Scrutinizing Tiers

Maxwell L. Stearns*

Abstract

If constitutional law were a sport, the playbook could be titled “tiers of scrutiny.” The constitutionality of laws affecting race, fundamental rights, speech, and religion frequently turns on the tier selected. Yet the strategies are often complex. Although strict scrutiny generally defeats challenged state and federal laws and rational basis generally sustains them, the Supreme Court has recently upheld a race-based affirmative action program under strict scrutiny and struck down laws classifying sexual orientation and criminalizing consensual same-sex intimacy under rational basis scrutiny. And while the Court nominally applies intermediate scrutiny to sex-based classifications, lifting the fig leaf ironically restores the dimorphism, closely resembling strict and rational basis review.

These doctrinal maneuvers have reinvigorated a generations-old debate implicating the competing views of Justices Thurgood Marshall and John Paul Stevens. Despite opposing doctrinal prescriptions—Marshall advocated an array of tiers correlated to the importance of the claimed right or the invidiousness of the challenged classification, and Stevens advocated a single tier—both jurists share a common error. The category mistake is assuming that the number of data to be classified correlates to the number of required classifications. Instead, any needed tier beyond strict and rational basis scrutiny arises from structural limits—a problem of dimensionality—inherent in a two-tiered scheme.

Infinite challenged laws arrayed along a common analytical scale can be sorted with two tiers, whereas even three laws implicating multiple analytical dimensions cannot. Scrutinizing tiers through the lens of dimensionality sharpens judicial classifications and provides critical insights into constitutional doctrine.

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The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review - strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.¹

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.²

INTRODUCTION

If constitutional law were a sport, the playbook could be titled “tiers of scrutiny.” Whether a racial classification is or is not permissible, a claimed right is or is not protected, or a law does or does not impermissibly affect religious practice or inhibit speech frequently turns on the tier of scrutiny that the reviewing court applies. But the strategies are often complex. Although strict scrutiny is generally fatal to challenged state and federal statutes, whereas rational basis is fatal to the claims themselves, the Supreme Court sometimes flips these conventional wisdoms on their heads. The Court has recently sustained a race-based affirmative action program while claiming to apply strict scrutiny,³ and has struck down laws classifying sexual orientation,⁴ and criminalizing consensual same-sex intimacy,⁵ while appearing to apply rational basis scrutiny. And although the Court insists upon applying so-called intermediate scrutiny in the context of sex-based classifications,⁶ once the fig leaf is lifted, the obvious dimorphism, more closely resembling strict and rational basis scrutiny, ironically reappears.⁷

These doctrinal maneuvers have reinvigorated a generations-old debate, drawn most sharply by the competing views of Justice Thurgood Marshall and John Paul Stevens, concerning the Supreme Court’s approach to tiers of scrutiny. Although these jurists offered seemingly opposite doctrinal prescriptions, with Marshall advocating an array of tiers correlated to the

⁷ See infra part III.B.
invidiousness of the challenged classification or the importance of the asserted right,\(^8\) and Stevens conversely suggesting a single meaningful tier in all equal protection cases,\(^9\) this Article will demonstrate that both positions share a common foundational flaw. That flaw is the category mistake of assuming that multiple data needing to be categorized, or multiple factors generating such data, require multiple analytical categories.

A simple mathematical example illustrates the problem. Just as one can subdivide an infinite number of integers along a single dimension, namely odds or evens, so too one can categorize countless laws subject to constitutional challenge according to whether strict or rational basis scrutiny should apply, provided, that is, that those categories cover the relevant spectrum along which the division occurs. The need for additional tiers beyond those two has no more to do with the relative importance of the claimed right or the relative invidiousness of the challenged classification than the need for additional categories in sorting odd and even integers has do with the number or size of the integers being sorted.

This does not mean that there is never a need for an additional tier, but rather that multiple gradations along a single dimension are not the reason. Such need arises, if at all, from a structural impediment that prevents the binary scheme from capturing the sought-after data. That impediment involves a missing analytical dimension. Although two classifications—odd and even—suffice to subdivide infinite integers according to whether they are susceptible to division by two, that binary scheme proves inadequate in further sorting out primes. Because two is an even prime and all remaining primes are a subset of odds, as Table 1 demonstrates, sorting odds, evens, and primes forces a second analytical dimension.\(^10\)

<table>
<thead>
<tr>
<th>Primes</th>
<th>Odds</th>
<th>Evens</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1, 3, 5, 7, 11, 13, 17, 19 . . .</td>
<td>2</td>
</tr>
<tr>
<td>Nonprimes</td>
<td>9, 15, 21 . . .</td>
<td>4, 6, 8 . . .</td>
</tr>
</tbody>
</table>

Table 1: Dimensionality in Categorizing Integers

\(^8\) See supra note 1 and accompanying text.
\(^9\) See supra note 2 and accompanying text.
\(^10\) For a more detailed discussion of the relevant terminology, see infra part II.A. (defining dimensionality and cycling). Preliminarily, a dimension is an analytical spectrum resting on a binary division (odd or even, prime or nonprime) or a continuum (large to small, tall to short, old to young), along which data are sorted. Multiple issues can sometimes be layered along a single dimension. In Table 1, for example, layering small-to-large integers atop odds or evens (or atop primes and nonprimes) does not require an added dimension. Starting at the upper left and working counter-clockwise, the three relevant categories list small-to-large odd primes, odd nonprimes, and even nonprimes. Sometimes, however, multiple issues require a second dimension, as seen in Table 1, combining “odds or evens” and “primes or nonprimes.” For a doctrinal analogies, compare MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 129-30 (2002) (including stare decisis and privacy along the single dimension of broad-to-narrow protection of abortion rights in categorizing the opinions of Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), with id. at 107-08 (demonstrating that standing and equal protection analyses in Miller v. Albright, 523 U.S. 420 (1998), implicate two dimensions).
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. Although either binary sorting scheme suffices to sort an infinite sequence of integers, classifying the deceptively simple sequence of three integers—2, 3 and 4—according to the criteria of odd, even, and prime, requires both dimensions.

This Article will demonstrate that the problem of tiers of scrutiny is a problem of dimensionality. A theoretically infinite number of challenged laws can be meaningfully categorized using a two-tier system, provided those tiers fully capture the relevant analytical spectrum, and thus the stakes, of the constitutional inquiry. This does not mean that lines will not need to be drawn or that jurists will necessarily agree on the proper location of those lines. Dividing integers into small and large is appropriate even if there is disagreement over where to draw the line.11 This same analysis applies to laws challenged as unconstitutional that admit of theoretically infinite gradations based on such criteria as the importance of a claimed right or the invidiousness of a challenged classification. And yet, as with 2, 3, and 4, a mere three laws will thwart the binary sorting scheme of strict or rational basis scrutiny if those laws implicate a second analytical dimension that these tests fail to capture. When this occurs, no clever tweaking—rational basis plus, strict scrutiny lite—will solve the analytical problem because the difficulty involves dimensionality rather than gradations along a common scale. Scrutinizing tiers through the lens of dimensionality not only offers a helpful framework for determining when an additional tier of scrutiny is or is not needed, but also it explains when and why the Supreme Court’s tiers-of-scrutiny scheme has so often appeared to misfire, generating judicial confusion and academic criticism.

This Article proceeds as follows. Part I provides an overview of tiers of scrutiny. After reviewing the essential functions that the existing scheme serves, this part presents several prominent anomalies associated with tiers of scrutiny and considers various normative approaches to improving tiers of scrutiny offered by jurists and scholars. Part II introduces more formally the dimensionality framework. This part demonstrates how and why the traditional two-tier system can properly handle an infinite array of classifications assessed along a common scale of measurement, and conversely, how dimensionality respecting even a small sampling of cases can thwart the two-tier scheme. It then explains why only a narrow class of constitutional doctrines likely implicates the problem of dimensionality, thus necessitating the introduction of an additional tier, and why constitutional doctrine more generally can operate within a two-tiered framework. Part III revisits some of the doctrinal anomalies introduced in part I, and some new ones. Specifically, this part discusses neutral laws implicating race, sex, religion and speech, which together demonstrate the benefits of viewing tiers of scrutiny through the lens of dimensionality.

11 As shown infra, part II.A, this is also true even when the location of the division point shifts over time.
I. Tiers of Scrutiny: A View from the Trenches

Professors of constitutional law well understand that a litmus test for classroom success is the ability to help students make sense of tiers of scrutiny. The Supreme Court has not made this job easy, and students take little comfort in the observation such law school challenges make for potentially lucrative legal careers. The most insightful students eventually come to appreciate two facts: (1) they need to master a set of rules that they will recite and claim to apply, for example, on their final exam, on the bar, and eventually in practice, and (2) they also must learn a different set of rules that actually do the analytical work in any given case. In part, this Article is an effort to make sense of that divergence: why don’t the formal rules actually work, and why has the Supreme Court proved unable to translate articulable intuitions—the sort that make for interesting classroom pedagogy—into workable doctrine?

We begin by viewing tiers of scrutiny from the trenches. Imagine yourself either as a 1L or as a federal district court judge, two seemingly divergent groups who nonetheless share a common need to decipher the Supreme Court’s often confusing commands concerning tiers of scrutiny as applied to new sets of case facts.

A. . . . Those who Dichotomize and Those Who Don’t

Although the Supreme Court planted the seed for two levels of scrutiny at least as early as Korematsu v. United States, the infamous Japanese internment case, and arguably much earlier, Professor Michael Klarman has identified McLaughlin v. Florida, a case involving a law banning interracial cohabitation, as the first time the Supreme Court applied strict scrutiny to strike down an invidious race-based classification. The conventional understanding is clear: strict scrutiny is almost always fatal to adverse racial classifications. More recently, the Court has extended this test to assess laws designed to advance the interests of African Americans. With the single exception of Grutter v. Bollinger, the University of Michigan Law School affirmative action case, the result has been to strike such racial preferences down. As a matter of doctrinal guidance, therefore, lower federal courts are expected to subject all laws drawing

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12 Following the conclusion, this Article offers interested readers a “Tiers of Scrutiny Playbook Cheat Sheet” that summarily compares these two sets of rules. See infra pp.50-52.
13 Although often expressed as, “There are two kinds of people in the world, those who dichotomize and those who don’t,” the attributable 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).
14 323 U.S. 214 (1944).
15 See The Slaughter-House Cases, 83 U.S. 36 (1873) (distinguishing claims arising under the Fourteenth Amendment based on race from those implicating other interests).
19 This was, for example, true of the companion case, Gratz v. Bollinger, 539 U.S. 244 (2003). For a discussion of cases treating race-based preferences under intermediate scrutiny, see infra at I.C.1. Exceptions to this rule have been overturned, see id., and cases therein, or, in the case of Regents of the University of California v. Bakke, 438 U.S. 265 (1978), has been superseded by Grutter, 539 U.S. 306.
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 serve a compelling governmental interest and that the selected means are narrowly tailored to further that interest. 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 the conventional understanding of tiers of scrutiny, 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, or a fundamental right, for example, the right to use contraceptives, or to terminate an unwanted pregnancy, at least prior to viability. 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 purpose or of means that rationally further that purpose. Under traditional rational-basis review, sometimes called the straight-face test, nearly any purpose counts as legitimate provided that one can articulate it without physically bellying sincerity. As demonstrated below, this is no longer literally true, although it is most obviously so in the Court’s never-ending willingness to accept creative defenses to rent-seeking legislation masquerading as furthering the public interest.

20 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.”).
21 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)).
23 Roe v. Wade, 410 U.S. 113 (1973). The Supreme Court complicated the analysis in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), where it downgraded abortion from a fundamental right to a liberty interest, and in Gonzales v. Carhart, 550 U.S. 124 (2007), where it sustained a late term, partial-birth abortion ban that did not include an exemption related to maternal health. These cases typify the analysis described more generally in this Article concerning the location at which the Supreme Court draws lines along a single analytical dimension, in this instance separating abortion procedures that are or are not protected, without creating a problem of dimensionality. See infra part III.
24 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.”).
25 See infra part I.C.2.
26 See, e.g., Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (sustaining under rational basis scrutiny law requiring prescriptions by optometrists or ophthalmologist before opticians fit new lenses onto old frames); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (sustaining under rational basis scrutiny 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).
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.

Although stage one is merely a rough sorting process, it 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.

