting privacy and physical exertion imposed on rats and even upperclassmen before women could enter the program. For that reason, the Commonwealth developed the Virginia Women's Institute for Leadership ("VWIL"), housed at the all-women's Mary Baldwin College, for women interested in developing military-style leadership skills in what the creators regarded as a more congenial setting.[77]

As Justice Ginsburg observed, the differences between the two programs—VMI and VWIL—were profound, including philosophical differences in pedagogy, with VWIL focused on group participation and building self-esteem rather than the breakdown-and-rebuild model embodied in the adversative method, and qualitative differences in degree programs, faculty, and opportunities for alumni networking.[78] The *Virginia* case thus resembled *Sweatt v. Painter*,[79] as the Court drew parallels between VWIL in the context of gender and the obviously inadequate effort by Texas to construct a law school for blacks in lieu of admission to the flagship University of Texas School of Law in the context of race. Still, there were notable differences between *Virginia* and *Sweatt*, not the least of which was the context—gender, not race—and the doctrine—intermediate scrutiny, not strict.

If intermediate scrutiny accommodates legislation recognizing real-sex differences and if admitting women requires changing institutional acculturation and pedagogy, then a small number of women seeking admission to VMI would not suffice to void the exclusion of women. Given the preexisting understanding of the test to accommodate laws reflecting such differences between the sexes, Ginsburg was thus forced to refine intermediate scrutiny to strike the law down. She did so by stating that the government has the burden to show an exceedingly persuasive justification for its policy,[80] which must be contemporaneous, and thus intended at the time of enactment, rather than constructed to justify the policy after the fact.[81] This doctrinal transformation had three important components. First, the burden of proof is squarely on the government. Second, an "exceedingly persuasive justification" is closer to "compelling" than "important." Third, that justification must be contemporaneous.

The contemporaneity requirement proved essential in striking VMI's exclusion of women. Even if the adversative system and spartan barracks life were grounded in important pedagogical concerns that justified excluding women, which the majority refuted, that was irrelevant if the Virginia legislature did not rest on those reasons when creating VMI in 1839. As Chief Justice Rehnquist aptly observed in his concurrence in the judgment, however, since Virginia was unaware of any obligation to offer such a program to women until, at the earliest, the 1982 decision, *Mississippi University for Women v. Hogan*,[82] which held that an *all women's*

[77] *Id.* at 526.
[78] *Id.*
[79] 339 U.S. 629 (1950).
[80] *Virginia*, 518 U.S. at 524.
[81] *Id.* at 536.
[82] 458 U.S. 718 (1982).

nursing program violated the equal protection rights of *men*, the majority analysis produced a constitutional anachronism.

The upward thrust of intermediate scrutiny toward strict scrutiny proved short-lived. In *Tuan Ahn Nguyen v. INS*,[83] Justice Kennedy, writing for a majority, sustained an INS policy that automatically conferred citizenship status on the foreign-born illegitimate children of U.S. citizen mothers, but that required affirmative steps prior to maturity before similarly situated children of U.S. citizen fathers could acquire citizenship.[84] The *Nguyen* majority held that real sex differences justified the policy because whereas fathers of illegitimate children are often unaware of the conception, let alone birth, of the child, mothers of illegitimate children are invariably aware of their birth and are thus far more likely to form meaningful parental bonds.[85] Even though at the time of enactment, one consideration was proof of paternity, a concern overtaken by DNA testing, that contemporaneous justification proved irrelevant. Also absent from Kennedy's opinion was any discussion of exceedingly persuasive justifications that the government must prove. Kennedy's intermediate scrutiny was of the pre-*Virginia* variety, which as applied to a case implicating real-sex differences equated, in effect, to rational basis review.

This brings us to the ultimate point. Although the Court has articulated an intermediate scrutiny standard, in this context, the test does no real work. Behind the intermediate scrutiny veil, the Court readily sorts into the presumptively good bin (intermediate lite) those laws based on real differences or that remedy past adverse treatment and into the presumptively bad bin (intermediate heavy) those laws based on "old fogyism." Of course the old-fashioned two-tiered scheme, with rational basis in place of intermediate lite and strict scrutiny in place of intermediate heavy, is entirely adequate to this binary task. The exception was the VMI case, which required redefining intermediate scrutiny to strike down a law implicating a real-sex difference, a result that lasted—if *Nguyen* is a meaningful indicator—only five years.

D. *Critiques and Proposals*

This case survey suffices to explain the critical reception that the Supreme Court's approach to tiers of scrutiny has received. Although the present scheme is not without defenders,[86] commentators have strongly criticized the Court's approach, focusing on apparent doctrinal inconsistencies, disingenuous applications of standards, and outcomes that seem overly determined by the chosen tier.[87] These concerns have given rise to myriad, sometimes

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[83] 533 U.S. 53 (2001).

[84] For a discussion of a fractured predecessor case, *Miller v. Albright*, 523 U.S. 420 (1989), including a breakdown of the opinions, see STEARNS, *supra* note 31, at 7-14.

[85] *Nguyen*, 533 U.S. at 73.

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

[87] *See* Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339, 2343-46 (2006) (summarizing "standard critiques of tiered review," including lack of guidance, excessive rigidity, and inadequate normative foundation).

conflicting, doctrinal prescriptions. Most notably, proposals for reform have included Justice Stevens's advocating abandoning tiers of scrutiny altogether in favor of a uniform approach to all equal protection cases,[88] and Justice Marshall's advocating for a broad array of tiers, linked to the invidiousness of the classification or the importance of the claimed right.[89]

II. THE DIMENSIONALITY OF TIERS

The discussion that follows offers an innovative framework for considering the problem of tiers of scrutiny. We begin with a simple numerical illustration. Although the example does not capture the nuance and complexity of constitutional doctrine, abstracting away from such detail will help frame dimensionality and related concepts. This part then progresses with increasingly complex illustrations of dimensionality that are relevant to constitutional doctrines.

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

Consider a simple binary division of integers into the categories of odd or even, expressed horizontally in Table 1. These broad categories, resting along a single dimension, suffice to sort as small a set as two consecutive integers (1,2), or infinite integers (1,2,3,4, etc.), based on whether each is or is not susceptible to division by two. No numbers listed under odds (1,3,5,7, etc.) can be so divided, whereas all numbers listed under evens (2,4,6,8, etc.) can. These two categories, resting along the odds/evens dimension, suffice for this elementary sorting task even over potentially infinite integers.

	Odds	Evens
Primes	**3**, 5, 7, 11, 13, 17, 19 . . .	**2**
Nonprimes	1, 9, 15, 21 . . .	**4**, 6, 8 . . .

[88] *See* Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in others."). *See also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484 (2004) (positing 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 . . . ."); Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 819, 824 (2002) ("The hard-judicial-look approach [set out in *United States v. Virginia*] could and should become the norm in both racial and gender cases."); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 177 (1984) (proposing that "[t]he multiple tiers . . . be transformed readily into a comprehensive system based upon the unitary standard . . . which in all instances would inquire whether there is an appropriate governmental interest suitably furthered by the governmental action in question") (internal quotations omitted).

[89] *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1972) (Marshall, J., dissenting) ("A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn"). *See also* James E. Fleming, *"There is only One Equal Protection Clause": An Appreciation of Justice Stevens's Equal Protection Jurisprudence*, 74 FORDHAM L. REV. 2301, 2311 (2006) (concluding from review of cases that "[t]here is only one Equal Protection Clause, with a continuum of judgmental responses or a spectrum of standards") (internal quotations omitted)).

Table 1: Dimensionality in Categorizing Integers

Now introduce another criterion, whether each listed integer is or is not prime, where prime means an integer larger than 1 that can only be divided by itself and 1 while generating a whole number. The odds/evens dimension cannot accomplish this task. The difficulty is that 2 is an even prime, whereas the remaining primes are a subset of odds. In effect, the number 2 is the mathematical equivalent of a hot air balloon, which required splitting the dimensions of size and weight.[90] Likewise, because of the number 2, sorting out primes requires introducing the separate primes/nonprimes dimension, expressed vertically in Table 1.[91]

However hard we might try to tweak the categories "odds" or "evens" to locate primes or to tweak "primes" and "nonprimes" to sort odds and evens we are destined to fail. Such categories as "even primes," with a set of one integer (2), and "odd primes," with an infinite sequence (3,5,7,11,13, etc.), must borrow criteria from both the odds/evens and primes/nonprimes dimensions.

This basic mathematical illustration reveals several points about dimensions. First, the analytical difficulty of multiple dimensions does not arise from the number of data being sorted. Either binary scheme—odds/evens or primes/nonprimes—suffices to sort infinite data.[92] Second, a single dimension can capture more than one normative criterion provided that those criteria move in a common direction.[93] Third, and perhaps most notably, Table 1 demonstrates that sorting as small a sequence as three consecutive integers—2,3,4—based on the criteria of odds/evens and primes/nonprimes requires two dimensions rather than one.[94]

Although constitutional law is more complex than sorting integers, tiers of scrutiny can also be assessed based on dimensionality. Infinite cases or challenged laws can be sorted over two tiers—rational basis or strict scrutiny—provided that those tiers rest along a dimension that accurately captures the relevant normative stakes. And yet, as with the deceptively simple sequence 2, 3, and 4, sorted as odds/evens and primes/nonprimes, even a small number of cases or challenged laws has the potential to force an additional dimension, thus thwarting a binary sorting scheme. The remainder of this part will explore each of these points as they relate to specified rulemaking contexts.

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[90] *See supra* at 3.

[91] For further discussion of the relevant terminology, see *infra* Part II.A. (relating dimensionality to cycling). For doctrinal applications, see STEARNS, *supra* note 31, at 129-30 (demonstrating single dimension in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)); *see also id.* at 107-08 (demonstrating multiple dimensions in *Miller v. Albright*, 523 U.S. 420 (1998)).

[92] Thus, for each listed dimension, we can overlay an additional normative criterion—small to large—without forcing yet another dimension. In Table 1, starting in the upper left and moving clockwise or counterclockwise, for each box we can plot an infinite sequence from small to large. *See supra* Table 1.

[93] By combining categories vertically or horizontally along each separate dimension, Table 1 reveals small-to-large odds or evens (the horizontal dimension), and small to large primes or nonprimes (the vertical dimension). *See supra* Table 1.

