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Erratum

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AMERICAN EQUAL PROTECTION AND GLOBAL CONVERGENCE

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Commentators have noted that equal protection doctrine is in a state of transformation. The nature of that transformation, however, is poorly understood. This Article offers a clearer view of the change underway. This Article is the first to reveal and synthesize three major trajectories along which the U.S. Supreme Court has begun to move. First, the Court has begun to blur the line that it previously drew between facial discrimination and disparate impact. Second, the Court has begun to collapse its previously established tiered standards for reviewing discrimination. These two trajectories combine to produce a third trajectory of change: by blurring the distinction between facial discrimination and disparate impact, and by collapsing tiered review, the United States' equal protection doctrine is converging with equality jurisprudence from peer jurisdictions abroad.

After describing these changes, we argue that the collective wisdom of foreign jurisdictions should serve as persuasive authority encouraging the United States to continue along its current trajectories of doctrinal reform. We contend that foreign jurisdictions have served as laboratories of doctrinal innovation from which the United States could learn.

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INTRODUCTION

When the U.S. Supreme Court reverses course on constitutional doctrine, it usually happens through evolution, not revolution. This was true, for example, when the Court abandoned its previously vigorous protection of freedom of contract during the so-called *Lochner* era.[1] The Court departed from precedent by moving slowly over a series of cases.[2] Similarly, the Court's precedents condoning racial segregation had begun to fray long before the Court explicitly rejected the doctrine of separate but equal.[3] These are just some examples demonstrating that constitutional law in the United States changes through small steps, much like the common law.[4]

Because changes to constitutional law develop slowly over time, they can be difficult to detect in real time. Indeed, three emerging trajectories in the Court's equal protection jurisprudence have received little scholarly attention.[5] This Article is the first to synthesize these developments and discuss their theoretical and practical significance.

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1. The most frequently discussed, and criticized, example of the U.S. Supreme Court's formerly strong protection of contractual freedom is *Lochner*. *See* Lochner v. New York, 198 U.S. 45, 64–65 (1905) (invalidating a labor law that set maximum work hours for violating freedom of contract protected by the Fourteenth Amendment). For background on the Court's gradual repudiation of the constitutional right to freedom of contract, see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986, at 210–14 (1990).

2. This departure began with *Nebbia v. New York*, 291 U.S. 502, 538 (1934), which upheld a law fixing the price of milk, and fully crystallized in *Ferguson v. Skrupa*, 372 U.S. 726, 732–33 (1963), which upheld a prohibition on the business of debt adjusting.

3. We borrow the imagery of precedents "fraying" from David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 902 (1996). Before the Court explicitly rejected racial segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court had issued many decisions that were inconsistent with the doctrine of separate but equal. *See generally* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Gaines v. Canada, 305 U.S. 337 (1938). For discussion on how these cases led up to *Brown*, see Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673, 699–708 (1992).

4. For another example of how constitutional doctrine changes slowly like the common law, see Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1461–72 (2000) (describing constitutional sex discrimination doctrine). For a foundational text on the similarities between constitutional law and common law, see generally Strauss, *supra* note 3.

5. While some commentators have identified particular points along these emerging trajectories, this Article presents a fuller view of them. For elaborations on relevant existing scholarship, see *infra* notes 30, 34, 165 and accompanying text.

The first two developments that we explore involve the Court distancing itself from longstanding equal protection doctrine. First, the Court has blurred the line that it once rigidly maintained between cases of facial discrimination and disparate impact.[6] Second, the Court has begun to collapse its tiered framework for reviewing equal protection cases.[7] These two trends come together to form a third trajectory, which is the growing convergence between American equal protection doctrine and equal protection doctrine around the world.[8] By blurring the distinction between facial discrimination and disparate impact cases and by collapsing tiered review in equal protection cases, the Supreme Court has aligned American jurisprudence more closely with jurisprudence abroad.

These three emerging trajectories all carry great significance. Indeed, they may become dispositive in Supreme Court decisions on cases currently finding their way to the Court. The growing global convergence should also prompt commentators to revisit heated debates about whether, and how, the Court engages with foreign sources of law.[9]

Consider, first, the distinction between facial discrimination and disparate impact. The Court has long drawn a line between laws that overtly discriminate (facial discrimination cases) and facially neutral laws that adversely affect particular groups of people (disparate impact cases).[10] In its equal protection jurisprudence, the Court has traditionally found facial discrimination cases to be much more troubling.[11] Recently, however, the Supreme Court has begun to blur the line between facial discrimination and disparate impact.[12]

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6. Facial discrimination cases challenge laws that overtly discriminate against a group of people, whereas disparate impact cases challenge laws that are technically neutral but disproportionately affect a group of people in adverse ways. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 698, 740–51 (5th ed. 2015).