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 such voters across multiple majority-white districts, thus risking defeat of a representative from the minority demographic group. Further assume, however, that the actual goals are two-fold: first, to redistrict in a manner that protects 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 do so without violating the non-retrogression principle under the Civil Rights Act of 1965. If the government must prove that the prohibited factor, race, did not control its redistricting scheme, 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 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. This stage operates through the application of each tier’s two-part formulation. 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!” 28

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. Specifically, laws are enacted
against the backdrop of the very rules used to classify them. Lawmaking is thus 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,
onece more, refines its rules to locate problematic laws that initially evaded detection; and so on.

To illustrate, consider an alternative, and stylized, version of the apportionment
hypothetical. 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
ensure that no black candidate would be chosen. 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 constitutional challenge to this rule, the Supreme Court construes the Fourteenth
Amendment Equal Protection Clause to invalidate the 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. Based on this ruling, we know 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 legislature remains undeterred. To accomplish the same objective, it
enacts a neutral law premised on various demographic factors that meaningfully correlate to race,
for example zip codes, income data, party registration, and proximity to identified community

28 LEWIS CARROLL, THROUGH A LOOKING-GLASS, AND WHAT ALICE FOUND THERE 50 (Henry Altemus Co. (1897)
(1871).
organizations or churches, with the same effect of dividing black voters across predominantly white voting districts so that no single district is predominantly black. Because this regime is technically race neutral, it would be sorted initially into the presumptive good pile. To avoid this obvious end run around its pre-announced rule, the Court might rule that despite its initial sorting, because the purpose and effect of the law is to prevent minority voters from electing a representative of their own race, there is no legitimate governmental purpose. Thus, 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 be sorted into the presumptive bad bin. The game, of course, will continue. The legislature might, for example, enact a similar scheme but expressly articulate or otherwise signal a primary purpose of protecting the functional incumbency of a non-minority representative, thus claiming to justify the outcome in spite of, rather than because of, any adverse consequence to African American voters.

Resolving such cases 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. 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 Americans are presumptively bad). Neutral classifications can mask illicit purposes. The converse is also true; non-neutral laws can have benign motivations. Through the operation of its two-part test, the Court can locate laws that would readily slip past its inevitably—in inevitable because of the Red Queen dynamic—overbroad initial sort, winding up in a pile for which the presumptive outcome should not control.

C. The Advanced Playbook: Beyond the Basic Tiers

While the preceding discussion outlines the basic architecture of the two-tier framework, the Supreme Court has decided several prominent cases in a manner that thwarts this binary 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 developed a third tier, most notably in the context of sex-based classifications. We now consider illustrations of each of these doctrinal maneuvers.

29 For a discussion of Red Queen games in evolutionary biology, see Matthew Ridley, The Red Queen: Sex and the Evolution of Human Nature (1994). Of course legislative objectives change over time along with public sentiment, whereas the goals of predation and avoiding becoming prey are constant. This merely goes to the level of generality at which the game is applied. If we treat accomplishing the legislature’s goals as the overriding objective, then its goals remain constant despite specific shifts in sentiment affecting particular policy objectives. Conversely, if we focus on specific predation or avoidance strategies among species, then, as with specific legislative objectives, these too change over time. In both settings, over the relevant time span, the underlying dynamics can be characterized as Red Queen games.
1. **Strict in Theory but not Fatal 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*, 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. 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. The combined opinions made Justice Powell’s opinion controlling under the narrowest grounds rule.

Two years later, in *Fullilove v. Klutznick*, 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.*, Justice O’Connor distinguished *Fullilove*, applying strict scrutiny to strike down a structurally parallel program benefitting minority businesses contracting for work performed for the City of Richmond, Virginia. 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, including the Richmond City Council. The tiers-of-scrutiny volley continued, and one year later, in *Metro Broadcasting v. Federal Communications Commission (FCC)*, Justice Brennan, for the first time, commanded majority support in applying intermediate scrutiny to sustain a racial

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31 *Id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part) (“[R]acial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives.” (internal quotations omitted)). Even today, it remains unclear who bears the burden of proof and more recent cases have vacillated over the test’s specific wording. For a discussion, see *infra* part III.B (discussing United States v. Virginia, 518 U.S. 515 (1996) and Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001).
32 *Id.* at 412 (Stevens, J., concurring in the judgment in part and dissenting in part) (“The University . . . acknowledges that it was, and still is, receiving federal financial assistance. The plain language of the statute therefore requires affirmance of the judgment below.” (footnote omitted)).
33 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). For an analysis of *Bakke* under the narrowest grounds rule, see STEARNS, *supra* note 10, at 130-33.
34 448 U.S. 448 (1980).
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. 37

Brennan’s victory was short-lived. In the landmark 1995 decision, Adarand Constructors
v. Pena, 38 Justice O’Connor, writing for a majority, took the lead, striking down a federal MBE
set-aside program under strict scrutiny, thus overturning Metro Broadcasting. The Adarand
round was particularly notable in part due to an ongoing disagreement between Justices
O’Connor and Scalia over the meaning of strict scrutiny as applied to race. Whereas Justice
Scalia favored the traditional version of strict scrutiny, which was almost invariably fatal, 39
Justice O’Connor reiterated her earlier refutation of Thurgood Marshall’s claim that “strict in
theory [is] fatal in fact.” 40 This disagreement between O’Connor and Scalia was sufficiently
important that it even affected how the opinions were reported out. The Court reporter’s
breakdown states that “Justice O’Connor announced the judgment of the Court and delivered an
opinion with respect to Parts I, II, III A, III B, III D, and IV, which is for the Court except insofar
as it might be inconsistent with the views expressed in Scalia’s concurrence.” 41 This peculiar
presentation, however, is easily explained. Had Justice Scalia concurred in the judgment,
insisting that strict scrutiny must be strict and fatal, Justice O’Connor would have lacked the
critical fifth vote to overturn Metro Broadcasting’s application of intermediate scrutiny to sustain
a benign federal race-based classification. Moreover, because Scalia’s analysis was broader than
O’Connor’s, had Justice Scalia done so, Justice O’Connor’s opinion, which applied strict
scrutiny but left open the possibility that some benign race-based classifications might survive,
would still have controlled under the narrowest ground rule, 42 but without creating a precedent
elevating scrutiny in such cases from intermediate to strict.

The second interesting aspect of Adarand’s peculiar play was figuring out what
O’Connor had in mind in her controversial insistence that as applied to race, strict is somehow
not fatal. Until Adarand, Justice O’Connor had never voted to sustain a benign use of race. 43 As

37 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 because D.C. is
not a state and thus not subject to the Fourteenth Amendment, it would otherwise not be bound by the requirements
of Brown v. Board of Education, 347 U.S. 483 (1954)).
39 515 U.S. at 239 (Scalia, J., concurring) (“In my view, government can never have a ‘compelling interest’ in
discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”).
The only exception that Scalia would recognize is reliance on race to separate inmates in a race riot until tempers no
40 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).
41 Adarand, 515 U.S. at 204.
42 See supra note 32, and cites therein.
43 Michael Klarman, Are Landmark Court Decisions All That Important?, CHRON. HIGHER EDUC. B10 (2003),
was borne out eight years later, the critical remaining case involved affirmative action in higher education.\textsuperscript{44} In what Justice Scalia described as the “split double header”\textsuperscript{45} of Grutter v. Bollinger\textsuperscript{46} and Gratz v. Bollinger,\textsuperscript{47} 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 a holistic admissions process that treats each applicant individually. The Court maintained this distinction despite overwhelming data demonstrating near-perfect precision in the ratio of minority to nonminority applicants, on the one hand, and the percentage of admitted minority and nonminority students, on the other.\textsuperscript{48} 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.

For our purposes, two important lessons emerge from this history: first, intermediate scrutiny no longer applies in the context of benign race-based preferences, and instead, all use of race is subject to strict scrutiny, and second, as Justice O’Connor has observed, strict in theory is not fatal in fact, albeit in the single context of race-based affirmative action in state institutions of higher learning, provided it is part of a formally holistic process without point scoring.

2. Rational in Theory but Strict in Fact

Just as the Court has salvaged race-based affirmative action while claiming to apply strict scrutiny, so too it has managed to invalidate laws adversely affecting sexual minorities under rational basis scrutiny. 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,\textsuperscript{49} the Court addressed a challenge to the denial of benefits

\textsuperscript{44}See id. (“Grutter reveals that O’Connor probably changed her mind about affirmative action over the past two decades.”).
\textsuperscript{46}539 U.S. 306.
\textsuperscript{47}539 U.S. 244 (2003).
\textsuperscript{48}Grutter, 539 U.S. at 367 (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).
\textsuperscript{49}413 U.S. 528 (1973).
under the Food Stamp Act of 1964 based on a provision that banned 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 a woman on public assistance to provide mutual financial support while the girl attended a special school for the deaf.

Justice Brennan, writing for the majority, struck down this eligibility provision on the ground that it was premised on an animus against “‘hippies’ and ‘hippy communes.’” Brennan held that it is never rational to exhibit an animus against a politically unpopular group. Then-Associate Justice Rehnquist dissented, arguing that the law satisfied conventional rational basis scrutiny because the proscription against unrelated cohabitants collecting benefits reduced the likelihood that those applying for benefits have come together for the purpose of receiving public benefits, thereby reducing fraud.

Although Justice Brennan rejoined that the statute contained separate anti-fraud provisions, under ordinary rational basis review, Rehnquist had the better argument. The test requires no more than a single legitimate governmental interest and means that are rationally in furtherance of that interest. A cumulative anti-fraud provision within an elaborate public welfare program certainly meets that test. The only way to hold that the cohabitation provision was motivated by an illicit animus—an obviously illegitimate purpose—is therefore to read out an otherwise qualifying legitimate justification. But that is not standard rational basis review.

The Court extended its Moreno analysis in City of Cleburne v. Cleburne Living Center. 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. The Court rejected several justifications for the denial and concluded instead that it was based on an illicit animus against

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50 Id. at 534.
51 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.”).
52 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.”)
53 Id. at 536-37 (majority opinion).
54 Accord Calvin Massey, The New Formalism: Requiem for Tiered Scrutiny?, 6 U. PA. J. CONST. L. 945, 952 (2004) (“[In] 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.”).
56 Id. at 436-37. Although at the time of decision, the common term was “mental retardation,” the more acceptable term today is “intellectual disability.” See Lynn Sweet, Obama signs “Rosa’s Law;” “mental retardation” out, “intellectual disability” in, LYNN SWEET: THE SCOOP FROM WASHINGTON (Oct. 5, 2010, 1:32 PM), http://blogs.suntimes.com/sweet/2010/10/obama_signs_rosas_law_mental_r.html (describing federal law that updates terminology in affected statutes).
57 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. 473 U.S. at 448-49.
such persons, which, once more, was not a permissible basis in support of the law. Again, however, this is not the conventional approach to rational basis review.

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

To be sure, such arguments were rightly rejected in the context of restrictive covenants excluding, typically, African Americans and Jews.\(^{58}\) No one would defend such laws today on the ground that blatant racial or religious exclusions preserve land values. But rather than helping the *Cleburne* majority, this merely underscores the difficulty with its analysis. In the context of state-supported restrictions based on race or religion, there is a justificatory trigger for strict scrutiny.\(^{59}\) Thus, even an arguably rational, albeit disturbing, justification along the lines proffered above for the such race- and religion-based restrictive covenants—“while I would love to reside in a multicultural community, alas, because my neighbors and prospective purchasers are less enlightened, preserving property values explains the ongoing exclusion of African Americans and Jews”—thankfully will not suffice. Instead, the state would have to offer a compelling justification plus narrow tailoring. And preserving property values based on societal racial or religious bigotry easily fails this more stringent test.

The real import of the animus line of cases became clear in *Romer v. Evans*.\(^{60}\) 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 forming the basis for inclusion in state or local antidiscrimination laws. Prior to that amendment, several localities had amended their antidiscrimination laws, which typically included categories such as race, religion, and sex to also include sexual orientation or other minority sexual status. In *Romer*, the Supreme Court, with Justice Kennedy writing, struck down Amendment 2, relying principally on the animus rationale set out in *Moreno* and *Cleburne*.

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\(^{59}\) This assumes, as the *Shelley* Court determined, that judicial enforcement of a restrictive covenant is state action, which, as commentators have noted, risks swallowing the state-action requirement to the extent that all lawful private arrangements are subject to judicial enforcement when breached. See Martha Minow, *Should Religious Groups be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 849 n.223 (2007) (discussing reliance on judicial enforcement to convert private rights into state action).