[94] Because 2 is an even prime, three is an odd prime, and four is an even nonprime, as the bolded sequence in Table 1 reveals, neither dimension alone is capable of this sorting task. *See supra* Table 1.

B. *Shifting Lines Along a Single Dimension*

Let us now consider the potential complexity of rules resting along a single dimension. Imagine the need to divide children and adults. In the ancient Jewish tradition—long before they became at best symbolic assumptions of community responsibility, and at worst an excuse to party—the age of 13 marked the Bar Mitzvah (for boys only, with girls considered adults at 12).[95] Even the most devout Jew would no longer consider a boy of 13 (or a girl of 12) an adult.[96] For a long time within the United States and many other parts of the world, many marked adulthood at the age of 18, corresponding roughly to completing high school. More recently within the United States, meaningful responsibility has been deferred through the end of college, typically age 22. And under the Affordable Care Act, "children" up to the age of 26 can remain on their parents' insurance,[97] thus continuing dependency through the completion of graduate or professional training. In effect, we have seen a doubling through four- or five-year increments—13, 18, 22, and 26—of a once-accepted age of maturity.[98]

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

Table 2: Shifting Division Along a Single Dimension

The point, of course, is not to lament (or praise) prolonged adolescence. Rather, it is to show that the difficulty in drawing a line, and even the need to relocate that line over time, does not, by itself, affect dimensionality. Whichever historical period in which the single immaturity-to-maturity dimension in Table 2 is assessed, and for whatever purpose, that division takes place along a single young-to-old dimension.[99] Drawing a line does not mean it will succeed for all affected persons. Along the relevant dimension, the dividing line is a rule that attaches different consequences based on the side on which an individual falls. Given the purpose for which the line is drawn—the ability to participate in particular religious rituals, to create binding contracts,

[95] *See* THE NEW ENCYCLOPEDIA OF JUDAISM 106, 109-10 (Geoffrey Wigoder et al. eds., 2002) (dating earliest bat mitzvah ceremony to the 1920s).

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

[97] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001 (a) (5), 124 Stat. 119, 132 (2010) (codified at 42 U.S.C. § 300gg-14) (amending section 2714(a) of the Public Health Service Act).

[98] For a recent debate relying on neuroscience to assess the child-adult line, see Laurence Steinberg, *What the Brain Says About Maturity*, N.Y. TIMES.COM ROOM FOR DEBATE (May 29, 2012), http://www.nytimes.com/roomfordebate/2012/05/28/do-we-need-to-redefine-adulthood/adulthood-what-the-brain-says-about-maturity.

[99] In some contexts, age might implicate dimensionality, for example, diminished capacity for the very young or old.

to consent to sexual activity, to marry, to finish school, to work, to live on one's own, to assume personal financial responsibility—its placement determines who can and who cannot lawfully engage in, or be held lawfully accountable for the consequences of, such activities. The rule accomplishes this sorting function even though some individuals sorted as children are more mature than others sorted as adults and vice versa.[100] That is the nature of a rule.

Despite this example's simplicity, the dimensionality insight is relevant to evolving bodies of nuanced constitutional doctrine. Degrees of invidiousness of challenged classifications or of the importance of claimed fundamental rights are subject to shifting societal understandings—and thus shifting lines along the relevant dimension—over time. To take one prominent example, consider the restriction of marriage to opposite-sex couples. The changing societal consensus respecting the unfairness of this traditional limitation has been sufficiently rapid as to give the casual observer whiplash. A mere generation ago, one prominent liberal scholar described constitutional arguments supporting same-sex marriage as "adventurous."[101] Indeed, they were, which merely highlights the Red Queen nature of constitutional law making. As later cases, including *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor* have created an increasingly firm foundation for such challenges, the result has been to render a constitutional ruling finding that equal protection applies to sex-marriage not only more plausible, but seemingly inevitable.[102] Societal sensitivity to this issue appears to have undergone a seismic shift.[103] Even so, as shown below,[104] the changing dividing line does not imply a change in underlying dimensionality.

C. *On the Inevitability of Tiers*

Even sorting constitutional cases along a single analytical dimension can generate substantial complexity. To illustrate, imagine how Justice Stevens's proposed regime—a single meaningful tier for all cases arising under the equal protection clause—would operate in practice.

Justice Stevens long maintained that equal protection demands that laws operate consistently with a regime that governs impartially.[105] Cass Sunstein has suggested more

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

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

[102] For a discussion of the role of incrementalism in strengthening the normative legitimacy of an eventual ruling on same-sex marriage, see Maxwell L. Stearns, *"Grains of Sand" or "Butterfly Effect": Standing, the Legitimacy of Precedent, and Reflections on* Hollingsworth *and* Windsor, 64 ALA. L. REV. 349, 393-98 (2013).

[103] Witness President Obama's "evolution." *See* Jackie Calmes & Peter Baker, *Obama Endorses Same-Sex Marriage, Taking Stand on Charged Social Issue*, N.Y. TIMES, May 10, 2012, at A1.

[104] *See infra* Part III.C.

[105] *See* Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. It requires every State to govern impartially.").

generally that the Constitution embraces a principle of impartiality.[106] These analytical frameworks are sufficiently appealing that it seems hard to argue against them (and thus for partiality or non-neutrality as an overriding normative principle), at least as an abstract matter. The problem, however, is discerning what such terms mean, not in the abstract, but as applied to actual cases testing constitutional doctrine in often-unanticipated ways.

From the perspective of lower federal and state courts, a single tier identifies an analytical dimension along which a line will eventually be drawn. The Court will not seek out the precise dividing line in any given case.[107] Rather, over myriad constitutional cases, the Court will identify particular features that result in each challenged law being sustained or struck down. Lower courts will carefully read these cases for guidance. Eventually those courts will come to associate certain descriptors as signaling a presumptively problematic law, and others as signaling a presumptively non-problematic law. Because of the inevitably dynamic responses, most notably by legislatures or other lawmakers, to the Court's pronouncements, a set of proxies will emerge that informs the initial sorting. Over time, as lawmakers seek to avoid adverse characterizations based on the Court's pronouncements that prevent them from accomplishing certain objectives, the Court will need to identify other rules that allow a search for errors missed in the initial sort.

Eventually the characterizations will solidify, and some will come to be associated with presumptively bad, and others with presumptively good, laws. Those respective groupings will fall on opposite sides of what will inevitably become a *de facto* dividing line. Along the relevant analytical spectrum, that line will sort out which characterizations have become associated with invidious or non-invidious classifications and which have become associated with protected rights or other non-protected interests. Once again, the analysis is not changed by the fact that the precise location of that line is unknown, or if it is known, that it might change over time.

Although it appears that Justices Marshall and Stevens have made opposite critiques of the Supreme Court's approach to tiers of scrutiny, their analyses fall victim to a similar analytical difficulty. Each Justice has committed a category mistake. Marshall's contrary approach, applying multiple tiers of scrutiny based on the degree of invidiousness of the challenged classification or the relative importance of the claimed right,[108] will generate the same process. As data accumulate, lower courts will realize which of the several tiers result in presumptively classifying the challenged law as presumptively bad or presumptively good, and which factors justify further inquiry, leading to a potential opposite result from that predicted by the initial

[106] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 24 (1993). Ronald Dworkin has expressed similar views. *See* RONALD DWORKIN, *Liberalism*, *in* PUBLIC AND PRIVATE MORALITY 127 (Stuart Hampshire ed., 1978) (asserting that "government must be neutral on what might be called the question of the good life").

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

[108] San Antonio School Indep. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (proposing a "spectrum of standards" in equal protection cases).

sort.[109] Whether our starting point is Stevens's single tier or Marshall's many tiers, the Court will eventually accomplish the very same result as two presumptive tiers, albeit with different terminology, and until the signals sort themselves out, less guidance.

D. *Third Tier as Splitting the Difference*

The preceding analysis further demonstrates the analytical difficulty of interposing a third tier. If intermediate scrutiny provides a means of avoiding difficult sorting decisions, the solution is merely temporary. The very same set of characterizations, resulting in the very same data over time, that pervade the Marshall-Stevens approach to tiers is destined to confront the middle tier. We know that cases involving gender classifications are not automatically placed in the bin for presumptively bad or good laws. But that is not terribly helpful. What we do not know (yet anyway) is which specific cases contain challenged laws that are presumptively bad or presumptively good. Avoiding an immediate answer does not mean avoiding an eventual answer.

Over time, the Court will attach characterizations to those cases that are, in fact, presumptively bad (associated with "overbroad generalizations" or "old fogyism") or presumptively good (associated with "real-sex differences" and making up for past adverse treatment of women). Ironically, given the gender context, once the fig leaf of intermediate scrutiny is lifted, the true dimorphism of strict or rational basis review is revealed. The so-called middle standard is doing no work in the context of gender classifications because if its purpose is to serve as a placeholder for tough eventual decisions, there is no work for it to do.[110]

This analysis does not mean that the two-tier system invariably succeeds, or that the lines that the Court has drawn are always correct. Rather, it means that a third tier must be justified by something unrelated to uncertainty respecting where to draw an eventual line in an inevitable binary split. That "something" involves dimensionality. Given its unique role in our constitutional history, it is perhaps not surprising that the analysis returns us to race.

E. *Expanded Dimensionality and the Benign Use of Race*

Recall that Justice Brennan long advocated applying intermediate tier of scrutiny in cases challenging the so-called benign use of race, meaning cases in which the challenged racial classification was intended to provide a benefit to identified racial minorities. For a short time, from *Metro Broadcasting* through *Adarand*, he succeeded for federal racial preferences.[111] Eventually the Court abandoned intermediate scrutiny in this context, reverting to the traditional two-tier scheme—strict or rational basis review—in all race cases. Although replacing three tiers with two might appear to simplify the Court's analysis, the opposite is true if the scheme masks a genuine dimensionality problem. Table 3 illustrates the conceptual difficulty.

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[109] This follows from Bayes theorem. *See generally* Steven C. Salop, *Evaluating Uncertain Evidence with Sir Thomas Bayes: A Note for Teachers*, J. ECON. PERSP., Summer 1987, at 178.

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

[111] For a review of the case history, see *supra* Part I.C.1.

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

Table 3: Race and Dimensionality

The first dimension, presented vertically, involves the binary choice whether or not to condone the adverse use of race, meaning reliance on race in a manner that benefits whites as a class and harms blacks as a class. The second dimension, presented horizontally, involves the binary choice whether or not to condone the benign use of race, meaning laws that are designed to benefit blacks as a class at the expense of whites or other non-recognized minorities. Within Table 3, "adverse" and "benign" are thus defined from the perspective of historical victims of race-conscious discriminatory laws.