7. As a de jure matter, the Court has applied three tiers of scrutiny in equal protection cases: rational basis review, intermediate scrutiny, and strict scrutiny. For background reading on this tiered system, see *id.* at 699–702. Many commentators, however, contend that the Court has developed additional de facto tiers of review. *See infra* Part I.B.

8. For background reading on comparative approaches to equality law, see generally DAVID B. OPPENHEIMER, SHEILA R. FOSTER & SORA Y. HAN, COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW: CASES, CODES, CONSTITUTIONS, AND COMMENTARY (2012).

9. Emblematic of this debate is the disagreement between Justice Breyer and the late Justice Antonin Scalia. Justice Scalia was a frequent and vocal opponent of citing foreign law. In contrast, Justice Breyer has written extensive defenses of citing foreign laws and has advocated that position during many public speaking engagements. *See* Robert Barnes, *Breyer: Fears of Foreign Law Don't Resonate*, WASH. POST, Sept. 13, 2015, at A3 (discussing debate among Supreme Court Justices on the appropriateness of citing foreign law).

10. *Washington v. Davis*, 426 U.S. 229 (1976), is a classic case in which the Court distinguished facial discrimination and disparate impact; it concluded that cases of disparate impact generally do not require vigorous scrutiny. *Id.* at 238–48.

11. *See, e.g.*, *id.* at 238–48. This Article's focus is constitutional law, not civil rights statutes. In some statutory areas, the Court has been much more willing to find impermissible discrimination based on disparate impact. *See, e.g.*, Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (discussing the Fair Housing Act); Griggs v. Duke Power Co., 401 U.S. 424, 428–29 (1971) (discussing Title VII of the Civil Rights Act of 1964). The Civil Rights Act of 1991 also explicitly makes disparate impact claims of employment discrimination colorable. 42 U.S.C. § 1981 (2012).

12. *See infra* Part I.

Whether the Court continues down the path of conflating these two categories of cases will influence pending litigation. Consider, for example, the current case challenging North Carolina's law that strips municipalities of power to enact antidiscrimination ordinances.[13] On its face, the statute does not discriminate. In restricting local governments' ability to enact antidiscrimination ordinances, the law does not overtly categorize people for differential treatment.[14] Yet, this facially neutral ban on local antidiscrimination ordinances uniquely impacts lesbian, gay, bisexual, and transgender (LGBT) communities.[15] Unlike other groups that are protected by federal civil rights laws—such as women and persons of color—LGBT communities in North Carolina have had to rely on local ordinances in progressive regions of the state for protection.[16] Local governments are now prohibited from passing any new antidiscrimination measures for at least three years.[17] Whether and how the Court distinguishes between facial discrimination and disparate impact are questions that will influence litigation challenging this restriction on antidiscrimination protections.

The litigation concerning North Carolina will also turn, in part, on the standard of review adopted in the case.[18] Traditionally, the Supreme Court has applied three levels of review in equal protection cases: strict scrutiny, intermediate scrutiny, and rational basis review.[19] Some scholars believe that the Court has opaquely developed a fourth standard of review, often referred

13. In 2016, North Carolina enacted the Public Facilities Privacy & Security Act of 2016, which is commonly referred to as House Bill 2 ("H.B. 2"). *See* H.R. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016). In addition to requiring transgender people to use public restrooms that comport with their assigned sex at birth, the law preempted local antidiscrimination ordinances. *Id.* In 2017, North Carolina repealed H.B. 2 and replaced it with House Bill 142 ("H.B. 142"). H.R. 142, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017). H.B. 142 preempts any local ordinance that regulates restroom access, including transgender people's right of access. *Id.* It also prohibits local governments from passing any other types of antidiscrimination protections until December 1, 2020. *Id.* The American Civil Liberties Union (ACLU) and Lambda Legal filed litigation challenging H.B. 2. *See* Complaint for Declaratory and Injunctive Relief para. 1, Carcaño v. McCrory, 203 F. Supp. 3d 615 (M.D.N.C. 2016) (No. 1:16-cv-00236), 2016 WL 1213004 para. 1. These organizations later filed an amended complaint to challenge H.B. 142 as well. *See* Plaintiffs' Fourth Amended Complaint para. 1, Carcaño v. McCrory, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. July 21, 2017). The U.S. Department of Justice also challenged H.B. 2, but not the part of the law that preempted local ordinances. *See* United States v. North Carolina, 192 F. Supp. 3d 620, 622–23 (M.D.N.C. 2016).