\(^{60}\) 517 U.S. 629 (1996).
Justice Scalia wrote a vehement dissent maintaining that because it was permissible to
criminalize same-sex intimacy—Romer was issued before Lawrence v. Texas—overruled
Bowers v. Hardwick—it was, in his view, permissible to deny special benefits to individuals
with a “self-avowed tendency or desire” to engage in such intimacies. More significantly,
Scalia 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. In Scalia’s analysis, it was not irrational in a
multilevel democracy for Colorado to choose to take an issue about which gays and lesbians had
scored local victories in various municipal lawmaking processes, and ratchet upward the
decision-making level state-wide for ultimate resolution. In fact, Scalia claimed, a right to retain
victories won at a lower level in a multilevel democracy was “unheard of.”

The point is not to resolve the debate between Kennedy and Scalia, but rather to suggest
that the same analysis concerning rational basis scrutiny in the context of Moreno and Cleburne
at least potentially applies here as well. There is a difference between the arguments that must be
set aside in order to claim an illicit animus in the Moreno and Cleburne cases, on the one hand,
and the principal argument that must be set aside in Romer, on the other. Whereas Moreno and
Cleburne would survive rational basis review if one took seriously the neutral, non-animus-based
rationale of inhibiting welfare fraud and preserving property values, respectively, Romer would
survive rational basis scrutiny if one accepts as rational an argument that the process through
which a law was made is its own rational justification for sustaining the result that the process
obtained. This is not necessarily problematic; arguments about process can be weighty. The
point is merely that the other two cases do not operate on precisely the same logic.

The relationship between Romer, an equal protection case, and Lawrence, a due process
case, is important. Justice Scalia relied in part on Bowers, a case that Lawrence later overruled,
to defend the rationality of systematically excluding sexual orientation from the category of
protected statuses for state and local antidiscrimination laws. After Romer, Lawrence struck
down the Texas consensual sodomy statute, which 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. While his precise choice of test is
not clear, Kennedy reasoned that the historical analysis on which the Bowers majority relied was

63 Romer, 517 U.S. at 642.
64 Id. at 652.
65 Id. at 639 (Scalia, J., dissenting).
66 For a related discussion, see Maxwell L. Stearns, Direct (Anti-)Democracy, 311 GEO. WASH. L. REV. 311, 373-80
(2012).
67 Indeed, this might justify rent-seeking laws sustained under rational basis scrutiny on the ground that such
interest-group payoffs are part of a larger legislative process necessary to secure other, benign legislative results. For
a general discussion, see Maxwell L. Stearns, The Public Choice Case Against the Item Veto, 49 WASH. & LEE L.
deeply flawed, and that when sexual activity is viewed not as an isolated event, but rather as part of a defining bond between intimate 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. 68 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 control69 and to terminate pre-viability pregnancies.70 The Court was not willing to do that, and thus it achieved the somewhat counterintuitive result, once more in the context of sexual orientation, of rational in theory, but strict in fact.

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 sex- or gender-based classifications. The history of such classifications is well known. What started as a more piercing rational basis scrutiny in this context quickly emerged as a formal third tier, intermediate scrutiny. That test requires proof of an important governmental interest and means substantially in furtherance of that interest.71 The results have been decidedly mixed. The Court has not systematically struck down sex-based 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 historical mistreatment of women, primarily in the workplace. Conversely, the Court strikes down policies based on overbroad generalizations about the sexes,72 sometimes referred to as “old fogyism.”73

Notably, Justice Stevens argued for a single-meaningful tier of scrutiny in the context of Craig v. Boren,74 a sex-based equal protection case involving an Oklahoma policy imposing a higher purchasing age on men than women respecting non-intoxicating, 3.2 beer. In Craig, Stevens made his famous pronouncement that because there is a single equal protection clause, there should be a uniform means of analyzing such cases rather than multiple tiers.75 As the dimensionality analysis reveals, however, the fact of a single clause no more defines the required number of tiers than does the number of cases to be classified. Two relatively recent sex-based equal protection cases highlight the difficulties that intermediate scrutiny has posed for sex-based cases, including how the test is defined.

68 Lawrence v. Texas, 538 U.S. 558, 567 (2003) (describing sexual intimacy as part of “personal bond that is more enduring”). 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.
73 Id. at 543 (internal quotation marks omitted).
74 429 U.S. 190.
75 Id. at 211-12 (Stevens, J., concurring).
In *United States v. Virginia*, Justice Ginsburg, writing for a majority, struck down the exclusion of women from the Virginia Military Institute (VMI), a state military 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 accommodations respecting privacy and physical exertion imposed on rats and even upperclassmen before women could enter the program. For that reason, the Commonwealth of Virginia developed the Virginia Women’s Institute for Leadership (“VWIL”), a program housed at the all women’s Mary Baldwin College, for women interested in developing military-style leadership skills in what the creators regarded a more congenial setting.

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. The *Virginia* case thus resembled *Sweatt v. Painter*, as the Court drew parallels between VWIL in the context of sex 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. Still, there were notable differences between *Virginia* and *Sweatt*, not the least of which was the context—sex, not race—and the doctrine—intermediate scrutiny, not strict.

If the intermediate scrutiny test accommodates legislation recognizing real sex differences, then a small number of women seeking admission to VMI will not suffice if admitting women requires changing institutional acculturation and pedagogy. Ginsburg therefore refined intermediate scrutiny, stating that the government has the burden to show an exceedingly persuasive justification for its policy, and that its justification must be contemporaneous, and thus intended at the time of enactment, rather than constructed to justify the policy after the fact. Ginsburg changed intermediate scrutiny in three important ways. First, the Court squarely placed the burden of proof on the government, thus moving the test closer to strict scrutiny. Second, the Court demanded an “exceedingly persuasive justification,” which appears closer to “compelling” than “important.” Third, the Court insisted the justification be contemporaneous. This is particularly notable because in the context of rational basis review, Justice Brennan had long insisted on this requirement only to be systematically rebuffed, in favor of a test that would allow virtually any justification, real or imagined, to quality as legitimate.

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77 Id. at 526.
78 Id.
80 Id. at 524.
81 Id. at 536.
82 Thus, in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981), Justice Rehnquist observed:
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, it was all beside the point if the Virginia legislature did not rest on those reasons when creating VMI in 1839. Of course, as Chief Justice Rehnquist aptly observed in his concurrence in the judgment, since Virginia would have been unaware of any obligation to offer such a program to women until the 1982 decision, *Mississippi University for Women v. Hogan*, which held that an all women’s nursing program violated the equal protection rights of men, the majority analysis produces a constitutional anachronism.

The upward thrust of the intermediate tier toward strict scrutiny proved short-lived. In *Tuan Ahn Nguyen v. INS*, Justice Kennedy, writing for a majority, revisited a three-year old decision, *Miller v. Albright*, in which a badly fractured Supreme Court 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. The *Miller* ruling resulted from an odd cobbling together of opinions expressing different views on the standard of review, the merits, and standing. Curiously, in the opinion that Kennedy joined in *Miller*, Justice O’Connor expressed the view that nearly all gender-based distinctions of the sort in question were destined to fail, but that it was improper to reach the question in that case because the petitioner lacked standing to raise it.

In *Nguyen*, a deportation case that did not implicate standing, however, Kennedy wrote the majority opinion and took an opposing view on the substantive issue as compared with O’Connor’s *Miller* opinion. The *Nguyen* majority held that real differences between the sexes amply justified the INS policy. Whereas fathers of illegitimate children are often unaware of the conception, let alone birth, of the child, and are thus less likely to form meaningful parental relationships, mothers of illegitimate children are invariably aware of them and are thus far more likely to form such bonds. Even though at the time the law was enacted, one consideration was uncertainty of paternity, a concern no longer relevant due to accurate paternity testing, that contemporaneous justification proved irrelevant. Also absent from Kennedy’s opinion was any

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My Brother Brennan argues that the Court should consider only the purpose the Iowa legislators actually sought to achieve by the length limit, and not the purposes advanced by Iowa’s lawyers in defense of the statute. This argument calls to mind what was said of the Roman Legions: that they may have lost battles, but they never lost a war, since they never let a war end until they had won it. This argument has been consistently rejected in other contexts. *Id.* at 702 (Rehnquist, J., dissenting) (italics in original).

86 For a discussion breaking down these opinions and demonstrating an embedded cycle across them, see Stearns, supra note 10, at 7-14 (2002).
88 Nguyen, 533 U.S. at 73.
discussion of exceedingly persuasive justifications that the state must prove. Instead, 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, clever 1Ls quickly recognize that the test does no real work. Once the case is properly sorted as the type of sex-based law that is presumptively good—laws that acknowledge real differences or that remedy past adverse treatment—or presumptively bad—laws based on “old fogyism”—other than by name, the old-fashioned two-tiered tests of strict and rational basis review fully explain the outcomes. The sole exception is the VMI case. To get there, however, Ginsburg had to tweak the doctrine in a manner that, in effect, applied strict scrutiny to a sex-based distinction, a result that lasted—if Nguyen is a meaningful indicator—merely five years.

D. Critiques and Extensions

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, in general, 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. These well-founded concerns have given rise to myriad, sometimes conflicting, doctrinal prescriptions. These most notably include, as Justice Stevens proposed, entirely abandoning tiers of scrutiny in favor of various uniform approaches based on each specific constitutional clause, and acknowledging more systematically a broad array of tiers, linked, as Justice Marshall proposed, to the invidiousness of the classification or the importance of the claimed right.


91 See, e.g., Suzanne B. Goldberg, Equality without Tiers, 77 S. CAL. L. REV. 481, 481 (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.”); 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); Lawrence Sager, Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan, 90 CALIF. L. REV. 819, 823 (2002) (“The hard-judicial-look approach [set out in United States v Virginia] should become the norm in both racial and gender cases.”).

92 See, e.g., 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).
Although the prior discussion centered on equal protection and, to a lesser extent, due process, commentators have observed similar analytical difficulties in other doctrinal areas, including the First Amendment. One commentator, for example, after reviewing the Court’s differing doctrinal approaches to expressive speech, commercial speech, and neutral laws affecting religious practice, concluded that the different tests developed for these separate doctrines each translate into a form of intermediate scrutiny.\textsuperscript{93} The lower courts’ treatment of these Supreme Court doctrines appears to corroborate that view inasmuch as they reveal a binary split following common doctrinal formulation based upon identified characteristics that correlate to presumptively good or presumptively bad laws.

II. THE DIMENSIONALITY OF TIERS

Of course lawsuits are not integers, and constitutional adjudication is often particularly complex. A simple classification scheme that sorts integers into such binaries as odds and evens, or a slightly more complex one that further accounts for primes and nonprimes, therefore, might offer little guidance concerning how best to assess the broad array of constitutional cases ranging from discrimination based on race or sex, affirmative action, disparate treatment of persons based on sexual orientation or consensual intimate acts, and policies related to speech and religion. Perhaps for that reason, Justice Marshall’s intuition about developing a broad spectrum of tiers linked to the importance of the underlying claim or the invidiousness of the classification is intuitive appealing. And yet, this very reasoning falls victim to the mistake of equating the number of things requiring classification with the number of required classifications, without considering analytical dimensions. The question is how to figure out when multiple dimensions are, or are not, present.

A. Shifting Lines Along a Single Dimension

We begin by returning to the example that opened this Article, the problem of evens and odds. One obvious objection to comparing this sorting function to constitutional case law is that one is binary—no integer is a little bit even or a little bit odd—and the other is spectral. Justice Marshall is certainly correct that there are potentially infinite gradations of harm respecting legislative classifications or rights infringements. And yet, binary sorting often accommodates gradations. Consider sorting integers based on whether they are large and small, a seemingly simple exercise that, unlike odds versus evens, admits of infinite gradations, including gradations that change over time.