The binary nature of the depictions in Table 3 do not contradict the historical treatment of race along a spectrum, with a dividing line governing what was or was not permissible shifting over time. Our country has moved from permitting ownership of chattel slaves *to* permitting segregation in virtually all walks of life *to* permitting segregation in most walks of life other htan public schools *to* permitting segregation in no walks of life at least as a matter of formal law *to* grappling with the reality that race-neutral laws often affect race-specific outcomes. And of course one could add several gradations in between.

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

Long before tiers of scrutiny were formalized,[112] the color-blind understanding of equal protection implicitly assumed that laws affecting race rested along a single dimension. Against the backdrop of laws countenanced in the Jim Crow era, the color-blind view of equal protection represented a liberal position inasmuch as it would ban adverse race-conscious laws. This was the view expressed, perhaps most poignantly, in Justice Harlan's famous dissenting opinion in *Plessy v. Ferguson*:[113]

> [In] view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our

[112] For a discussion of the history of tiers, see *supra* Part I.A.
[113] 163 U.S. 537 (1896).

> Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.[114]

The concept of a color-blind Constitution is admirable, especially in the historical context of the *Plessy* decision. It remains so for those who embrace it as an ideal embedded within the Constitution. Justice Thomas has strongly asserted just this view in *Parents Involved in Community Schools v. Seattle School District No. 1*,[115] and in his opposition to reliance on race as part of an effort to help blacks, he identifies himself as heir to a tradition that includes Justice Harlan. Thus, Thomas states:

> Most of the dissent's criticisms of today's result can be traced to its rejection of the colorblind Constitution. The dissent attempts to marginalize the notion of a colorblind Constitution by consigning it to me and Members of today's plurality. But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy:* "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." And my view was the rallying cry for the lawyers who litigated *Brown.*[116]

Justice Thomas had previously gone further. In his separate opinion in *Adarand v. Pena*, Thomas stated:

> I believe that there is a "moral [and] constitutional equivalence," between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.[117]

Justice Thomas appears to have retreated from his *Adarand* moral-equivalence stance. After comparing the position of Justice Breyer and those who joined his *Seattle School District No. 1* dissent to that of segregationists, Thomas states in a footnote: "Justice Breyer's good intentions, which I do not doubt, have the shelf life of Justice Breyer's tenure."[118] Justice

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[114] *Id.* at 559 (Harlan, J., dissenting).

[115] 551 U.S. 701, 748 (2007) (Thomas, J., concurring).

[116] *Id.* at 772 (citations omitted). *Parents Involved* itself involved whether one northern school district that never segregated its schools based on race and one southern district that had done so but that had since been declared unitary, and thus in compliance with Equal Protection, could employ race-conscious policies as a school assignment tiebreaker to avoid the risk of reversion to single-race schools. In a sharply contested five-to-four decision, with Chief Justice Roberts writing the majority opinion, the *Parents Involved* Court struck down the race-specific policies, resting on a color-blind reading of Brown v. Board of Education, 347 U.S. 483 (1954), and a restrictive construction of the later southern desegregation decision, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

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

[118] *Parents Involved*, 551 U.S. at 781 n.30 (Thomas, J., concurring in part and concurring in the judgment). Most recently, Justice Thomas stated: "There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits." *Fisher*, 133 S. Ct. 2411, 2422 (2013) (Thomas, J., concurring). Assuming that what makes those who condone race-conscious affirmative action morally equivalent to those condoning Jim Crow is (1) the willing acceptance of race-conscious policies that have (2) the purpose and effect of harming African Americans, then Thomas's block quote is in tension with his earlier moral-equivalence stance. In acknowledging Breyer's good faith, Thomas implies that

Thomas's ultimate position is less important than the merits of the substantive analysis contained in his longer *Parents Involved* quotation. Although each separate assertion seems defensible,[119] the larger import misses a critical point related to the state's reliance on race to benefit blacks. The resulting tension arises due to the problem of dimensionality.

When Harlan embraced a color-blind view of equal protection in *Plessy*, he did not do so in an analytical vacuum. He expressed that view in the historical context of the then-dominant understanding: the relevant spectrum along which racial laws were assessed involved possible limitations on a state's power to use race in a manner that perpetuated the status and interests of the dominant white race. At the time of *Plessy*, the dominant understanding condoned express reliance on race that maintained a social caste consistent with then-dominant cultural mores. So long as the enacting legislature had a rational justification in support of the law—otherwise, it would presumably violate dominant social mores—the law would be sustained.

Even Justice Brown, in rejecting an equal protection challenge to segregated railway cars for the *Plessy* majority, acknowledged possible state laws that might cross the permissibility line, namely those whose sole or dominant purpose was to harass the minority race.[120] Justice Harlan, relying on his color-blind reading of equal protection, drew the permissibility line in a far more restrictive manner. In his view, whatever the dominant cultural norms of the day were, the races had to realize—more to the point, whites had to realize—that their fates were inextricably intertwined. And thus, Harlan asked, what could more powerfully prevent eventual, and indeed inevitable, race progress than a law boldly signaling that one race was so unfit as to be unsuited to sit next to another on a railway coach?[121]

Although the Supreme Court has nominally applied strict scrutiny while sustaining a limited use of race in the context of admissions in state institutions of higher learning, it had to distort the application of that test to accomplish its goal. In addition to relaxing the understanding of narrow tailoring so as not to require exhausting race-neutral alternatives that might accomplish diversity at the expense of the law school's elite status, the *Grutter* majority afforded unprecedented deference to the law school's asserted desire to eventually bring to a close its reliance on race-advertent admissions.[122] The *Grutter* majority winked and nodded at the law

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Breyer, along with the other dissenters, does not seek to harm, but rather seeks to help, blacks, even if he disagrees on the merits of the underlying policies in question. This also explains his more recent reliance on the absence of a "principled distinction," rather than on moral equivalence, thus implying that Thomas simply disagrees on the merits with those who characterize the policies respecting race that he disfavors as benign.

[119] With one notable quibble. Historians have demonstrated that color blindness was part of a larger strategy among the *Brown* litigants that freely combined elements of anti-classification and of anti-subordination and that the deciding justices did not uniformly embrace either theory. *See generally* Christopher W. Schmidt, Brown *and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008).

[120] Plessy v. Ferguson, 163 U.S. 537, 549-50 (1896) (illustrating with laws that would require blacks and whites to walk on opposite sides of the street.)

[121] *Id.* at 560 (Harlan, J., dissenting). Even then, Justice Harlan was explicit that his concern was limited to formal legal equality; he believed social inequality of the races inevitable. *Id.* at 559.

[122] *See supra* Part I.C.1; *see also* Grutter v. Bollinger, 539 U.S. 306, 339 (2003) ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between

school's claimed holistic daily-monitoring, which functionally replicated *Gratz* Court's rejected point-driven algorithm.

This analysis helps to explain why in *Fisher* Justice Kennedy claimed that as applied to the University of Texas, the *Grutter* version of strict scrutiny looked "feeble in fact."[123] Under traditional strict scrutiny, the Court would not delegate to the very institution seeking to defend its race-conscious policy against an equal protection challenge the power to decide if its claimed interest was sufficiently compelling or its chosen means was sufficiently tailored.[124] In remanding the Fifth Circuit *Fisher* ruling, Kennedy was implicitly suggesting that *Grutter*'s strict scrutiny framework was at war with itself.

Table 3 exposes the analytical difficulty as a problem of dimensionality. Thus, benign race-conscious programs, specifically affirmative action, occupy in the lower left, whereas adverse race-conscious laws, namely Jim Crow, occupy the upper right, within a two-dimensional space. Harlan's color-blind constitution is not only apt; it is comprehensive, in a world in which relevant laws rested along a single dimension with those harming minorities at one end and race neutral laws at the opposite end.[125] In that world, wherever the eventual line is drawn along the single dimension—harmful race-conscious laws to neutral laws—color blindness represents the minority-protecting position; conversely, along that same dimension, a regime that condones race advertence represents a decidedly illiberal position. Dimensionality is

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maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups."); *id.* at 343 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.").

[123] Fisher v. Univ. of Texas, 133 S. Ct. 2411, 2421 (2013).

[124] *Id.*

[125] Locating illustrations of benign racial preferences before the modern era is fraught with difficulty. Some post-Civil War laws benefitted blacks based on specific statuses, notably as former slaves or dependent widows, as opposed to based on race (thus also benefitted some whites). *See* Ira C. Colby, *The Freedmen's Bureau: From Social Welfare to Segregation*, 46 PHYLON 219 (1985). Justice Thomas rested on this very distinction in *Parents Involved*, 551 U.S. at 772 n.19 (Thomas, J. concurring) ("What the dissent fails to understand . . . is that the colorblind Constitution does not bar the government from taking measures to remedy past state-sponsored discrimination—indeed, it requires that such measures be taken in certain circumstances. Race-based government measures during the 1860's and 1870's to remedy *state-enforced slavery* were therefore not inconsistent with the colorblind Constitution." (emphasis in original) (internal citation omitted)). Other post-Civil War laws targeted destitute blacks as a class. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430-33 (1997) (citing statutes). These laws appear to have operated in parallel with others benefiting destitute whites, *see id.* at 431 n.23 (comparing statutes), and thus to have employed race for purposes of administrability, not as an early counterpart to a modern benign racial preferences.

Table 3 should not be read to imply that equal protection necessarily precluded the benign use of race during the Jim Crow era, which is why it frames the dimensions in terms of which practices are or are not condoned. Dimensionality thus persists when we consider the combined effect of laws that are or are not condoned along each separate dimension. During Jim Crow, the general (conservative) understanding condoned a regime in which the only race-specific laws were adverse to blacks (thus lacking benign race-based laws as a matter of fact); the color blindness position failed to condone any race-based laws on the understanding that all such laws were detrimental to blacks; and the modern liberal position condones benign race-based laws but not adverse race-based laws. Each camp believes that its combined views are consistent with equal protection, even if each separate component is not specifically compelled by equal protection. And each camp holds a contrary view respecting the permissibility of at least one, and possibly both, of the alternative combinations.

revealed, however, when we introduce racial equivalent of hot air balloons or the number 2, namely race-advertent laws coupled with a benign motivation.