Imagine, for example, we are trying 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).\textsuperscript{94} Even the most devout Jew would no longer consider a boy of 13 (or a girl of 12) an adult.\textsuperscript{95} 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 Affordable Care Act, “children” up to the age of 26 can remain on their parents’ insurance,\textsuperscript{96} 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.\textsuperscript{97}

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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 need to draw a line, and even to relocate that line over time, does not, of its own force, add an analytical dimension. 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 analytical dimension.\textsuperscript{98} As law students very quickly appreciate, drawing a line does not mean that the line works well for all affected persons. The line is a rule: given the purpose for which the line is drawn—the ability to create binding contracts, to consent to sexual activity, to marry, to finish school, to work, to live on one’s own, to assume personal financial responsibility—its placement determines who is on either side. And it does so even if there are some on the children side who are more mature than some adults, and vice versa.\textsuperscript{99} That is the nature of a rule.

\textsuperscript{94} See THE NEW ENCYCLOPEDIA OF JUDAISM 106, 109-10 (Geoffrey Wigoder et al. eds., 2002) (dating earliest bat mitzvah ceremony to the 1920s).

\textsuperscript{95} That is, other than for the very limited purpose of counting toward a minyan, the requisite quorum of ten required for collective prayer. \textit{Id.} at 106.


\textsuperscript{98} This is not to suggest that for some purposes, age can never implicate dimensionality, as might occur, in contrast with the examples in Table 2, with diminished responsibility for the very young and very old, but not for those in between.

\textsuperscript{99} Thus, for example, although in Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012), the Supreme Court extended its death penalty holding in Roper v. Simmons, 543 U.S. 551 (2005), disallowing the death penalty for juveniles, to also disallow life without eligibility for parole for juveniles, certainly some under the age of eighteen have sufficient
Degrees of invidiousness respecting classifications and importance respecting claimed rights are equally subject to shifting societal understandings over time. To take one prominent example, consider the historical restriction limiting marriage access to opposite-sex couples. Although this ranks among the most pressing constitutional issues of our time, merely one generation ago, even those advancing such arguments considered a claimed right to same-sex marriage ambitious. Indeed, they were, and this merely highlights the Red Queen nature of constitutional law making. As later cases, including *Romer v. Evans* and *Lawrence v. Texas*, created a foundation for such challenges, the result has been to render once-ambitious arguments more plausible, even to the point of drawing in prior foes from across the political spectrum. Societal sensitivity to this issue, and thus the collective appreciation for the invidiousness of a sexual-orientation exclusion from state-sanctioned marriage is undergoing, and perhaps has already undergone, a seemingly seismic shift.102 The fact of that shift, however, does not undermine the observation that the degree of invidiousness respecting a ban on same-sex marriage can be assessed, in like manner with any number of other legislative classifications, along a single analytical dimension.

**B. On the Inevitability of Tiers**

Constitutional adjudication is complex. Indeed, sorting cases along a single analytical dimension can generate complexity, at least in the near term. 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.

According to Justice Stevens, the judicial inquiry is whether the challenged law is consistent with a regime that governs impartially.103 Cass Sunstein has suggested that the Constitution more generally, embraces a principle of impartiality.104 These analytical frameworks are intuitively appealing, so much so that it is hard to argue against them, at least as an abstract matter. Who, at least in the modern era, would argue in favor of partiality or non-neutrality as an overriding normative governing principle? The problem, however, is discerning what these terms mean, not merely as a philosophical matter, but as they inform constitutional doctrine in cases that test them in often-unanticipated ways.

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100 See, e.g., Cass 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.”).


103 See Craig v. Boren, 429 U.S. 190, 211 (1970) (Stevens, J., concurring) (“There is only one Equal Protection Clause. It requires every State to govern impartially.”).

104 CASS SUNSTEIN, THE PARTIAL CONSTITUTION 347 (1993). Ronald Dworkin has expressed similar views. See Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 127 (1978) (asserting that “government must be neutral on what might be called the question of the good life.”)
From the perspective of lower federal and state courts, a single tier is equivalent to identifying the analytical dimension along which a line will eventually be drawn. This is not to suggest that the Court seeks out the specific location of the line as such. Rather, under this single test, the Court will confront myriad constitutional cases, some of which will involve problematic and others non-problematic laws. The Court might identify particular features of the challenged law in each case that result in its either being sustained or struck down. Lower courts will read these cases carefully for guidance. Eventually those courts will come to associate certain descriptors as signaling a presumptively problematic law, and other descriptors 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 to inform the initial sorting. Over time, as lawmakers seek to avoid adverse characterizations based on the Court’s pronouncements that prevent them from accomplishing certain objectives, the Court will need to identify other rules allowing 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 line along the relevant analytical spectrum based on characterizations associated with invidiousness or non-invidiousness of challenged classifications or degrees of importance of infringements on claimed rights. Once again, the analysis is not changed by the fact that the precise location of that line is not known, or if it is known, is likely to change over time.

At this point, it should be apparent why, 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 the same category mistake. If we take Marshall’s seemingly opposite approach, applying multiple tiers of scrutiny based on the degree of invidiousness of the challenged classification or the relative importance of the claimed right, the same process will occur over time. As data accumulate, lower courts will realize which of the several tiers result in presumptively classifying the challenged law as bad or good, and which factors justify further inquiry, leading to a potential opposite result from that predicted by the initial sort.\footnote{This is a simple implication of Bayes theorem. For a general discussion, see Steven C. Salop, Evaluating Uncertain Evidence with Sir Thomas Bayes: A Note for Teachers, J. ECON. PERSP. 178 (1987).} Whatever our starting point—Stevens single tier or Marshall’s many tiers—the Court will eventually accomplish, in effect, the very same result of two tiers, albeit with different terminology, and until the signals sort themselves out, less guidance.

C. Third Tier as Splitting the Difference

The preceding analysis further demonstrates the analytical difficulty with interposing a third tier, at least if the purpose of that tier is to capture the tough middle case. If the motivation for intermediate scrutiny is to provide a vehicle through which difficult sorting decisions will be avoided, 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 sex-based distinctions are not automatically placed in the bin for presumptively bad or good laws. But, of course, that is not terribly helpful. What we do not know (yet anyway) is which of these cases 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. Those include foremost among them associations with “overbroad generalizations” or “old fogyism.” It will also attach characterizations to those cases that are presumptively good. These include laws that are based on “real-sex differences” and laws that make up for past adverse treatment of women. But once we know this, we also know that the formal statement of doctrine notwithstanding, the former category of laws are more or less subject to strict scrutiny (hence presumptively bad) and the latter are more or less subject to rational basis scrutiny (hence presumptively good). Effective lawyers cannot say this, of course, other than to each other. In court, they must engage in the charade that intermediate scrutiny has meaningful content. Yet it is a charade nonetheless, and it is also part of the reason why 1Ls come to appreciate the need to learn one set of rules to apply and another set of rules to articulate. The so-called middle standard is doing no work in the context of sex-based classifications, and that is because if its purpose is to serve as a placeholder for tough eventual decisions, there is no work for it to do.\footnote{Of course in some contexts, middle categories are often fruitful, even necessary. For example, admissions officers sort “automatic admit,” “automatic reject,” and “hold,” and, depending on one’s religious beliefs, a similar scheme, with higher stakes, might characterize heaven, hell, and purgatory. In addition, market forces generate sizes between large and small, sometimes simply medium, and other times, a complete array, as in men’s dress shirts. There are also, of course, gradations of quality. In the sex cases, however, the Supreme Court is simultaneously resolving particular claims in binary fashion—upholding or striking the challenged classification—and announcing intermediate scrutiny as the governing rule despite the fact that the rule provides no help in the inevitable sorting. Even admissions “hold” piles (and perhaps purgatory) are temporary; the candidate eventually receives an admission or rejection, and from such aggregated data, observers can infer the qualifying line.}

This does not mean, however, that the two-tier system invariably succeeds. 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 answer returns us to race.

D. \textit{Expanded Dimensionality and the Benign Use of Race}

Let us now return to the longstanding controversy surrounding tiers of scrutiny and affirmative action. Recall that Justice Brennan long argued for developing an intermediate tier of scrutiny in such cases and that for a brief time he succeeded. Eventually, however, the Court abandoned that test in favor of strict scrutiny in all race cases. This might appear to simplify the
Court’s treatment of race cases by placing them under a unified doctrine, but instead, the doctrine masks an important problem of dimensionality. The two-tier scheme is no more helpful as a matter of simplification in such cases than is limiting ourselves to the categories of odd and even when required to sort out primes. Table 3 illustrates the conceptual difficulty.

<table>
<thead>
<tr>
<th>Adverse use of race permitted</th>
<th>Benign use of race permitted</th>
<th>Benign use of race prohibited</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jim Crow</td>
<td>Modern liberal</td>
<td>Color-blind</td>
</tr>
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</table>

Table 3: Race and Dimensionality

The affirmative use of race implicates two analytical dimensions, and historically, both jurists and the public have embraced positions implicating both. The earliest dimension involved the binary choice whether to permit or prohibit reliance on race respecting laws benefiting whites as a class and harming blacks as a class. Table 3 refers to this group of laws as permitting the adverse use of race, where adverse refers to those who were victimized by the Jim Crow regime. The binary nature of this choice, as shown in the table, should not belie the historical treatment of this issue as spectral, with dividing lines that shifted 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 excluding public schools to permitting segregation in no walks of life, at least as a matter of law to grappling with the reality that even race-neutral laws can affect race-specific outcomes. And of course one could add several gradations in between.

The issue is not where the line is drawn at any one time, but rather, the inevitability of drawing a line. Today, the line is drawn so as to exclude all laws classifying by race in a manner that harms 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 moved was, of course, Jim Crow. That regime permitted express racial classifications operating to the benefit of whites and to the detriment of blacks based on accepted societal (read white) understandings concerning the appropriate relationships between the races.

Against the backdrop of laws countenanced in the Jim Crow era, the color-blind view of equal protection emerged as a liberal position preventing adverse race-based laws. This was the view expressed, perhaps most poignantly, in Justice Harlan’s famous dissenting opinion in *Plessy v. Ferguson*:

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

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107 163 U.S. 537 (1896).
and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.\textsuperscript{108}

The concept of a color-blind Constitution is admirable, especially in the historical context of the \textit{Plessy} decision. It is also an admirable position today among those who sincerely embrace it as an ideal embedded within the Constitution. Justice Thomas has strongly asserted just this view in \textit{Parents Involved in Community Schools v. Seattle School District No. 1},\textsuperscript{109} 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 \textit{Plessy}: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." \textit{Plessy v. Ferguson}, 163 U.S. 537, 559 . . . (1896) (dissenting opinion). And my view was the rallying cry for the lawyers who litigated \textit{Brown}.\textsuperscript{110}

What makes this passage fascinating is that each separate assertion appears defensible on its own terms.\textsuperscript{111} And yet, the passage curiously seems to miss a critical point central to whether the state can affirmatively rely on race to benefit blacks. How can both of these propositions be true? The answer lies with the problem of dimensionality.

When Harlan embraced a color-blind view of equal protection in \textit{Plessy}, he did not do so in an analytical vacuum. Rather, he expressed it in the particular historical context of the then-dominant understanding: the relevant analytical spectrum along which the issue of laws respecting race would be assessed involved whether there was any limitation on the power of a state to rely on race to perpetuate the interests of the dominant white race. At the time of \textit{Plessy}, the dominant understanding was that express reliance on race was permissible to maintain a social caste, at least provided it was consistent 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 in that context, Justice Brown, writing for the \textit{Plessy} majority, although rejecting an equal protection challenge to segregated railway cars, stated in dictum that there might be a case that would cross the line, specifically laws the sole or dominant purpose of which is to harass the

\textsuperscript{108} \textit{Id.} at 559 (Harlan, J., dissenting).
\textsuperscript{109} 551 U.S. 701, 748 (2007) (Thomas, J., concurring) For an analysis of this case, see \textit{infra part III.A.}
\textsuperscript{110} \textit{Parents Involved}, 551 U.S. at 772 (Thomas, J., concurring).
\textsuperscript{111} With one notable quibble. Historians have demonstrated that color blindness was part of a larger strategy among the litigants in \textit{Brown}, one that freely combined elements of anti-classification and of anti-subordination, and that the justices deciding \textit{Brown} did not embrace either as a uniform theory. For an informative review of the historical record, see Christopher W. Schmidt, \textit{Brown and the Colorblind Constitution}, 94 CORNELL L. REV. 203 (2008).
minority race. Justice Harlan, relying on his color-blind reading of equal protection, drew that line in a far more restrictive manner. In his view, whatever the dominant cultural norms of the day were, the races had to realize that their fates were inextricably intertwined, and thus, he 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?113

The issue of affirmative action arises along a separate analytical dimension. Harlan’s color-blind constitution is not only apt; it is comprehensive, at least in a world in which relevant laws are either harmful to minorities or are race neutral.114 In that world, wherever the eventual line is drawn, color-blindness represents the minority-protecting position, and, conversely, race advertence represents a decidedly illiberal position. The dimensionality is revealed, however, when we introduce the possibility of a set of race-advertent, but benignly motivated, laws.