The terms "adverse" or "benign" require clarification. Justice Thomas maintains that all use of race is offensive, and thus that there is no such thing as the benign use of race. This posit, however, does not eliminate the separate analytical dimensions respecting race depicted in Table 3. To see why, we must consider why race is widely condemned as a permissible basis for legal categorization.

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

It will not do to suggest that of all the potential bases for classification in the world (those listed above plus countless others), only the color of one's skin, or other racial characteristics, are sacrosanct. It also cannot be because race is never plausibly relevant, which is all that would be required if race were subject to rational basis scrutiny. Rather, throughout most of history, and certainly not only in the United States, empowered groups have used race to maintain privilege, often through brute force, at the expense of out groups. The historical problem with race has been its use in entrenching dominant power structures favoring elites at the expense of minorities, and in some cases, even out-of-power majorities.[126]

Simply put, the historical use of race has almost always been adverse, often severely so, to out-of-power groups, and in the United States, that has most notably included African Americans. Race is not off limits in the United States because *of all* the potential bases for classifications in the world, it has randomly been plucked for exclusion. Rather, race has been excluded because throughout most of our history (and most of world history) race has been employed adversely to minorities. For some, this alone is sufficient to ban its use altogether. However respectable that position is, it does not contradict characterizing some intended uses of race as adverse, and others as benign. And most importantly, this does not depend on the wisdom or efficacy of the policies under review.[127]

The fact that the category "race" is excluded due to its adverse historical treatment of blacks means that it has been used to benefit those in power. This necessarily implies that racial

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

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

classifications can be structured in reverse, seeking to help those who have been historically subordinated due to race, with a cost borne by those who have been historically dominant. Table 3 labels this the benign use of race.[128]

Table 3 reveals a true dimensionality problem. This is most obvious when considering that although the Jim Crow and modern liberal positions embrace opposing positions on each of the two critical questions—(1) condoning or not condoning adverse use of race, and (2) condoning or not condoning benign use of race—unlike the Color-blind camp, each condones some use of race. Although the Color-blind camp appears to provide a partial issue victory to each side (agreeing with modern liberals who will not condone adverse use of race and with Jim Crow who will not condone benign use of race), color blindness does not, therefore, occupy a middle ground along a single analytical dimension.

F. *Dimensionality, Cycling, and Multicriterial Decision Making*

Dimensionality, a concept that underlies the analysis of race-conscious laws, implicates several additional social choice concepts. These include cycling and multicriterial decision making. The somewhat technical discussion that follows helps to lay the foundation not only for revisiting the dimensionality of race, but also for other legal contexts that implicate tiers of scrutiny. Although the presentation that follows is helpful, those who would prefer to skip ahead,[129] can instead rely on the following takeaway points: As applied to race, the phenomena of dimensionality and cycling can arise even if one of the historical positions that belie a single dimension is no longer embraced. Dimensionality is not only affected by presently accepted normative views; also it can be forged by previously rejected positions. Even though modern liberals and those embracing a color-blind view of equal protection and race alike discredit Jim Crow, that rejected position nonetheless continues to affect dimensionality. It does so because the currently embraced positions—modern liberal and color blind—frame their approaches to race based in large part on the conflicting lessons each has drawn from the now-discredited Jim Crow position.

1. Cycling and the Condorcet Paradox

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

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

[129] *See infra* at 33.

prefer C to A, and yet with one more iteration, P1 and P3 prefer A to B. The result is a cycle in which the group prefers A to B and B to C, but C to A.

The cycling result is not inevitable. If we slightly modify P3's preferences so that she ranks her preferences CBA rather than CAB, there remains no first-choice winner. And yet, a regime of binary comparisons reveals that P1 and P2 prefer B to C, and P2 and P3 prefer B to A. This time, a final comparison, between A and C, is beside the point. Although P2 and P3 prefer C to A, B defeats either alternative in direct comparisons. In social choice theory, option B, the option that defeats all others in direct comparisons, is known as a Condorcet winner.[130]

Although Condorcet winners, and rules capable of generating them when they are available, are often viewed favorably, such rules are not without limitations. When there is no Condorcet winner and when the institution nonetheless must generate an outcome, rules ensuring that Condorcet winners prevail risk cycling instead of producing an outcome. To be sure, cycling need not imply endless indeterminacy; rather, it might mean no more than that the arbitrarily selected outcome—one dictated more by the voting path or other considerations than by the actual preferences of voters—was heavily influenced by the decision-making process. When this occurs, an alternative process might have generated another, no less defensible, result.[131] In addition, the Condorcet criterion only takes ordinal rankings into account, without considering the participants' strength of preferences.

Dimensionality is the underlying phenomenon that generates cycling preferences. Dimensionality implies a cycle in that it creates the conditions from which, with plausible assumptions,[132] to posit cycling preferences. When dimensionality arises, those who resolve the identified issues along each dimension in opposite fashion (condoning or not condoning (1) adverse use of race or (2) benign use of race), nonetheless share a value in common (a willingness to permit *some* use of race). By contrast, the group that appears to provide a partial victory to each other camp (not condoning adverse use of race—favoring modern liberals—and not condoning benign use of race—favoring Jim Crow), thwarts the common value the other groups share. Although the process invariably rests on at least one contestable assumption, dimensionality creates conditions from which it is possible to construct cycling preference rankings over combined options. In this instance, that assumption involves either the Jim Crow or modern liberal positions ranking each other ahead of Color-blind, thus valuing a possible preferred use of race, and the hope of defeating the disfavored use politically, to a complete ban

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

[131] Cycling rests at the core of another social choice insight, namely Arrow's Impossibility Theorem, or simply Arrow's Theorem. Arrow proved that any set of rules designed to avoid cycling when transforming member inputs into collective outputs will necessarily violate one of several conditions that he considered essential to fair group decision making. Because this Article is not focused on the capacity or limits of institutional rule making, it does not address Arrow's theorem. For a detailed discussion, see STEARNS, *supra* note 31, at 81-94.

[132] Plausible does not mean irrefutable; cycles are often constructed with alternative sets of contestable, yet plausible, assumptions. For an illustration, see *infra* note 133.

on race.[133] Because we do not have actual ranking information, we can only hypothesize the resulting cycle.

Dimensionality, and thus cycling, arises not only from positions people hold over choices, but also from background rules or conceptual framings that are affected by those choices. In multicriterial decision making, background rules potentially force an additional choice dimension. This applies to tiers of scrutiny where dimensionality arises even though participating members or groups do not simultaneously embrace all relevant analytical positions. Although all three identified positions in Table 3 were viewed as legitimate at various historical points, at any given time, no more than two were widely viewed as legitimate or plausible. During the Jim Crow era, the two dominant positions were Jim Crow and color blindness. Today, with Jim Crow thankfully discredited, they are color blindness and modern liberal.

Recall that with preferences P1: ABC, P2: BCA, P3: CAB, the group will discover a cycle such that BpCpApB, where p means preferred to by simple majority rule. But even if a decision maker is removed, a cycle can still arise as a function of the relationship between preferences, on the one hand, and rules or normative framings, on the other. We can think of rules, for example, as extensions of preferences after the participant who held them is no longer formally involved in the decision-making process.

If P3 is set to retire, she might encourage P1 and P2 to embrace a rule that captures her preferences. Doing so might discourage either P1 or P2, working with P3's replacement, P4, from enacting either of their last choices.[134] The P3 rule provides that when choosing either

[133] Based on Table 3, we can construct either of two theoretical cycles over these three positions, (A) Modern liberal, (B) Jim Crow, and (C) Color-blind. Each hypothetical cycle rests on at least one counterintuitive assumption. For a forward cycle, assume that modern liberals believe that they can defeat adverse race-conscious laws politically, but fear a rule altogether banning benign race-conscious laws. If so their preferences are ABC. The positions allowing Jim Crow to rank BCA, and color-blind to rank CAB, are intuitive, and together generate a cycle ApBpCpA where each preference is based on binary comparisons. To generate a reverse cycle, assume that the Jim Crow camp believes it can defeat benign race-conscious measures politically but fears the inability to pass adverse ones (CBA); that the Color-blind camp is more fearful of benign race-preferences, which are likely to endure, than adverse ones, which they believe are sufficiently reprehensible that they will soon be politically defeated (BCA); and that the modern liberals intuitively prefer color blindness to Jim Crow (ACB). The result is a reverse cycle CpBpApC. Notice that each ranking includes both available orderings for each camp over the remaining options.

[134] Once P3 is retired, the remaining preferences will be P1: ABC and P2: BCA. P3 anticipates that her last choice, B, might prevail to avoid having either P1 nor P2 obtain their last choices, C or A, respectively. To avoid this result, P3 might encourage P1 and P2 to adopt a rule honoring P3's preferences after she is gone. This will not dictate an outcome, but it will make it harder for either P1 or P2, acting alone or in concert with whoever later replaces P3, to enact C or A. P3's preferences have thus been replaced by what we can think of as the P3 rule. In effect, even without P3 involved, P1 and P3 can cycle as a consequence of multicriterial decision making that accounts for P3's views.

For a fascinating study of multicriterial decision making, see LEO KATZ, WHY THE LAW IS SO PERVERSE 25-31 (2012). In a fanciful illustration, Katz demonstrates how competing rules of triage and free exchange (the *Pareto* principle) can create a confounding cycle for a physician with time to treat only one of three patients involved in a crash: one member of a married couple, Al and Chloe, with Al suffering relatively severe, and Chloe, a relatively minor, injury, and another woman, Bea, with a moderate injury. If Al and Chloe prioritize Chloe's treatment over Al's, then under the *Pareto* principle, Chloe is treated first. Under triage, Bea takes priority over Chloe. And under triage again, Al takes priority over Bea. Then under *Pareto*, Chloe regains priority. This combination generates a treatment cycle: Chloe p Al p Bea p Chloe, where p means preferred to under the

between B and C or between B and A, her preferences, which least favor B, must be taken into account. When combined with the ordinal preferences of P1 and P2, the P3 rule replicates the earlier forward cycle.[135] Although cycling is not always viewed favorably, it might be preferable to the risk that P4 will team up with either P1 or P2 to forge P3's least preferred result.[136] Because preferences can cycle either forward or in reverse,[137] the same phenomenon can arise if P1 and P2 reject the P3 position, albeit on different normative grounds.

This dynamic can arise when modern jurists frame present equal protection options based upon their conflicting understandings of a discredited position embraced in the past. This might occur, for example, if the modern liberals' lesson from the history of race is to avoid racial subordination, even if doing so means condoning an occasional express use of race designed to help a once subordinated group, and if the color blind's lesson from the same history is that regardless of how it is characterized, any express racial classification must be prohibited. In this analysis, although universally discredited, the Jim Crow position has nonetheless helped forged multicriterial decision making in the modern era.

2. Multicriterial Decision Making and the Complexity of Race

Multicriterial decision making helps to explain the dimensionality of race. At the time that Harlan issued his *Plessy* dissent, race-based laws were not intended to advance the interests of African Americans.[138] Justice Harlan envisioned the color-blind Constitution against the background of Jim Crow, a regime in which the general universe of race-advertent laws perpetuated a racial caste system operating to the detriment of blacks.

Table 3 exposes the how the problem of dimensionality affects reliance on Justice Harlan's color-blind Constitution to strike down affirmative action or other benign racial preferences. The increased sensitivity to laws adversely affecting blacks, have placed ongoing stress on the location of the permissibility line respecting legal policies with an adverse impact on blacks and other racial minorities. Without precisely locating that line, it is well understood that laws expressly relying on race to the detriment of blacks, and laws with the purpose and effect of harming blacks, are almost certainly presumed invalid and struck down. Uncertainty concerning the line's precise location, or the possibility of its shift over time, does not remove

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conflicting decision-making criteria of triage and *Pareto*. This holds even if only a subset of patients participates in the formal decision making at a given time.

[135] This further explains the parallel logic of Arrow's Theorem and multicriterial decision making. For a discussion of multicriterial decision making, see Matthew L. Spitzer, *Multicriteria Choice Processes: An Application of Public Choice Theory to* Bakke, *The FCC, and the Courts*, 88 YALE L.J. 717 (1979). For a discussion of Arrow's Theorem, see STEARNS, *supra* note 31, at 81-94.

[136] Thus, whereas Donald Saari ascribes cycling to the "curse of dimensionality," depending on the threatened outcome, some might instead regard dimensionality, and the resulting cycle, a blessing. DONALD G. SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES 13-15 (2008) (ascribing cycling in group decision making to the "curse of dimensionality").

[137] *See supra* note 133 (illustrating forward and reverse cycles).

[138] For a discussion of post-Civil War laws benefitting African Americans, see *supra* note 125, and cites therein.

the inevitable binary sorting along each separate dimension with respect to laws that are or are not harmful to blacks. This is depicted vertically in Table 3.

More recent cases involving race, however, have included a second analytical category, namely race-specific laws designed to benefit African Americans, depicted horizontally in Table 3. At first blush, the modern liberal position (lower left) appears entirely at odds with the discredited Jim Crow position (upper right). The preceding dimensionality analysis, however, explains why this is misleading. Although these two groups resolve the salient issues in opposite fashion, they share in common condoning some use of race. By contrast, the color-blind (lower right) position resolves partially in favor of each group, while refusing to condone any use of race.

Even though modern race litigation no longer includes Jim Crow as a legitimate position, Jim Crow nonetheless continues to affect dimensionality.[139] Both the modern liberals and those embracing the color-blind view are influenced by the dangers of Jim Crow, but each reads the lessons of history differently. Although our legal doctrines have largely eliminated race-specific laws adversely affecting blacks along with race neutral laws with the same purpose and effect, this involves shifts along the dimension involving "laws harming blacks." As with age, a shifting dividing line does not add an analytical dimension.[140]

The potential for dimensionality, and for multicriterial decision making, depends in large part on the level at which the relevant analytical category—for example "race" or "benign use of race"—is defined. Ironically, the inability to rely on two tiers to assess race cases arises from the insistence that all race case be treated as one analytical category. If instead the adverse or benign use of race were treated separately, two tiers would suffice in each category to draw the permissibility line. Combining these categories, however, invites the need for a third tier, which those seeking a combined approach to race have come to reject.

Assume that the benign use of race was treated separately. Further assume, consistent with present doctrine, that some reliance on race is permitted. If so, the cases would eventually produce a dividing line along each separate dimension. Based on current law, as applied to affirmative action in higher education, for example, the split would place laws roughly resembling the Harvard plan, which Justice Powell favored in *Board of Regents of the University of California v. Bakke*,[141] and the Michigan Law School plan, which was sustained in *Grutter v. Bollinger*[142]—plans that do not employ formal quotas and that use race as one factor among many in a holistic admissions process—in the rational basis bin for presumptively good laws. And it would place laws like those struck down in *Bakke* and in *Gratz v. Bollinger*—plans that

[139] As a result, it becomes possible to construct a set of plausible, albeit contested, preferences from which to infer either a forward or reverse cycle. *See supra* note 133 and accompanying text.
[140] *See supra* Part II.A. For a counter illustration in which age affects dimensionality, see *supra* note 99.
[141] 438 U.S. 265 (1978).
[142] 539 U.S. 306 (2003).

set up racial quotas, segregate files based on race, or award fixed points for race—in the strict scrutiny bin for presumptively bad laws.

a. A Comment on Fisher v. Texas

After the *Fisher* remand, it is unclear where the University of Texas plan fits along the benign race-conscious spectrum. The program's history is complex. In 1996, the United States Court of Appeals for the Fifth Circuit struck down the University's *Bakke*-like race-based plan in *Hopwood v. Texas*.[143] The University responded by implementing an admissions policy relying on holistic factors, without relying expressly on race, as proxies for diversity, and the state legislature responded by enacting the top ten-percent law, ensuring qualifying high school graduates meeting certain criteria admission to any public state college, including the University of Texas. Justice Kennedy, writing for the *Fisher* Court, explained that this combined post-*Hopwood* regime improved overall racial diversity relative to the final year of the pre-*Hopwood* regime, with 4.5% African Americans and 16.9 % Hispanics as compared with 4.1 % African Americans and 14.5% Hispanics.[144] Following *Grutter*, and with the top ten-percent in place, the University adopted the revised holistic race-conscious plan at issue in *Fisher*, which was intended to ensure a "critical mass" of students, including meaningful minority enrollment in the classroom.[145]

The combined scheme, which the Fifth Circuit sustained on the logic of *Grutter*, substantially improved minority enrollment.[146] Justice Kennedy explained:

> [The Fifth Circuit] held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan.[147]

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[143] 78 F.3d 932 (5th Cir. 1996).

[144] *Fisher*, 133 S. Ct. 2411, 2416 (2013).

[145] Kennedy described the program as follows:

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

Id.

[146] Although the *Fisher* Court did not recount admissions statistics under the new plan, the Fifth Circuit stated:

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

Fisher v. Univ. of Tex., 631 F.3d 213, 226 (5th Cir. 2011).

[147] *Id.* at 2417.

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

> Narrow tailoring . . . requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" then the university may not consider race. . . . [S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.[148]

Justice Kennedy then explained why his understanding of strict scrutiny compelled a remand, stating:

> Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." And in considering such a challenge, the court would "presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption.[149]

Once more, what is most striking is what the *Fisher* opinion did not say. Justice Kennedy did not suggest that the University choose either to relinquish its elite status or its racial diversity. And yet, he maintained that deferring to the University's good faith judgment about how to balance these competing concerns—the very deference that *Grutter* afforded the University of Michigan Law School—was inconsistent with strict scrutiny, and in fact risked rendering strict scrutiny "feeble in fact." Although, in this analysis, strict should be neither fatal nor feeble, the Court offered no meaningful intermediate test, other than by implying by omission that the test is *not* intermediate scrutiny.

b. Race and Dimensionality Revisited

Under *Grutter*, the Court claimed to apply strict scrutiny to all express race-based laws, but then having declared diversity in higher education compelling, that Court provided unprecedented deference to state judgments respecting both the need to rely on race (the compelling interest prong), and the need to do so in a manner that preserves the law school's

[148] *Id.* at 2420 (second and third alterations in original) (citing *Grutter*, 539 U.S. 306 (2003); *Bakke*, 438 U.S. 265 (1978)) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986)).
[149] *Id.* (alteration in original) (quoting Fisher v. Univ. of Texas, 631 F.3d 213, 236, 231-32 (5th Cir. 2011)).

academic standing (the narrow tailoring prong).[150] This softer version of strict scrutiny became evident when comparing the near-perfect match between the percentage of minority students applying and admitted to the Michigan Law School,[151] suggesting that the school accomplished the same algorithmic result as the university on a smaller scale with careful monitoring of daily admissions reports.[152] This very doctrinal tension appears to have motivated the *Fisher* remand, which claimed that strict becomes feeble when courts defer to the very institutions whose policies are under review.

The resulting doctrinal tension is not inevitable. As Justice Stevens recognized in his *Adarand Constructors, Inc. v. Pena* dissent, strict scrutiny is unnecessary to distinguish a "no trespassing sign" from a "welcome mat."[153] If the Court had acknowledged this distinction, and along with it the dimensionality of race, the conventional two-tier approach would work perfectly well, with an attendant line separating permissible from non-permissible conduct drawn along each dimension. But if all race cases fall into the single doctrinal bin of strict scrutiny, then we need a mechanism with which to separately handle cases relying on race in opposite ways respecting the two critical questions of whether the policy seeks to benefit or to harm African Americans as a class.

This analysis explains why the dimensionality problem implicating a third tier is endemic to race. This relates to the historical role of race throughout United States history and constitutional doctrine, which give color blindness its distinct normative status. Treating race as a meta-category, with all such cases subject to strict scrutiny, has produced one of the most notorious anomalies in constitutional jurisprudence: although the Fourteenth Amendment was designed to end longstanding adverse treatment of blacks at the hands of the state, states have the least latitude in developing race-based programs to advance the interests of African Americans. This is most notable when compared with gender-based programs benefitting women, which are subject to the lower standard of intermediate scrutiny. The anomaly of disempowering states to devise methods of benefitting the group that motivated the Fourteenth Amendment based on that very amendment while permitting greater regulatory leeway regarding gender underscores dimensionality problem underlying the Supreme Court's tiers of scrutiny analysis.

III. TIERS REVISITED: ANOTHER LOOK FROM THE TRENCHES

This part takes up several important remaining issues implicating race, gender, and sexual orientation. The analysis reveals which of the equal protection categories are or are not affected by dimensionality along with the implications for tiers of scrutiny.