In dividing race-conscious laws in this manner, it is important to explain the characterizations “adverse” or “benign.” Justice Thomas and others maintain that all use of race is offensive, and thus there is no such thing as the benign use of race. Even on its own terms, this claim does not refute the need for these competing classifications. All laws draw lines along some analytical dimension as a means of determining whether a given activity is or is not permitted to particular classes of individuals. The analytical dimension along which the classifications are drawn can, of course, involve literally anything, and can also include binaries or spectra: sex (male or female), height (tall or short), weight (heavy or light), wealth (wealthy or poor), IQ, willingness to pay, ability to perform a given task, or completion of degrees or other training. As an historical matter, classifications have also included race. With rare exception, however, race, almost exclusively, has been taken off the table. The question is “why?”

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112 Plessy, 163 U.S. at 550 (illustrating with laws that would require blacks and whites to walk on opposite sides of the street.)
113 Id. at 560 (Harlan, J., dissenting). Of course, Harlan was explicit that he was only speaking in terms of formal legal equality, and that he thought the social inequality of the races inevitable. Id. at 559.
114 The history is complex. Some post-Civil War laws benefiting blacks relied on specific statuses as former slaves or dependent widows rather than race (thus also benefitted some whites), see Ira C. Colby, The Freedmen’s Bureau: From Social Welfare to Segregation, 46 PHYLON 219 (1985), thereby distinguishing them from a reversal of Jim Crow’s express racial caste system. Justice Thomas rested on this distinction in Parents Involved, 551 U.S. at 772 n.19 (Thomas, J. concurring) (“What the dissent fails to understand, however, is that the color-blind 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 color-blind Constitution.”). 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). To the extent that these laws operated in parallel with others benefiting destitute whites, expressly or otherwise, see id. at 431 n.23 (comparing statutes), they too appear distinguishable from modern benign racial preferences. And although the Supreme Court in Strauder v. West Virginia, 100 U.S. 303 (1879), claimed unconstitutional a reverse law banning white jurors in a white defendant’s trial, rather than producing a general race-based preference, the theoretical law targeted a narrow class of white criminal defendants for adverse treatment.
It would make little sense to suggest that the reason is because, among 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, it is because throughout most of history, and not only in the United States, groups in power have used race to maintain privileges, 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.\textsuperscript{115}

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 classification in the world, that one has randomly been plucked for exclusion. Rather, of all the potential bases for classification, race has been excluded because throughout most of our history (and throughout most of world history) it has been used in an adverse manner for 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 this is so without regard to the wisdom or efficacy of the policies under review.\textsuperscript{116}

Because the category “race” is excluded due to its adverse historical treatment of blacks, that implies that it has been used to the benefit of those in power. Racial classifications can also 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.\textsuperscript{117}

Table 3 reveals a true dimensionality problem. The Jim Crow and modern liberal positions embrace opposing positions on each of the two controlling issues (permitting or not permitting adverse or benign use of race). And yet unlike those in the Color-blind camp, which provides a partial issue victory to each side (agreeing with modern liberals against adverse use of

\textsuperscript{115}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).

\textsuperscript{116}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 fortuitously produces the opposite effect.

\textsuperscript{117}The term benign might also appear objectionable on the alternative ground that policies that benefit minorities based on race necessarily impose costs on non-minorities based on race. We can easily reframe the inquiry from the perspective of the non-minority race, but to do so consistently, we would need to flip the words benign and adverse along both dimensions (making benign adverse and making adverse benign), creating the same dimensionality problem with reversed labels.
race and with Jim Crow against benign use of race), these camps reach a common ground in permitting some use of race.

E. Dimensionality, Cycling, and Multicriterial Decision Making

The problem of dimensionality lies at the root of social choice theory, and specifically at the root of cycling.\(^{118}\) The converse is also true: whenever preferences cycle, there is invariably a problem of dimensionality involved. Briefly exploring the relationship between dimensionality, cycling, and multicriterial decision making will help to explain the problem of dimensionality as applied to tiers of scrutiny.

1. The Condorcet Paradox

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

The cycling result is not an inevitable feature of group decision making. To illustrate, slightly modify P3’s preferences so that she ranks her preferences CBA rather than CAB. Although there is still no first-choice winner, the same regime of binary comparisons reveals that P1 and P2 prefer B to C, and P2 and P3 prefer B to A. This time taking the 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.\(^{119}\) Although Condorcet winners, and rules capable of generating them when they are available, are often viewed favorably, the such rules are not without limitations. When there is no Condorcet winner and when the institution nonetheless must generate an outcome, a rule that ensures that Condorcet winners prevail risks a cycle instead of an outcome. In addition, the Condorcet criterion only takes ordinal rankings into account, meaning that it does not consider the participants’ strength of preferences. It is also important to recognize that 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—heavily

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\(^{118}\) DONALD SAARI, DISPOSING DICTATORS, DEMYSTIFYING VOTING PARADOXES 13-15 (2008) (ascribing cycling in group decision making to the “curse of dimensionality”).

\(^{119}\) For a general discussion, see Maxwell L. Stearns, The Misguided Renaissance of Social Choice, 103 YALE L.J. 1219 (1994).
influenced the outcome selected. Simply put, when this occurs, an alternative process might have generated another, no less defensible, result.\footnote{The problem of cycling rests at the core of another critical social choice insight, namely Arrow’s Impossibility Theorem, or simply Arrow’s Theorem. Arrow proved that any set of rules designed to avoid cycling will necessarily violate a condition that he considered essential to fair group decision making. In effect, Arrow identified a set of conditions—range, independence of irrelevant alternatives, non-dictatorship, and unanimity—that while important to fair and democratic norms, could not be ensured if the regime sought to ensure outcomes even when member preferences cycled. Because our concern is identifying the conditions of dimensionality rather than the limits of institutional rule making, the details of Arrow’s theorem are less important. For a detailed discussion, see Stearns, supra note 10, at 81-94.}

The underlying phenomenon that creates the possibility of cycling preferences is dimensionality. Dimensionality is a necessary but insufficient condition to a cycle. When a problem of dimensionality arises, those who resolve the underlying issues along each dimension in opposite fashion (allowing or disallowing benign use of race and adverse use of race), nonetheless share a common outcome (allowing \textit{some} use of race), whereas the group that gives a partial victory to each side (disallowing adverse use of race—consistent with modern liberals—and disallowing benign use of race—consistent with Jim Crow), would ban the use of race altogether. When this occurs, it is theoretically possible that one of the extreme positions (Jim Crow or modern liberal) might favor an opposite extreme position (modern liberal or Jim Crow) to a seemingly middle position (color blind), if required to rank preferences over all three positions.\footnote{This observation might appear jarring to some readers, but for now the argument is merely about the analytical coherence of such a ranking. For a more detailed discussion, see \textit{infra} note 126 and accompanying text.} Because we do not have complete ranking information, we cannot know if there is a cycle. Dimensionality creates conditions from which, with plausible assumptions, we might infer a cycle.

Cycling can arise not only as a result of individuals holding particular preference orderings, but also as a function of the rules against which individuals make decisions. Rules can create what social choice theorists identify as multicriterial decision making. Cycling based on aggregating preferences, on the one hand, and based on multicriterial decision making, on the other, are conceptually parallel. The distinction is nonetheless helpful to the analysis to follow.

Although all three identified positions in Table 3 were viewed as legitimate at various points in our history, this is no longer the case. In fact, at any given point in time, no more than two were considered plausibly legitimate. In the Jim Crow era, the two plausible positions were Jim Crow and color-blindness. Today, the Jim Crow position has been thankfully discarded, leaving as the two plausible positions color-blindness and modern liberal. Although only two options are on the table, cycling can still arise as a consequence multicriterial decision making.

The relationship between these two forms of cycling is intuitive. Recall that with preferences P1: ABC, P2: BCA, P3: CAB, the group will disclose a cycle such that BpCpApB, where p means preferred to by simple majority rule. But if one of the decision makers is removed, a cycle can still occur. The explanation has much to do the meaning of a rule. Think of
a rule as an extension of preferences after the person who held them no longer participates in the formal decision-making process. In contrast with preferences, rules are vehicles through which participants continue to influence outcomes after they are gone.

To illustrate, imagine that P3 anticipates that she will no longer participate in this group decision-making process, perhaps because she is set to retire. Her retirement, of course, does not mean that she no longer cares about the issues she was previously involved in deciding. To her, these issues continue to matter deeply. She might well fear that when she is gone, those who remain or who replace her will not share her views. She recognizes that once she is retired, the remaining preferences will be P1: ABC and P2, BCA. She anticipates that there is a good likelihood that her last choice, B, might prevail so that neither P1 nor P2 obtain either of their last choices, C or A, respectively. P3 sees an opportunity. She approaches the other two and proposes that to minimize the risk of obtaining either of their last choices, they adopt a rule that honors her preferences after she is gone. This will not necessarily dictate a particular outcome, but it will make it harder for either, acting alone or in concert with whoever later replaces P3, to enact either of their last choices. To do so, they must agree to a rule that in effect requires P1 and P2 (and possibly P4 replacing p3) to account for a set of preferences, now taking the form of the P3 rule.\(^{122}\)

That rule states that in any decision between C and B, one set of preferences in favor of C must be accounted for, and in any decision between B and A, one set of preferences in favor of B must be accounted for. With this rule in place, even with P3 gone, P3 has replicated the earlier cycle with only two players.\(^{123}\) And in fact, if P3 is replaced with P4, this rule might bond P1 and P2 to operate as if P3 were participating instead of P4. While cycling is not always looked upon favorably, it might be preferable to the risk that P4 will team up with either P1 or P2 to forge the other’s least preferred result.\(^{124}\)

\(^{122}\) For a fascinating study of multi-criterial decision making in law, see LEO KATZ, WHY THE LAW IS SO PERVERSE (2012). In one admittedly fanciful discussion, which he calls a parable, Katz demonstrates how competing rules of triage, on the one hand, and free exchange (or the Pareto principle), on the other, can create a confounding cycle for a physician with time to treat only one of three patients. Katz imagines a married couple, Al and Cloe, with Al suffering relatively severe, and Cloe, a relatively minor, injury, and another woman, Bea, with an injury of moderate severity. If Al and Cloe prefer that Cloe be treated over Al, then under the Pareto principle, Cloe takes priority over Al. Under triage, Bea takes priority over Cloe. And under triage again, Al takes priority over Bea. Then under Pareto, Cloe regains priority, starting the cycle anew. The cycle manifests itself based on competing rules (or analytical dimensions)—triage and Pareto—even if the physician is only consulting one patient or group of patients at a time.

\(^{123}\) This further explains why the internal logic of Arrow’s Theorem and multicriterial decision making are analytically parallel. 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 10, at 81-94.

\(^{124}\) Thus, whereas Donald Saari rightly ascribes cycling to the “curse of dimensionality,” depending on the threatened outcome, some might instead regard dimensionality, and the resulting cycle, a blessing. See SAARI, supra note 118, at 113-15.
2. Multicriterial Decision Making and the Complexity of Race

The problem of race implicates both dimensionality and multicriterial decision making. At the time that Harlan issued his *Plessy* dissent, race-based laws were not designed to advance the interests of African Americans. Justice Harlan thus envisioned the color-blind Constitution against the background of a regime—specifically Jim Crow—in which the universe of general race-advertent laws were designed to advance the interests of whites by perpetuating a racial caste system operating to the detriment of blacks.

Table 3 exposes the limits of relying on Justice Harlan’s color-blind Constitution to strike down affirmative action or other benign racial preference laws by exposing the two dimensions along which race must be assessed. We are increasingly sensitive to laws that adversely affect blacks, and as a result, there is the ongoing struggle respecting the dividing line concerning laws that have an adverse impact on blacks and other racial minorities. Without precisely locating that division, it is well understood that laws expressly relying on race deemed harmful to blacks, and laws that have the purpose and effect of harming blacks, are almost certain to be presumed invalid and struck down. Any uncertainty concerning the precise location of that line, or the possibility of its shift over time, does not remove the inevitability of a binary division between laws that are, and that are not, harmful to blacks. This is depicted along the horizontal division in Table 3.

More recent cases involving race, however, include a second analytical category, namely race-specific laws that are designed to benefit African Americans. Although at first blush, the modern liberal position, occupying the lower left box, appears utterly at odds with the discredited Jim Crow position in the upper right, the dimensionality in Table 3 explains why this is misleading. The lower left (modern liberal) and upper right (Jim Crow) boxes resolve the two critical issues in opposite fashion, but reach a common ground permitting some use of race. By contrast, the lower right (color blind) box resolves partially in favor of each other group but disallows any use of race. As a result, we can construct a set of preferences from which to infer a forward or reverse cycle. It is possible, although by no means inevitable, that one or the other of the more extreme positions would disfavor the color-blind view on the assumption that if race is permitted, those embracing it can obtain their preferred use of race politically, while defeating rules relying on race that they disfavor. Although the lower left (modern liberal) and upper

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125 For a discussion of post-Civil War laws benefiting African Americans, see supra note 114, and cites therein.
126 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. For each cycle, we need at least one somewhat counterintuitive assumption. For a forward cycle, assume that modern liberals believe that they can defeat adverse race-conscious laws politically, but fear a rule forever 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 defeated (BCA); and that the modern liberals intuitively prefer Color blindness to Jim Crow (ACB). The result is a reverse cycle CpBpApC. Although each assumption is contestable, each ranking includes each available ordering over the remaining options.
right (Jim Crow) positions resolve these critical issues in opposite fashion, they share an important result in common, and that is the characteristic feature of dimensionality. Unlike the color-blind view, the modern liberal and Jim Crow positions each permit race-advertent laws and legal policies.

Justice Thomas has made clear that he regards the modern liberal position and Jim Crow as equally condemnatory. Even treating the modern liberal and Jim Crow positions as morally equivalent, however, has no bearing on the need to treat them differently for analytical purposes due to the problem of dimensionality.

By way of analogy, a political moderate might equally lament extremism on both the far left and right. That does not mean, however, that those on opposite extremes are the same; rather, it merely means that the moderate finds those occupying opposing extreme positions equally problematic, albeit for different reasons, with the extreme right unwilling, for example, to admit a benign role for government in all but the most limited circumstances, and the extreme left unwilling, for example, to admit a benign role for market-based decision making, again, in all but the most limited circumstances. While both groups might share some common elements—an unwillingness to compromise, to acknowledge the possibility of sound arguments informed by the other side, and the like—they are both in tension with a third position that sees some good and some bad in both the public and private sectors and that is, in general, extremely skeptical of extreme skepticism.

Even though modern race litigation no longer includes Jim Crow as a legitimate position, Jim Crow continues to influence dimensionality. 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. And 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, moving the dividing line does not necessarily implicate dimensionality.

The potential for dimensionality, and thus for a cycle, 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 conservative insistence on considering all racial classifications as a unified category is inevitably in tension with relying on two tiers to assess both subcategories, adverse race-based laws and benign race-based classifications. This is so even though conservatives have historically opposed the allowance of a third tier in this context.

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128 To be clear, I personally reject this moral-equivalence position, and Justice Thomas might as well. See Parents Involved, 551 U.S. at 780 n.30 (noting that “Justice Breyer’s good intentions [in supporting the benign use of race to avoid reversion to single race schools], which I do not doubt, have the shelf life of Justice Breyer’s tenure.”).

129 See supra part II.A. For a counter illustration in which age affects dimensionality, see supra note 98.
If benign use of race were treated as its own analytical category, and if some state reliance on race were permitted, the cases would eventually produce a dividing line along a single analytical dimension. As applied to affirmative action in higher education, for example, the split would place laws like the Harvard plan that Justice Powell favored in *Board of Regents of the University of California v. Bakke*,\(^{130}\) and the Michigan Law School plan that was sustained in *Grutter v. Bollinger*\(^{131}\) — 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 that struck down in *Bakke* and in *Gratz v. Bollinger* — plans that set up racial quotas, segregate files based on race, or award fixed points based on race — in the strict scrutiny bin for presumptively bad laws. The Court has instead relied on a sort of doctrinal fiat, claiming that diversity in higher education is compelling and rejecting arguments designed to show the absence of narrow tailoring. As previously observed,\(^{132}\) this is evident from the near-perfect match between the percentage of minority students applying for and admitted to the Michigan Law School, suggesting that the school accomplished the same algorithmic result as the university on a smaller scale with careful monitoring of daily admissions reports.\(^{133}\) This merely reaffirms the need to distinguish the formal statement of tiers, on the one hand, and the actual set of rules doing the analytical work, on the other.

To be clear, this doctrinal tension is not inevitable. As Justice Stevens recognized in his *Adarand Constructors, Inc. v. Pena* dissent, one does not need strict scrutiny to sort out a “no trespassing sign” from a “welcome mat.”\(^{134}\) If the Court were willing to acknowledge the distinction between these two categories, then the conventional two-tier approach would work perfectly well, with the attendant line drawing along each dimension. But if we instead insist that race is single doctrinal category, then we need a mechanism with which to separately handle those cases relying on race for precisely opposite reasons respecting the two critical questions of seeking to advance or harm African Americans.

The dimensionality problem that requires introducing a third tier appears endemic to race. This should not be surprising given the historical role of race throughout United States history and constitutional doctrine, which together explain the unique status of color blindness as a normative position. 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 schemes designed to advance the interests of blacks relying specifically on race. This is most notable in contrast with sex-based programs benefitting women, which are subject to the lower standard of intermediate

\(^{130}\) 438 U.S. 265 (1978).


\(^{132}\) See supra note 48, and accompanying text.

\(^{133}\) *Grutter*, 539 U.S. at 383-84 (Rehnquist, C.J., dissenting).

\(^{134}\) *Adarand Constructors, Inc. v. Pena*, 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.”).
scrutiny. The obvious normative difficulty of disempowering states to devise methods of benefiting the group that motivated the Fourteenth Amendment based on that very amendment, while permitting greater regulatory leeway regarding sex, merely highlights the difficulties of the Supreme Court’s approach to tiers of scrutiny in race and sex.

As this part has shown, that problem arises from the Court’s failure to recognize that tiers of scrutiny implicate the problem of dimensionality. And, as shown below, once we recognize this, we see that, ironically, the Court has interposed an unnecessary third tier where cases can be fully assessed along a single dimension requiring only two—sex—just as it has removed a necessary third tier where the cases cannot be so assessed because of a true dimensionality problem—race.

III. Tiers Revisited: Another Look from the Trenches

This part relies on dimensionality analysis to revisit several of the problems identified in part I. It also takes up some new cases implicating race, sex, speech, and religion.

A. Dimensionality and Race: School Resegregation and Antisubordination

We now turn to one of the most controversial decisions of the early Roberts Court, Parents Involved in Community Schools v. Seattle School District No. 1,135 the case that gave rise to previously-discussed Justice Thomas quote.136 Parents Involved itself involved the efforts of two school districts, one that previously segregated by race and another that did not, to avoid the risk of reversion to single-race schools absent some reliance on race as a tie breaker, among myriad other considerations, in public school assignments. Parents Involved differed from post-Brown v. Board of Education,137 landmark cases both in the South,138 and in the North.139 The case involved one Southern district that although previously segregated had since been declared unitary, and thus in compliance with equal protection, and one northern district that had not been found to violate equal protection. The reliance on race, therefore, was prophylactic in the sense that it was designed to avoid the risk of racial reversion, rather than to remedy an identified and ongoing constitutional violation.

In addition to the specific issues presented, the case also served as a vehicle through which the Court’s liberal and conservative wings debated the intellectual legacy of Brown. Chief Justice Roberts read Brown to prevent any reliance on race absent an identified equal protection violation and considered the affirmative efforts to perpetuate reliance on race in either district as antithetical to Brown’s color-blind command. The dissenters, conversely, claimed that this reading of Brown was ahistorical and that it undermined past decisions conferring broad

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136 See supra note 110, and accompanying text.
administrative tools, including race-conscious tools, on school boards and lower federal courts to achieve meaningful integration.  

The dimensionality analysis Table 3 captures the essence of Parents Involved. While both Brown and Plessy involved the deliberate use of race, the particular use in those cases was designed to serve whites at the expense of blacks. Identifying the dimensionality issue across these two contexts—Brown and Plessy on one hand and Parents Involved on the other—does not, of its own force, answer how the latter case should have been resolved. It does, however, make plain the inadequacy of assuming that Brown’s race-neutrality principle addresses Parents Involved. The unanimous Brown Court did not contemplate equal protection challenges to general race-advertent policies designed to help blacks by encouraging integrated schools. Instead, Brown relied on equal protection to eradicate race-advertent policies with the opposite purpose and effect of mandating single-race schools.

Color blindness was responsive to the needs of that day inasmuch as it foreclosed the relevant adverse racial policy. And yet color blindness of its own force does not resolve legal challenges resting along the alternative dimension of policies designed to benefit blacks by encouraging integration.

<table>
<thead>
<tr>
<th>Permit race to integrate both races in public schools</th>
<th>Do not permit race to segregate blacks in public schools</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permit race to segregate blacks in public schools</td>
<td>Null set</td>
</tr>
<tr>
<td>Do not permit race to integrate both races in public schools</td>
<td>Pre-Brown regime in the South.</td>
</tr>
<tr>
<td></td>
<td>Dissent’s modern liberal position</td>
</tr>
<tr>
<td></td>
<td>Majority color-blind position</td>
</tr>
</tbody>
</table>

Table 4: Seattle School District No. 1 in Two Dimensions

Table 4 exposes the analytical difficulty of relying on Brown for the proposition that race is impermissible to avoid reversion to single-race public schools. If the Constitution forbids benign race-based classifications, that argument must be assessed on its own terms—meaning along the relevant dimension involving laws that do not harm blacks, but rather seek to benefit them—rather than by trying to equate two opposing positions residing along alternative analytical dimensions. The color-blind Constitution is an admirable position, but its force in the context of Jim Crow has no direct bearing on how to treat a case presenting opposing resolutions on both key issues presented in Table 4.

140 In addition to rejecting the majority’s claim that Swann did not control because the challenged district was then non-unitary, the dissenters rejected the majority’s reliance on Gratz as preventing reliance on race in public school assignments. Parents Involved, 551 U.S. at 847 (Breyer, J., dissenting) (“Here, race becomes a factor only in a fraction of students' non-merit-based assignments—not in large numbers of students’ merit-based applications.”). The dissent maintained that unlike college admissions, public school assignments are not based on individual applications, and instead reflect a variety of demographic factors including residency, sibling assignments, and in some cases as a tiebreaker, race. Id. at 832, 834-35.
1. The Problem of Adverse Race-Neutral Laws

Because express racial classifications are subject to strict scrutiny, and because of the Red Queen nature of constitutional lawmaking, the Supreme Court must also decide where to draw the line respecting race-neutral laws that adversely affect African Americans. In *Washington v. Davis*, the Supreme Court considered an equal protection challenge to a neutral English literacy exam used as part of the qualification process for hiring District of Columbia police officers. Although the policy disproportionately disqualified African American applicants, the Supreme Court sustained it under rational basis scrutiny.

Writing for a majority, Justice White determined that because the program was motivated by the legitimate purpose of increasing communicative skills in a workforce where such skills mattered, the differential impact did not itself trigger heightened scrutiny. The Court further rejected a purpose-and-effects analysis, observing that the police department undertaken affirmative efforts to recruit minority officers.

The Court has applied similar analyses in two other notable and controversial cases. First, in *United States v. Armstrong*, it rejected a claim of selective prosecution that resulted in egregiously 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 it was mistaken to assume that all races committed the same offenses proportionately to their representation in the general population. He observed, for example, that serial murder and child pornography tend to be disproportionately white offenses, whereas crack cocaine is a disproportionately black offense.

In *McCleskey v. Kemp*, 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 racial relationship of the perpetrator and victim. The major findings were that a black murderer killing a white victim was more than 4 times as likely to receive the death penalty than any other combination, and that overall, black defendants stood a far greater likelihood of receiving the death penalty than white defendants.