[150] *See supra* notes 28-44 and accompanying text.
[151] *See supra* note 44 and accompanying text.
[152] *See Grutter*, 539 U.S. at 383-84 (Rehnquist, C.J., dissenting).
[153] 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) ("The consistency that the Court espouses today would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

A. *Dimensionality and Race: Race Neutral Law and Anti-subordination*

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

1. The Problem of Adverse Race-Neutral Laws

In *Washington v. Davis*,[154] the Supreme Court considered an equal protection challenge to a race-neutral English literacy exam used in hiring District of Columbia police officers. Although the policy disproportionately disqualified African American applicants, the Supreme Court sustained it against an equal protection challenge applying rational basis scrutiny. Writing for a majority, Justice White determined that because the program was motivated by the legitimate purpose of increasing the communicative skills in a workforce valuing such skills, the differential impact did not itself trigger heightened scrutiny.[155] The Court further rejected a purpose-and-effects analysis, observing that the police department had undertaken affirmative efforts to recruit minority officers, thereby refuting the adverse purpose prong. The Court has applied similar approach in two subsequent, and notably controversial, cases.

First, in *United States v. Armstrong*,[156] it rejected a claim of selective prosecution that resulted in disparate sentencing for crack cocaine, a predominantly black offense, versus powder cocaine, a predominantly white offense. Chief Justice Rehnquist, writing for a majority, applied rational basis scrutiny, reasoning that all races did not commit the same offenses proportionately to their demographic representation.[157] He observed, for example, that whereas crack cocaine is a disproportionately black offense, prostitution and child pornography tend to be disproportionately white offenses.

In *McCleskey v. Kemp*,[158] the Supreme Court, again with Rehnquist writing, rejected an equal protection challenge premised on the famous David Baldus study demonstrating the disparate application of the death sentence based on the races of the perpetrator and victim. A black murderer killing a white victim was more than four times as likely to receive the death penalty than any other combination, and overall, black defendants stood a far greater likelihood of receiving the death penalty than white defendants.[159]

Although the challenged laws in *Armstrong* and *McCleskey* were facially neutral, they were obviously not benign in the sense of affirmatively seeking to benefit blacks. Rather, the government defended these policies as furthering some non-racial objective *in spite of* that policy's adverse racial impact. These cases illustrate another round in a Red Queen game involving: (1) race-specific laws harming blacks; (2) race-neutral laws with the purpose and effect of harming blacks; and *now* (3) race-neutral laws claimed to serve an independent benign

[154] 426 U.S. 229 (1976).
[155] *Id.* at 245.
[156] 517 U.S. 456 (1996).
[157] *Id.* at 469.
[158] 481 U.S. 279 (1987).
[159] *Id.* at 279.

purpose, but with an adverse consequence on blacks. Thus far, the Court has drawn the line along this analytical dimension placing categories 1 and 2 on one side (prohibited), and category 3 on the other (permitted). Whether the resulting deference in category 3 cases, to which rational basis scrutiny applies, will continue, or whether the Court will, over time, throw more such cases in the presumptive-bad pile remains to be seen. However such future cases are resolved, they do not create a dimensionality problem inasmuch as the challenged laws, although racially neutral, are not intended to benefit racial minorities.

2. The Problem of Non-Discriminatory Laws that Subordinate Based on Race

In *Loving v. Virginia*,[160] the Supreme Court struck down a state anti-miscegenation statute. Such statutes criminalized the conduct of both parties to an interracial marriage, and thus applied equally to the white and black spouses.[161] The analytical difficulty, therefore, is that the statutes do not discriminate on the basis of race. They discriminate, but along a separate dimension, specifically between same-race (treated favorably) and mixed-race (treated unfavorably) couples. This distinction does not mean that the law is benign; quite the contrary, it is not, which is the point. Historically discrimination correlated with presumptively bad laws, and conversely, non-discrimination correlated with presumptively good laws. This set of intuitions is tested not only in the context of benign race-based laws, which discriminate favorably to blacks, but also in the context of anti-miscegenation laws, which do not discriminate based on race but that nonetheless subordinate the minority race.

Writing in *Loving* for a unanimous Court, Chief Justice Warren struck down the law, which was obviously designed to harm blacks and other racial minorities by protecting, in effect, the white race from corruption of blood. As Justice Stewart, who also joined the majority opinion, aptly observed in a separate concurrence, it is sufficient to say that a law that criminalizes based on the race of the actors cannot stand.[162] And this is true even if the law's reliance on race is nondiscriminatory.

Loving infuses anti-subordination as an independent principle into equal protection doctrine. Setting aside benign racial preferences, laws that discriminate based on race typically also subordinate based on race. *Loving* demonstrates how a law can subordinate without discriminating, thus thwarting the conventional assumption that antidiscrimination and anti-subordination go hand in hand. The case thus carries an important implication for dimensionality and race. *Loving* helps to explain why when we combine the principles of antidiscrimination and anti-subordination in the context of race, we have a true dimensionality problem, whereas outside that context, these two principles tend to operate in tandem such that dimensionality flattens. Consider Table 4 below.

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[160] 388 U.S. 1 (1967).

[161] The case facts were more complex. The statute banned intermarriages between minorities and whites, but not between minorities. Chief Justice Warren, writing for the majority, declared this irrelevant, holding the challenged law is patently unconstitutional "even assuming an even-handed state purpose to protect the 'integrity' of all races." *Id.* at 11-12 n.11.

[162] *Id.* at 13 (Stewart, J., concurring).

	Racial discrimination condoned	Racial discrimination not condoned
Racial subordination condoned	Jim Crow	Null set
Racial subordination not condoned	Modern Liberal	Modern Conservative

Table 4: Discrimination, Subordination, and Dimensionality

In Table 4, the two critical dimensions involve whether racial discrimination and racial subordination are or are not condoned. The null set, or position no one would logically assume, is not condoning discrimination, but condoning subordination (upper right). The Jim Crow position, upper left, condones both. The modern liberal position, which condones affirmative action, thus allows discrimination, but does not condone subordination. The modern conservative position, associated with color blindness, neither condones racial discrimination nor subordination. Although the Jim Crow and modern conservative positions resolve the two critical issues in opposite fashion, it is mistaken to assume that the modern liberal splits the difference, thus emerging a Condorcet winner. Instead, what the modern conservative and Jim Crow positions share is an opposition to the benign use of race, for example, in affirmative action.

Dimensionality flattens, however, when we eliminate discrimination, which is not in play in *Loving*, at least given Warren's forced construction of the challenged statute.[163] The normative attachment to color blindness, therefore, no longer forces a separate dimension. Instead, the binary split, condoning or not condoning racial anti-subordination, rests along one dimension, shown in Table 5. The *Loving* Court unanimously threw the subordinating anti-miscegenation statute into the bin for presumptively bad laws, and struck it down, with the modern liberal and modern conservative positions on the same side, opposite Jim Crow.

Conservative/Liberal	Jim Crow
Loving result	Anti-miscegenation result
Prohibit subordination	Allow subordination

Table 5: Loving in One Dimension

B. *Dimensionality and Gender*

The *Loving* analysis also helps frame equal protection and gender. The general absence of a sex-blindness equivalent to color blindness supports the intuition that gender cases are more likely to rest along a single analytical dimension. Along with *Loving*, gender-based equal protection cases center on anti-subordination, rather than antidiscrimination.

The challenge of gender-based classifications is that there are times when the sexes are situated differently in relevant ways and, as a result, when the analogy between race and sex

[163] *See supra* note 161.

breaks down. To begin thinking about gender and dimensionality, reconsider Table 3, this time using gender, not race, as informing the relevant categories.

	Benign gender classifications permitted	Benign gender classifications prohibited
Adverse gender classifications permitted	Null set	Pre-*Reed v. Reed* restrictions on participation in bar, estate planning, and jury service
Adverse gender classifications prohibited	Modern liberal view	Sex-blindness?

Table 6: Gender and Dimensionality

The parallel structure of the Tables 3 and 6 notwithstanding, something (someone?) is amiss. Prior to *Reed v. Reed*,[164] which struck down a restriction on the ability of women to administer estates, and *Frontiero v. Richardson*,[165] which struck down a presumption of family benefits for enlisted men, but not women, in the military, the Court routinely sustained laws distinguishing men and women based on then-dominant social mores concerning sex roles. Classic illustrations include preventing women not married to the proprietor from bartending,[166] and automatically excluding women, but not men, who did not voluntarily elect jury service.[167]

In such cases as *Reed* and *Frontiero*, both of which purported to apply rational basis scrutiny (of the "plus" or "with teeth" variety) while striking the challenged laws down, the Court began developing what we can now view as the modern liberal position. That position no longer condones sex-based distinctions premised on "overbroad generalizations" about the sexes.[168] In *Craig v. Boren*,[169] the non-intoxicating beer case, Justice Brennan articulated what has become known as "intermediate scrutiny." The test states: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[170]

The intermediate tier returns us to the analysis of dimensionality. As in Table 3, the lower right and upper left positions in Table 6 embrace seemingly opposite views respecting the permissibility of challenged laws, this time harming or benefiting women. But there is a critical

[164] 404 U.S. 71 (1971).
[165] 411 U.S. 677 (1973).
[166] Goesaert v. Cleary, 335 U.S. 464 (1948). The Court had similarly rejected due process challenges to laws limiting the hours, or imposing minimum wages, for working women despite evidence that such laws undermined employment prospects for unskilled women as compared with similarly situated men. *See, e.g.*, Muller v. Oregon, 208 U.S. 412 (1908) (distinguishing *Lochner v. New York*, 198 U.S. 45 (1905), and sustaining state law setting ten-hour workday for women), *overruled by* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (relying on substantive due process to strike down minimum wage for women).
[167] Hoyt v. Florida, 368 U.S. 57 (1961).
[168] United States v. Virginia, 518 U.S. 515, 533 (1996).
[169] 429 U.S. 190 (1976). For a more detailed discussion, see *supra* Part I.C.3.
[170] *Craig*, 429 U.S. at 197.

difference. In contrast with race, there is no principled sex-blind position within our jurisprudential tradition.[171] Both the conservative and liberal positions on gender agree that sex-based distinctions can be drawn but disagree on the permissibility line.