The immediate concern is the implication of these cases for tiers of scrutiny analysis, both with respect to race and with respect to several other categories discussed below. 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 based as furthering some non-racial objective in spite of that policy’s adverse racial impact. These cases thereby illustrate yet another round in the following Red Queen game:

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141 426 U.S. 229 (1976).
142 Id. at 245.
144 Id. at 469.
146 Id. at 320.
(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 independently benign purpose, but with an adverse consequence on blacks. Thus far, the Court has drawn the line along this analytical dimension placing categories 1 and 2 on one side, and category 3 on the other. 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.

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

In *Loving v. Virginia*, 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. Although law students sometimes struggle with this, the difficulty is that these statutes do not discriminate on the basis of race. They discriminate, but along a different analytical dimension, namely between same-race (treated favorably) and mixed-race (treated disfavorably) couples. This distinction does not mean that the law is benign; quite the contrary, it is not, and that is the point. Historically discrimination correlated with presumptively bad laws, and conversely, non-discrimination correlated to presumptively good laws. This set of intuitions is tested not only in the context of benign race-based laws, laws that discriminate favorably to blacks, but also in the context of anti-miscegenation laws that do not discriminate based on race but that nonetheless subordinate the minority race.

Writing for the *Loving* majority, 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 aptly observed in concurrence, it is sufficient to say that a law that criminalizes based on the race of the actors cannot stand. And this is true even if the law employs race in a nondiscriminatory manner.

*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, whereas outside that context, these two principles tend to operate in tandem such that dimensionality flattens. Consider Table 5 below.

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147 388 U.S. 1 (1967).
148 The case facts were more complex. The statute banned minorities from marrying whites, but not each other. Chief Justice Warren, writing for the majority, declared this irrelevant because the challenged law is patently unconstitutional “even assuming an even-handed state purpose to protect the ‘integrity’ of all races.” *Id.* at 11 n.11.
149 *Id.* at 13 (Stewart, J., concurring).
Table 5: Discrimination, Subordination, and Dimensionality

In Table 5, the two critical dimensions are the permissibility or non-permissibility of both racial discrimination and racial subordination. The null set, or position no one would logically assume, is disallowing discrimination, but allowing subordination. The Jim Crow position allows both. The modern liberal position, which permits affirmative action, permits discrimination, but disallows subordination. The modern conservative position, associated with color-blindness, disallows both racial discrimination and 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*. The normative attachment to color-blindness, therefore, no longer adds an analytical dimension. Instead, the two positions, allowing or disallowing racial anti-subordination can be cast along a single analytical dimension as shown in Table 6. 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.

<table>
<thead>
<tr>
<th>Conservative/Liberal</th>
<th>Jim Crow</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Loving result</strong></td>
<td>Anti-miscegenation result</td>
</tr>
<tr>
<td>Prohibit subordination</td>
<td>Allow subordination</td>
</tr>
</tbody>
</table>

Table 6: Loving in One Dimension

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

B. The Dimensionality of Sex-Based Distinctions

The challenge of sex-based classifications is that there are times when the sexes are situated differently in relevant ways and, as a result, when the analogy between race and sex breaks down. To begin thinking about sex and dimensionality, reconsider Table 3, this time using sex rather than race, as the relevant set of categories.
Adverse sex classifications permitted | Null set | Pre-Reed v. Reed restrictions on participation in bar, estate planning, and jury service
---|---|---
Adverse sex classifications prohibited | Modern liberal view | Sex-blindness?

| Table 7: Sex and Dimensionality |

The parallel structure of the Tables 3 and 7 notwithstanding, something (someone?) is amiss. Prior to Reed v. Reed, striking down a restriction on the ability of women to administer estates, and Frontiero v. Richardson, striking down a presumption of family benefits for enlisted men but not women in the military, the Court routinely sustained laws distinguishing the sexes based on then-dominant social mores concerning sex roles. Classic illustrations include preventing women not married to the proprietor from bartending, and automatically excluding women, but not men, who did not opt in from serving as jurors.

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. In Craig v. Boren, the non-intoxicating beer case, Justice Brennan articulated what has become known as “intermediate scrutiny.” That test, as then formulated, states: “To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”

The intermediate tier returns us to the analysis of dimensionality. As in Table 3, the lower right and upper left positions in Table 7 embrace seemingly opposite positions involving the permissibility of laws this time harming or benefitting women. But there is a critical difference. In contrast with the race context, there is no principled sex-blind position. Both the conservative and liberal positions on sex agree that sex-based distinctions can be drawn; the disagreement is over the line’s location. As a result, the dimensionality of Table 7 flattens. As shown in Table 8,

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150 404 U.S. 71 (1971).
152 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 placed unskilled women at a competitive disadvantage with men, thereby undermining their employment prospects. 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).
156 For a more detailed discussion, see supra part I.C.3.
157 Craig, 429 U.S. at 197.
as with *Loving*, which involves antisubordination but not antidiscrimination and thus where color-blind position falls out, the issue in sex-based equal protection jurisprudence is therefore one of line drawing along a single-dimensional spectrum.

<table>
<thead>
<tr>
<th></th>
<th>Intermediate Scrutiny</th>
<th>Strict Scrutiny in Fact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rational Basis in Fact</td>
<td>Intermediate Scrutiny as Placeholder</td>
<td>Easy cases to strike down</td>
</tr>
<tr>
<td>Easy cases to sustain</td>
<td>Hard Cases</td>
<td>adverse sex-based laws</td>
</tr>
<tr>
<td>benign sex-based laws</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Table 8: Sex-Based Equal Protection with Flattened Dimensionality**

This result should not be surprising. Whether such challenged laws draw lines based on sex, as in the prior examples, or apply equally to both sexes, as with race in *Loving*, the cases ultimately rest on principles of anti-subordination. The ongoing disagreements involve which types of laws do or do not subordinate women.

Table 8 thus reveals the real purpose that intermediate scrutiny serves, and further explains why students must learn two parallel sets of doctrines, one to say and one to apply. In the context of sex-based classifications, there are easy cases, and those cases occupy the opposite extremes along a single analytical dimension. We know that simple exclusions or disadvantageous treatment of women based on antiquated notions about the sexes 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 (and, speaking as a man, perhaps not altogether equal) bathrooms is, of course, a trivial example. Others involve policies that recognize genuine sex differences, for example, who makes the final decision to terminate a pregnancy; 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 prioritize based on the parent’s sex when a nonmarital overseas-borne offspring of only one U.S. citizen-parent later seeks citizenship.

The real purpose of intermediate scrutiny is not to acknowledge a problem of dimensionality, but rather, to serve as a placeholder for the harder cases in between. As

158 Relevant cases include *California v. Goldfarb*, 430 U.S. 199 (1977) (striking down federal program affording widow automatic benefits but conditioning widower benefits on proof of dependency) and *Wengler v. Druggists Mutual Insurance Co.*, 466 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 is not sex discrimination—both the woman paying in contributions and her widower seeking to receive benefits—are harmed; rather, the discrimination is in favor of traditional families in which the husband is the primary breadwinner, and against families in which this responsibility is either shared or rests with the wife.

159 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, *THE NATION: Sperm Politics, The Right to be a Father (or Not)*, N.Y. TIMES, Nov. 6, 2005, at A44.

160 *See supra* part III.B (discussing Tuan Ahn Nguyen v. INS, 533 U.S. 53 (2001)).
previously shown, however, difficult line drawing, and even shifting lines over time, does not create dimensionality. To illustrate, consider two much-criticized sex-based equal protection cases. The first case, *Geduldig v. Aiello*, 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 sex-based. The second decision, *Personnel Administrator of Massachusetts v. Feeney*, involved a challenge to a program benefitting veterans in hiring, which, due to the history of military service, disproportionately benefitted men.

The difficulty that these cases raise is that although each is technically neutral, each also appears to have a profound sex-based affect. The Court sustained both policies, and the question is whether intermediate scrutiny is doing any work here. *Geduldig* is amusing for the simple reason that men cannot become pregnant, and *Feeney* is disturbing because the history of military service affects men differently from women, thus appearing to test sex neutrality.

What makes these cases hard has nothing to do with dimensionality. It has everything to do, instead, with a difficult exercise in 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 far 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 the coverage period. The beneficiaries of the pregnancy exclusion are all persons whose premiums are reduced as a result, which 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 whose wives will become pregnant during the coverage period, the exclusion is as financially detrimental as it is for women employees who will become pregnant during the coverage period. And that is the problem. The pregnancy exclusion does not translate into a sex-based financial burden.

The analysis of *Feeney* is more difficult because we could say that the wives of former military service members who benefit from the challenged policy benefit in like manner with their husbands, and the husbands of women excluded from such positions due to the military benefit are burdened in like manner with their wives. The difficulty, however, is that this assumes a set of familial structures that implicate the very sex roles challenged in our evolving equal protection analysis. The point here is not to resolve these cases. Rather, it is to show that because the societal understanding of sex roles is in the process of evolving, these cases are hard. What makes them hard, however, is disagreement on where to draw the line, not how to define the analytical spectrum along which that line, inevitably, will be drawn.

C. *The Dimensionality of Religion and Speech*

A brief discussion of two sets of First Amendment doctrines will suffice to show that the preceding analysis also holds great promise in this important area of constitutional law. We

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161 See *supra* part II.A.
begin with the case of Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah. That case tested the limits of the Free Exercise Clause in an unusual circumstance in which the City Council specifically targeted practitioners of the Santeria religion, a traditional African religion that blends elements of Roman Catholicism and that was brought to the U.S. from Cuba.

We then briefly consider three multi-factor tests that the Supreme Court has constructed to assess restrictions on specific forms of speech: time, place, and manner regulations; symbolic expression; and commercial speech. Although we could select other illustrations, the essential lesson would remain: these doctrinal contexts, like virtually all non-race contexts arising under equal protection, can be assessed along a single analytical dimension, without the need for a third tier of scrutiny.

1. Free Exercise and Deliberate Restrictions on Santeria Ritual Sacrifice

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, the Supreme Court struck down an ordinance enacted in the City of Hialeah that banned ritual slaughter in the form employed by practitioners of the Santeria faith. As Justice Kennedy observed in his partial majority opinion, targeting a particular religious group in this manner is rare. The more typical case, albeit one that has created an ongoing division among the justices, involves the application of neutral laws that carry an incidental burden on religious practice. This targeting resulted from the community’s discomfort with the tenets of the Santeria faith that required animal slaughter and the eventual consumption of the meat in a manner that many regarded as cruel to animals and potentially unsanitary. The difficulty is that the city did not tighten its general animal or food-disposal safety laws to prevent particular Santeria practices in which others might also engage. Instead, it created a legal gerrymander that exempted virtually anyone but practitioners of this particular faith. Although the law was justified as, among other grounds, preventing animal cruelty, the ban did not, for example, extend to hunting, pesticides, or kosher slaughter.

The Supreme Court’s most prominent recent statement respecting such laws was set out in Employment Division, Department of Human Resources of Oregon v. Smith. In Smith, the Supreme Court reversed a ruling of the Oregon Supreme Court holding that the state ban on unemployment benefits to members of the Native American Church, who ingest Peyote as a religious rite, a practice criminalized under Oregon law with no religious exemption, violated the First Amendment Establishment Clause as applied to the States through the Fourteenth Amendment. The Smith Court instead ruled that neutral laws of general applicability that

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165 Id. at 529.
167 In an earlier round of litigation in the same case, the Supreme Court remanded to the Oregon Supreme Court to determine whether the sacramental use of Peyote was exempted from the general criminal ban, which provided the basis for the denial of employment benefits. Emp’t Div., Dept. of Human Res. of Or. v. Smith, 485 U.S. 660, 670 (1988). The Oregon Supreme Court concluded that the ban covered all uses with no religious exemption, and it further reaffirmed its earlier conclusion that because banning such use violated the Free Exercise clause, the denial of benefits violated the First Amendment. Smith v. Emp’t Div., 763 P.2d 146, 148 (Or. 1988).
incidentally burden religious practice are subject to rational basis review, and that the exclusion of benefits on the *Smith* facts is constitutionally permissible.

By contrast, the Court unanimously overturned the law at issue in *City of Hialeah*. The primary concern here involves that case’s reliance on the *Smith* rule for neutral laws that incidentally burden religious practice. Justice Souter, concurring in part and concurring in the judgment, echoed the *Smith* dissent and explained why the majority’s reliance on the *Smith* rule to achieve its result was problematic.\(^{168}\)

In *City of Hialeah*, we can derive three relevant positions and then see if these lie along one or two analytical dimensions. The positions are set out in Table 9.