Intermediate Scrutiny		
Rational Basis in Fact	Intermediate Scrutiny as Placeholder	Strict Scrutiny in Fact
Easy cases to sustain	Hard Cases	Easy cases to strike down
benign sex-based laws		adverse sex-based laws

Table 7: Sex-Based Equal Protection with Flattened Dimensionality

The result, resting on one dimension as shown in Table 7, should not be surprising. Whether such challenged laws draw lines based on gender, as in the prior examples, or apply equally to both sexes,[172] as with race in *Loving*, the cases ultimately implicate anti-subordination. The ongoing disagreements involve which types of laws do or do not subordinate women.

Table 7 thus reveals the real purpose that intermediate scrutiny serves. In the context of sex-based classifications, the easy cases occupy the opposite extremes along one dimension. We know that simple exclusions or disadvantageous treatment of women based on antiquated notions about the gender roles are easily struck down. These cases are subject to intermediate scrutiny in name, and to strict scrutiny in fact. Conversely, while there are few easily sustained sex-based distinctions, the box is not empty. Separate bathrooms have long been viewed as a trivial example.[173] Others involve policies that recognize genuine sex differences, for example, who makes the final decision to terminate a pregnancy;[174] same-sex rooming assignments in state institutions of higher learning, in the military, or in other venues where government provides housing to non-married persons; and as seen in *Nguyen*, whether to permit the government to

[171] This is not to suggest that sex-blindness does not exist as a theoretical position, or even as a policy in some institutions. For a discussion of Egalia, a preschool in Stockholm, Sweden that eschews gendered pronouns, "him" or "her," in favor of "friend," and that rejects any suppositions about sex roles, see John Tagliabue, *Swedish School's Big Lesson Begins with Dropping Personal Pronouns*, N.Y. TIMES, Nov. 13, 2012, http://www.nytimes.com/2012/11/14/world/europe/swedish-school-de-emphasizes-gender-lines.html.

[172] Relevant cases include *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down federal program affording widows automatic benefits but conditioning widower benefits on proof of dependency), and *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (striking Missouri workers' compensation scheme specially requiring proof of dependency prior to widower, but not widow, receiving benefits). In both cases, the difficulty was not gender discrimination since both the woman paying in contributions and the widower seeking benefits were harmed; rather, the discrimination favored traditional families in which the husband was the primary breadwinner over families in which the responsibility was either shared or rested with the wife.

[173] Pending challenges by transsexuals to gender-specific bathrooms might change this. See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010). Most likely, as with gender cases, such challenges will implicate the single dimension of anti-subordination.

[174] Thus, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894-95 (1992), the joint authors held that a pregnant woman cannot be required to inform her husband of a planned abortion. For an article discussing the role of fathers in abortions, see Pam Belluck, *Sperm Politics, The Right to be a Father (or Not)*, N.Y. TIMES, Nov. 6, 2005, at A44.

prioritize based on the parent's sex when a non-marital overseas-borne offspring of only one U.S. citizen-parent later seeks citizenship.[175]

Intermediate scrutiny might serve as a placeholder for difficult cases. And yet, line drawing difficulties, and even shifting lines over time, do not affect dimensionality.[176] To illustrate, consider two much-criticized sex-based equal protection cases. The first case, *Geduldig v. Aiello*,[177] provides law professors a predictable punchline. The Supreme Court held that the state did not violate equal protection in denying insurance benefits for pregnancy because the denial is not gender-based. The second decision, *Personnel Administrator of Massachusetts v. Feeney*,[178] involved a challenge to a program benefitting veterans in hiring, which, due to the history of military service, disproportionately benefitted men.

Although each challenged law was technically gender neutral, each also appears to have had a profound gender-based effect. The Court sustained both policies, and the question is whether intermediate scrutiny is doing any work in reaching those results. *Geduldig* is amusing for the simple reason that men cannot become pregnant,[179] and *Feeney* is disturbing because the history of military service affects men differently from women, thus appearing to test gender neutrality.

What makes these cases hard is not dimensionality. It is instead the difficulty of line drawing. Although the policies at issue in *Geduldig* and *Feeney* appear to affect men and women differently, and to some extent they do, the effects are more subtle than first appears. Consider pregnancy benefits. Of course only women become pregnant, but only a relatively small number of women will do so during any given coverage period. The beneficiaries of the pregnancy exclusion are all persons whose contributions are reduced as a result of the exclusion, and that includes all women who will not become pregnant. Notably, however, it does not include all men. For men whose wives are covered on their policies and who become pregnant during the coverage period, the exclusion is as financially detrimental as it is for employed women who become pregnant during the coverage period. For these reasons, the pregnancy exclusion does not translate into a sex-based financial burden.

Feeney appears problematic because we could say that wives of former military service members who benefit from the challenged policy do so along with their husbands, and husbands

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[175] For a discussion of *Tuan Ahn Nguyden v. INS*, 533 U.S. 53 (2001), see *supra* Part I.C.3.
[176] *See supra* Part II.A.
[177] 417 U.S. 484 (1974).
[178] 442 U.S. 256 (1979).
[179] Justice Ginsburg unsuccessfully argued for revisiting the *Geduldig* holding in *Coleman v. Maryland Court of Appeals*. 132 S. Ct. 1327, 1344 (2012) (Ginsburg, J., dissenting) (arguing that pregnancy discrimination "[b]y definition . . . discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male" (alteration in original) (citation omitted)). Not true of seahorses. Stentor Danielson, *Seahorse Fathers Take Reins in Childbirth*, NAT'L GEOGRAPHIC NEWS (June 14, 2002), http://news.nationalgeographic.com/news/2002/06/0614_seahorse_recov.html (describing the peculiarities of seahorse reproduction). By splitting the dimensions of female/male and conceivability/nonconceivability, seahorses are evolutionary biology's hot air balloon. *See supra* at 3.

of women excluded from such positions due to the military benefit are burdened along with their wives. Although the burdens and benefits are not gender specific, the challenged scheme reinforces stereotypical notions about which spouse is responsible for providing housing and related benefits. The point here is not to resolve these cases. Rather, it is to show that because the societal understanding of gender roles is continuing to evolve, these cases are hard. That difficulty, however, involves line-drawing along the single dimension of anti-subordination.

C. *Dimensionality and Sexual Orientation*

Although *Hollingsworth v. Perry*[180] appeared to place the question of same sex-marriage squarely before the Court, Chief Justice Roberts, writing for a majority, denied the sponsors of Proposition 8 standing, leaving that ultimate question for another day. The *Hollingsworth* lineup was unusual, with the Chief Justice joined by Justices Scalia, Ginsburg, Breyer, and Kagan, and with Justice Kennedy, writing in dissent, joined by Justices Alito, Thomas, and Sotomayor. Justice Kennedy also wrote the majority opinion in *United States v. Windsor*,[181] which struck down § 3 of DOMA, thus invalidating federal laws that fail to recognize state-sanctioned same-sex marriage. The *Windsor* lineup was more conventional, with Justice Kennedy joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, and with Justices Scalia and Alito producing dissents, portions of which were joined by Chief Justice Roberts and Justice Thomas.

To assess the implications of these cases (including the lineups), and of dimensionality analysis, for same-sex marriage, two observations will be helpful. First, the choice of tiers of scrutiny is primarily important assuming, as seems probable, that the Supreme Court finds a right to same-sex marriage. Second, as with gender but unlike race, the constitutionality of laws affecting sexual orientation rests along a single dimension. Minority sexual orientation lacks an historical status that produces a compelling normative jurisprudential commitment to "sexual-orientation neutrality" akin to color blindness.[182] Along with gender, the analysis that follows reveals that the discrimination dimension drops out, and the operative dimension along which to assess laws implicating sexual orientation involves anti-subordination.

The peculiar lineup in *Hollingsworth* supports the intuition that the Court is headed in the direction of finding an equal protection right to same-sex marriage. Justice Kennedy has now authored three canonical cases advancing the interests of members of the LBGT community: *Romer v. Evans*, *Lawrence v. Texas*, and now *United States v. Windsor*. In addition, he authored a strong dissent to the *Hollingsworth* standing denial.[183] While judicial tea leaves can be difficult to read, no advanced divination is required. It seems hard to imagine that Kennedy dissented from the standing denial in *Hollingsworth* because having authored *Romer*, *Lawrence*, and *Windsor*, he was itching to draw a clear line just short of the term "marriage." Instead, it seems

[180] 133 S. Ct. 2652 (2013). For an analysis of the standing analysis in both *Hollingsworth* and *United States v. Windsor*, 133 S. Ct. 2675 (2013), see Stearns, *supra* note 102, at 393-98.
[181] 133 S. Ct. 2675 (2013).
[182] Benign practices might include preferential treatment in hiring or university admissions to enhance diversity.
[183] For my separate analysis of the standing issues in these two cases, see Stearns, *supra* note 102, at 393-98.

far more likely that Kennedy's goal was to get to the merits so that he could author the final culminating opinion, striking down Proposition 8.

The liberals who joined the *Hollingsworth* majority opinion denying standing likely feared moving too quickly, especially when rapidly changing conditions at the state level—in courts and general assemblies, and via referendums—would enhance the Court's legitimacy.[184] Better to wait another round than later risk judicial retrenchment that might signal a commitment to implementing same-sex marriage "with all deliberate speed."[185] The delay further relates to the choice of tiers and thus to dimensionality. Even for those who reject any rational justification for Proposition 8, it is certainly easier to strike that, or any, law down using a more stringent test.

Thus far, we know that that the following laws fall on the impermissible side of the anti-subordinating dimension: (1) a regime raising special barriers for sexual minorities seeking inclusion within state and local antidiscrimination laws (*Romer*), (2) laws singling out same-sex consensual sodomy for criminalization (*Lawrence*), and (3) laws denying federal benefits to same-sex widows or widowers whose marriages are recognized under state law (*Windsor*). The substantive question raised in *Hollingsworth* was on which side of the line laws limiting marriage to opposite-sex couples fall.

Assuming that the Court rules in favor of a constitutional protection for same-sex marriage, it can take any of the following three approaches: (1) apply rational basis scrutiny, holding that the restriction rests on an illicit animus against gays and lesbians; (2) apply intermediate scrutiny, classifying gays and lesbians as a quasi-suspect class, and holding that the restriction is premised on overbroad generalizations about gays and lesbians or same-sex couples; or (3) apply strict scrutiny, classifying gays and lesbians are a suspect class, and finding that the law does not further a compelling governmental interest or that it is not narrowly tailored. Because many commentators intuitively liken sexual-orientation discrimination to gender discrimination, and because intermediate scrutiny is ultimately a conduit for either alternative test,[186] we begin there.

Although in some sense intuitive, treating a ban on same-sex marriage as an actual instance of gender discrimination creates an analytical difficulty. One argument for such treatment is as follows: restricting marriage to opposite-sex couples allows a woman to marry a man but disallows a man to marry a man, thus discriminating based on sex. The difficulty is that the same restriction allows a man to marry a woman but disallows a woman to marry a woman. This suggests that the Court might treat banning same-sex marriage as gender neutral inasmuch as it applies equally to both sexes. One can argue from the employment-benefits cases, where widows automatically receive benefits whereas widowers must prove dependency or need, that

[184] This is consistent, for example, with the observation that the Court tends to move with, rather than against, popular sentiment on socially controversial issues. BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 4 (2009).
[185] Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955) (ordering the implementation of the mandate in *Brown v. Board of Education*, 347 U.S. 483 (1954) "with all deliberate speed.").
[186] *See supra* part I.C.3.

such laws discriminate equally against both sexes.[187] The argument, however, merely highlights the difficulty of claiming that the line of discrimination is sex as opposed to something else.

The analysis suggests that the true line of discrimination as between opposite-sex (favored) versus same-sex (disfavored) couples. As seen in other contexts, including most notably *Loving*, the non-discrimination (or neutrality) principle does not resolve the ultimate constitutional question. Even accepting that restricting marriage to opposite-sex couples is gender neutral does not answer whether the law is on the wrong side of the line respecting constitutional permissibility based on anti-subordination.

The problem with applying intermediate scrutiny is that it begs this ultimate question. Under that test, the Court would have to determine whether the basis for differential treatment is founded upon an overbroad generalization about gays and lesbians, or same-sex versus opposite-sex couples, or instead, is based on relevant differences affecting marital status. The answer will affect whether the version of intermediate scrutiny applied is lax or strict. Assuming the Court finds a "real difference," it would then apply the relaxed, or rational basis, version of intermediate scrutiny. And if the Court instead finds no such difference, then it will apply the more piercing, strict scrutiny, version of the test. Because the relevant question rests along a single dimension of anti-subordination, applying the "third tier" of intermediate scrutiny proves unhelpful.

One benefit of simply applying rational basis in this context is doctrinal consistency with the test applied in *Romer*, *Windsor*, and arguably *Lawrence.* Although the Court could obviously strike down a restriction on same-sex marriage under strict scrutiny, the question is whether, extending the logic of these cases, it could achieve that result with rational basis review. If the Court employs an animus rationale, it would read out any proffered legitimate rationale supporting the law, homing in on the illicit rationale of animus, or simply indifference, toward the concerns of sexual minorities. Alternatively, if the Court applies the more traditional rational basis review, any proffered legitimate governmental purpose, coupled with rational means of achieving it, would suffice to sustain the law.

Notably, under this test, the issue is not the merits of the underlying rationale, but rather whether those who enacted or who support the law could plausibly embrace it. As previously noted, one problematic aspect of the rational basis/animus cases is that it invites condemnation of or name-calling directed at those supporting the challenged law.[188] The issue of same-sex marriage is sufficiently contentious that many readers will likely find problematic a neutral presentation of arguments on both sides of this rationality divide. And yet, absent such a presentation, it is not possible to engage in meaningful discourse that explains the benefit of selecting the appropriate tier of scrutiny. The cultural divide can be likened to the famous goblet illusion in which, viewed one way, the observer sees a goblet, and viewed another, she sees two

[187] For a discussion of the cases, see *supra* note 172, and accompanying text.
[188] *See* NAGEL, *supra* note 58.

faces.[189] And yet, there is a difference: For those who support or oppose an equal protection right to same-sex marriage, it is sometimes difficult to concede visualizing a contrary point of view. Of course seeing an alternative image (the goblet or the faces) does not mean acquiescing.

Let us start with the perspective of those opposing such a constitutional right. What does the image look like? It begins with deep-seated, traditional understandings, related to such matters as marriage and childrearing, combined with a distrust of claims that modern social mores or social science findings should displace them. Those holding this view embrace the intuition that the sexes bring separate and complementary skills to these tasks. Some who embrace this view might even claim reliance on their own admittedly contested social science research claiming to demonstrate different distributions of such skills along axes of empathy and systemization correlated, however imperfectly, to gender.[190]

Of course same-sex couples can and do raise children, including the biological children of one spouse. Those opposing an equal protection right to same-sex marriage might believe, however, that such a rule would limit the power of states or state-funded adoption agencies to favor opposite-sex couples, especially in adoptions involving infants and very young children. Indeed, this dynamic is already playing itself out in some jurisdictions.[191]

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[189] The illusion is referred to as "figure-ground reversal." *See* Bela Julesz, *Cooperative Phenomena in Binocular Depth Perception: Novel Stereoscopic Demonstrations Lead to a Simple Model that Explains Many of these Complex Phenomena*, 62 AM. SCIENTIST 32, 34 (1974).

[190] *See generally* SIMON BARON COHEN, THE ESSENTIAL DIFFERENCE: MALE AND FEMALE BRAINS AND THE TRUTH ABOUT AUTISM (2004). In this account, although individual men and women are broadly distributed along the relevant spectra, the standard distributions for men and women testing systematization and empathy skills, respectively, have non-overlapping median concentrations, implying potentially complementary parenting skills taken in large numbers. *See generally id*.at 34-133 (describing testing results). This general literature contributed to the shortened tenure of former Harvard University President Lawrence Summers, who had relied upon particular findings to explain the shortage of women among hard scientists at elite institutions. Alan Finder et al., *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES, Feb. 22, 2006, at A1. Detractors from this account contend that such findings reflect commonly held suppositions about men and women, combined with societal influences, rather than genetic predispositions. *See generally* CORDELIA FINE, DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE, at xxv (2010) (providing methodological critique of brain-sex thesis).

[191] For illustrations of state laws favoring opposite-sex marriages in adoption proceedings, see, e.g., CONN. GEN. STAT. ANN. § 45a-726a (West 2004) ("[T]he Commissioner of Children and Families or a child-placing agency may consider the sexual orientation of the prospective adoptive or foster parent or parents when placing a child for adoption or in foster care."), MISS. CODE ANN. § 93-17-3(5) (Supp. 2012) ("Adoptions by couples of the same gender is prohibited."), and *Single Parent and Same-Sex Adoptions*, AMERICAN ADOPTIONS, http://www.americanadoptions.com/adopt/single (last visited Jan. 25, 2013) (describing the policy of American Adoptions, "America's Adoption Agency," to not offer adoption services to "single individuals or same-sex couples at this time"). Notably, in 2011 the Catholic Church withdrew its adoption services from Illinois after determining its agencies could no longer favor married couples. Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417, 1447 (2012) ("Illinois's same-sex civil union law ushered in a new requirement that all social service agencies that receive state money, including religiously affiliated ones, 'must consider same-sex couples as potential foster-care and adoptive parents.' . . . Finding themselves without an exemption, many [religious] groups are shedding their adoption services, closing them, or transferring them outside the church . . . ." (footnotes omitted)).

Let us now consider the perspective of those embracing the contrary view. Those favoring an equal protection right to same-sex marriage often claim that opponents are biased, even bigoted, against gays and lesbians, and hold up the increasing numbers of loving homes in which same-sex couples are raising happy, well-adjusted children. They further claim that if marriage provides stability for children, this is equally true for opposite- or same-sex marriage. In addition, with respect to opposite-sex complementarity, those favoring same-sex marriage might observe that many and perhaps most same-sex parents seek out role models of both sexes for their children. Finally, supporters of a right to same-sex marriage have noted the obvious decline of traditional marriage, asking how the nascent institution of same-sex marriage could possibly be to blame.[192]

Under the old-fashioned rational basis test, of course, such rejoinders would appear beside the point. Traditional rationality review does not demand that the proffered justification, or the competing image, be proven right; the rest is not empirical. Rather, it asks if someone might plausibly believe it. By contrast, the animus version of rational basis would cast such beliefs aside, instead focusing on a singular overriding purpose, one deemed the product of an effort to subordinate a politically unpopular group.

Although my own intuition is that the Court will likely find a right to same-sex marriage, the issue here is the mechanism for doing so, and to this observer, the choice of tier, and how that tier might be framed, seems less obvious than the eventual ruling. An additional explanation for why some liberal jurists joined the *Hollingsworth* standing denial is that they would prefer to avoid risking a judicial decree declaring those who oppose same-sex marriage are somehow irredeemably bigoted against gays and lesbians and hold views beyond the pale of mere rationality review. Strict scrutiny (or strict intermediate scrutiny) does not require name-calling. The liberal members of the *Windsor* majority might have reasoned that ratcheting up the level of scrutiny over the course of even a few years is likely to be more widely accepted as legitimate than doing so over a mere two opinions, *Windsor* and *Hollingsworth*, issued on the same day.

CONCLUSION

Tiers of scrutiny have long been a centerpiece of the Supreme Court's jurisprudence respecting race, gender and sexual orientation, and this is likely to continue. The Roberts Court has left important questions open related to such doctrines as affirmative action and same-sex marriage. But it has made one thing perfectly clear: These issues will almost certainly turn on the Court's treatment of tiers of scrutiny.

This Article has offered a novel way of thinking about tiers of scrutiny, one that considers the role of dimensionality in assessing the underlying legal claims. Despite widespread condemnation of the Court's approach, the problem of tiers does not rest on the chosen number of tiers; rather it rests on the its failure to properly match existing tiers to the relevant bodies of

[192] William N. Eskridge, Jr., *Six Myths that Confuse the Marriage Equality Debate*, 46 VAL. U. L. REV. 103, 106 (2011) (noting that given the radical changes in sexual mores affecting opposite-sex marriage, "it would be astounding to find that gay marriage caused a decline in marriage as an institution.").

case law based on the dimensions that underlie them. Dimensionality helps make sense of tiers by both explaining existing approaches and by offering methods of simplification. Although recognizing the central role that dimensionality plays in selecting and applying tiers of scrutiny will not eliminate the Red Queen nature of constitutional lawmaking, it might just allow lower courts, and perhaps even the Supreme Court, to push ever-so-slightly ahead.