<table>
<thead>
<tr>
<th></th>
<th>Free Exercise Clause Bans Inhibition on Religious Practice</th>
<th>Free Exercise Clause Permits Inhibition on Religious Practice</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free Exercise Clause Does not Require Special Religious Accommodation</td>
<td>Kennedy/Scalia position</td>
<td>City Council Position (embraced by no jurists)</td>
</tr>
<tr>
<td>Free Exercise Clause Does Require Special Religious Accommodation</td>
<td>Souter/Blackmun position</td>
<td>Null set</td>
</tr>
</tbody>
</table>

**Table 9: Dimensionality of Ritual Sacrifice in City of Hialeah**

In *City of Hialeah*, no jurist could logically hold that the Free Exercise clause simultaneously permits laws that inhibit religious practice while also insisting that the same clause requires special religious accommodations. That null set appears in the lower right box. Although each of the three remaining positions is plausible, members of the Court occupy only two. One could take the view, as did members of the City Council, that the free exercise clause merely protects religion as a matter of personal conscious, and that the state, therefore, is free to ban any aspects of practice in a manner consistent with societal mores. While this would, perhaps, prevent banning particular religious practices by name that merely invites the sort of

\(^{168}\) Justice Souter agreed with the *Smith* dissent’s dissatisfaction with what he termed the “substantive neutrality” rule, and that “The enforcement of a law ‘neutral on its face,’ . . . may nonetheless offend [the Free Exercise Clause’s] requirement for government neutrality if it unduly burdens the free exercise of religion.” *City of Hialeah*, 508 U.S. at 562-63 (Souter, J., concurring in part and concurring in the judgment). Justice Souter maintained that *Smith*’s neutrality position carves out no protected sphere for religion, and that if they are not accompanied by special religious exemptions, such “neutral” impositions on religious practice should be subject to protection beyond rational basis review. *Id.* at 571. In his earlier *Smith* dissent, Justice Blackmun had expressed similar views:

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State’s refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means. Until today, I thought this was a settled and inviolate principle of this Court’s First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a ‘constitutional anomaly.’

religious gerrymander challenged in this case. This view would apply a rational basis test to this and similar laws.

Members of the Court split over the two remaining boxes, depicted in the upper and lower left corners of Table 10. The Kennedy/Scalia position, captured in the upper left, would allow laws, whether described as “neutral” or “generally applicable,”¹⁶⁹ that limit the ability to practice rites that otherwise violate those laws. This view gives religion no special place, but does require that laws affecting religious practice apply with equal force to nonreligious activities, thus banning religious gerrymanders. Using *Smith* as an illustration, this position does not require carving out a religious exemption from a generally applicable ban on unemployment benefits ban for those using Peyote. In his concurring opinion in *City of Hialeah*, Souter describes this position as “formal neutrality.”¹⁷⁰ Finally, the Blackmun dissenting position in *Smith* and the Souter concurring position in *City of Hialeah*, embrace what Souter describes as “substantive neutrality.”¹⁷¹ That position demands a heightened justification, specifically narrow tailoring and, when possible, an exemption from neutral, or generally applicable, laws that inhibit religious practice.

The structure of Table 9 depicts a potential dimensionality problem such that the lower left and upper right boxes permit or even require laws targeting religion. In the case of Blackmun and Souter, this takes the form of required religion-specific exemptions from neutral laws of general applicability. And yet, as in the sex context, this is not an actual case of dimensionality. The better analysis shows that both the upper right and lower left would each prefer the upper left neutrality position to the opposite extreme.

<table>
<thead>
<tr>
<th>Souter/Blackmun</th>
<th>Scalia/Kennedy</th>
<th>Hialeah City Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny for neutral laws that make no special accommodation (substantive neutrality)</td>
<td>Strict scrutiny for laws singling out religion; rational basis for neutral laws (formal neutrality)</td>
<td>Rational basis for all laws that do not ban freedom of conscience even if they otherwise affect religion</td>
</tr>
<tr>
<td>Broad free exercise protection</td>
<td>Narrow free exercise protection</td>
<td></td>
</tr>
</tbody>
</table>

**Table 10: City of Hialeah in One Dimension**

As Table 10 demonstrates, the formal neutrality position thus emerges the Condorcet winner, meaning that dimensionality has flattened. In this instance, however, no sitting member occupies the right-most position. The doctrinal issue, therefore, is whether the dividing line for permissible or banned laws requires special religious accommodations or, stated differently, where the line between formal and substantive neutrality should be drawn. That line-drawing

¹⁶⁹ Although these terms are not synonymous, the justices agreed that they sufficiently overlapped in the case that they could be treated interchangeably.

¹⁷⁰ *City of Hialeah*, 508 U.S. at 561.

¹⁷¹ *Id.*
exercise, giving rise to the debate between Justices Kennedy and Souter in *City of Hialeah* does not create a problem of dimensionality.

2. Dimensionality in Speech

The final set of doctrines we will consider involve neutral regulation and lesser-protected speech. The Supreme Court has developed a variety of balancing tests to assess against the free speech clause neutral laws affecting the time, place, and manner of speech (“TPM”); expressive conduct; and commercial speech. Each test shares some common elements, but also varies in the relevant details.

In *Ward v. Rock Against Racism*, the Supreme Court stated that TPM restrictions withstand First Amendment scrutiny provided they are “justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” In *United States v. O'Brien*, the Court advanced a similar test governing expressive conduct, stating that such regulation will be sustained:

> If it is within the constitutional power of the Government; if it furthers an important or substantial interest; if the governmental interest is unrelated to suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

And in the context of commercial speech, the Court will sustain the regulation provided the speech is (1) “protected by the First Amendment,” meaning that it concerns “lawful activity [and is] not misleading”; (2) “the asserted governmental interest is substantial”; (3) “the regulation directly advances the governmental interest”; and (4) that interest cannot be as well served “by a more limited restriction on commercial speech.”

Each of these doctrines corresponds to a large body of case law drawing lines as to which TPM restrictions, regulations on conduct with expressive quality, or commercial speech is or is not protected. The main point for our purposes is simply this. It is possible, once more, to devise a matrix that appears to expose dimensionality concerning (1) whether to allow or disallow TPM restrictions or restrictions on expressive speech or commercial speech, and (2) conversely, whether to allow or disallow regulations that create greater TPM outlets for speech, or that encourage expressive speech or commercial speech. And yet, in none of these three areas is there a principled normative commitment to speech neutrality. No jurist would say that the First Amendment prevents both inhibiting and creating speech venues, or that it prohibits inhibiting

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173 *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).
175 *Id.* at 377.
and encouraging expressive or commercial speech. Once again, in each context, dimensionality flattens.

The preceding tests—tests that one commentator has demonstrated have been construed in lower federal courts as a form of intermediate scrutiny\(^\text{177}\)—once more appear to serve the function of placeholders for an eventual line to be drawn concerning which regulations are, or are not, permissible. To the extent these tests combine elements from both strict and intermediate scrutiny, this merely shows ongoing difficulties in anticipating the lines’ locations, rather than a problem of dimensionality.

**CONCLUSION**

The Supreme Court confronts the daunting task of simultaneously creating novel substantive rules of constitutional law in the cases it decides and of supervising the process of constitutional law making in the lower federal and state courts. This process includes vast numbers of cases arising in these courts that the Supreme Court will never review. This supervisory function further extends to legislatures and other regulatory bodies that operate against the background signals of constitutional doctrine. All are players in the dynamic process of creating constitutional doctrine.

Tiers of scrutiny are an unusual feature in this process because they simultaneously fit both categories. They are themselves substantive constitutional doctrines, even if taking presumptive form, that are often sufficient to dispose of cases on their own. They are also an important set of principles guiding other institutions in their own complex task of adjudication or lawmaking.

This Article did not argue for or against particular case outcomes, although it did explain how some outcomes might have been reached with improved clarity. Rather, the central purpose was to show that a greater appreciation for when cases can be assessed along a common analytical dimension, and when they cannot, proves critical in understanding the functions that tiers of scrutiny serve and how courts might better apply them.

Individual members of the Supreme Court and several well-respected constitutional scholars have been highly critical of the Court’s approach to tiers of scrutiny. This Article is sympathetic to the criticisms and has suggested an innovative means of adding analytical clarity. Recognizing tiers of scrutiny as a problem of dimensionality holds the potential to substantially improve the Supreme Court’s own constitutional decision making, and also to help it give improved guidance to other institutional actors, especially lower federal and state courts. Although an improved understanding of tiers—one that recognizes the central role that

\(^{177}\) See Bhagwat, supra note 93 at 784 (“[I]n the early to mid-1980s, . . . the lower courts, began to bring order to this tangle, ultimately combining these various ‘tests’ into a single, unitary standard of review that has come to be called intermediate scrutiny.”).
dimensionality plays in selecting and applying those tiers—will not eliminate the Red Queen game of constitutional lawmaking, it might just allow all the key players to push ever-so-slightly ahead.
<table>
<thead>
<tr>
<th>Race</th>
<th>Doctrinal Test</th>
<th>Actual Test</th>
<th>Comment</th>
<th>Illustrations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adverse</td>
<td>Strict Scrutiny</td>
<td>Same</td>
<td>Due to Red Queen game, most laws adversely affecting minorities no longer take express form.</td>
<td>Jim Crow laws</td>
</tr>
<tr>
<td>Benign</td>
<td>Strict Scrutiny</td>
<td>Intermediate Scrutiny</td>
<td>Although Court formally applies same test to benign and detrimental laws, this is the rare, and possibly only, instance where dimensionality forces an alternative test to distinguish analyses concerning illicit and benign laws.</td>
<td>Bakke; Grutter</td>
</tr>
<tr>
<td>Nondiscriminating/-Subordinating</td>
<td>Strict Scrutiny</td>
<td>same</td>
<td>Dimensionality flattens when antidiscrimination is eliminated, avoiding the central normative position of modern conservatism, associated with color blindness, placing modern liberals and modern conservatives on the same side, opposite Jim Crow.</td>
<td>Loving</td>
</tr>
<tr>
<td>Adverse</td>
<td>Intermediate scrutiny</td>
<td>Strict scrutiny</td>
<td>Although Court uses a single test, intermediate scrutiny, to assess sex-based distinctions, the test does no work; laws</td>
<td>VMI illustrates judicial effort to ratchet up intermediate scrutiny to strike down a law that would otherwise likely</td>
</tr>
<tr>
<td>Sex</td>
<td>Benefit</td>
<td>Scrutiny</td>
<td>Scrutiny</td>
<td>Comment</td>
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</tr>
<tr>
<td>Benign</td>
<td>Intermediate scrutiny</td>
<td>Rational basis scrutiny</td>
<td></td>
<td>Cases that are based on real sex differences or that overcome past discrimination against women are functionally subject to rational basis review.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><em>Nguyen</em> illustrates a benign law prioritizing treatment of mothers over fathers of foreign-born illegitimate children based on real-sex differences.</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>Adverse</td>
<td>Rational basis scrutiny</td>
<td>Strict scrutiny</td>
<td>Laws that distinguish gays and lesbians for greater levels of difficulty in lawmaking or that single out their intimate conduct will be invalidated based on animus or an understanding of the essential role intimate conduct plays in forming meaningful relationships, thus benefitting society. (Thus far we have no illustration of benign laws challenged under equal protection in this category).</td>
</tr>
<tr>
<td>Free Exercise Clause</td>
<td>Adverse</td>
<td>Strict scrutiny</td>
<td>same</td>
<td>The division on the present Court involves whether this clause permits neutral laws (or laws of general applicability) that adversely affect ability to practice religion; these positions, however, rest along a single analytical dimension.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><em>Romer; Lawrence</em> (overturning <em>Bowers</em>).</td>
</tr>
<tr>
<td>Neutral Regulation of Speech or of Low-Priority Speech</td>
<td>Adverse</td>
<td>Various four-part balancing tests that some scholars and jurists equate to intermediate scrutiny.</td>
<td>Strict or rational basis scrutiny.</td>
<td>Although lower federal courts construe these balancing tests as a form of intermediate scrutiny, as in the sex category, the tests are placeholders for inevitable lines that will later be drawn.</td>
</tr>
</tbody>
</table>