14. *See* H.R. 142; H.R. 2; *see also infra* Part III.C.

15. The North Carolina bills are distinguishable from the facially discriminatory Colorado constitutional amendment that prohibited local governments from having antidiscrimination laws that explicitly protect gay, lesbian, and bisexual individuals. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996).

16. *See* Jeff Tiberii, *Sifting Through the Facts on House Bill 2*, WUNC (Apr. 1, 2016), http://wunc.org/post/sifting-through-facts-house-bill-2 [https://perma.cc/LP7U-FY8B] (listing local antidiscrimination measures that existed prior to North Carolina's moratorium on such measures).

17. *See supra* note 13.

18. *See supra* note 13.

19. *See* CHEMERINSKY, *supra* note 6, at 699–702.

to by commentators as "rational basis review with bite."[20] Other scholars interpret case law to contain even more de facto tiers.[21] We contend, however, that a better reading of recent cases is that the Court has functionally eschewed its tiered framework and is converging upon a new form of intermediate scrutiny that applies to all cases involving discrimination based on personal characteristics.[22] In gay rights cases, the Court has ratcheted up rational basis review so that it functions more like intermediate scrutiny.[23] Meanwhile, in at least one recent race discrimination case, the Court ratcheted down strict scrutiny so that it functions as strict scrutiny in name only and as intermediate scrutiny in effect.[24]

To be clear, blurring of the distinction between facial discrimination and disparate impact and the collapse of tiered review are still in the early stages. Change is afoot.[25] At this juncture, it is helpful to look abroad because many

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20. *E.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–24 (1972); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classes Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2773–74 (2005) (arguing that while the Supreme Court has applied rational basis with bite to sexual-orientation discrimination, it has not done so explicitly and thus has left lower courts confused).

21. *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, 2304–10 (2006) (contending that there are at least six tiers); Maxwell L. Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. (forthcoming 2017) (identifying five tiers).

22. As we explain in Part I.B, this Article focuses on cases involving discrimination based on personal characteristics that are usually difficult to change, with race, sex, and sexual-orientation discrimination serving as paradigmatic examples. We refrain from examining how the Court will treat discrimination based on other characteristics, such as the differential treatment of licensed optometrists and ophthalmologists versus unlicensed opticians. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 490–91 (1955). We limit our analysis to the first category of cases because they have been the focus of the Court's recent jurisprudence and our aim is to examine the consequences of recent developments. We note that personal traits might be difficult to change for a variety of reasons including biological constraints or the fact that the change would require a large compromise to one's sense of self. The Supreme Court has said that race, sex, and sexual orientation are all "immutable" personal characteristics, but it has not defined immutability. *See* Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 34 n.168 (2015) (explaining that the Court's usage of the term "immutability" in *Obergefell* was unclear); *infra* note 141 and accompanying text. Some lower courts have said that an immutable trait is not necessarily unchangeable but is at least difficult to change. *See* Clarke, *supra*, at 34–35. Other courts have expanded the definition of immutability by stating that a trait should be considered immutable whenever it would be unfair to ask someone to change that aspect of themselves. *See id.* at 25–26, 35–36; *see also* Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 635 (2014) (critiquing courts' capacious definition of "immutability" because it "is just not immutability in the standard sense of the term").

23. *See* United States v. Windsor, 133 S. Ct. 2675, 2692 (2013); Lawrence v. Texas, 539 U.S. 558, 583–84 (2003) (O'Connor, J., concurring); Romer v. Evans, 517 U.S. 620, 632 (1996); *infra* Part I.B (discussing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

24. *See infra* Part I.B (discussing *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016)).

25. In our constitutional system, old doctrines erode slowly while new ones crystallize over time. *See* Strauss, *supra* note 3, at 935 ("Gradual innovation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism.").

foreign peers long ago bridged the divide between facial discrimination and disparate impact and have forgone using multiple tiers of review in equal protection cases.[26] Drawing on theories about collective wisdom, we contend that the experiences of foreign jurisdictions give us good reason to believe that the Supreme Court is on the right path and should stay its course.[27] Moreover, as we explain below, foreign jurisdictions are laboratories of doctrinal experimentation from which the United States should learn.[28] While the Supreme Court should not blindly follow foreign trends, it should view foreign jurisdictions as helpful sources of information.[29]

This Article proceed as follows. Parts I and II are primarily descriptive in nature. Part I traces the gradual blurring of the distinction between facial discrimination and disparate impact and the collapsing of tiered review in the United States.[30] Part II examines equal protection abroad and focuses specifically on Canada, South Africa, the Council of Europe, and Hong Kong. We chose the first three of these jurisdictions because comparativists commonly view them as leading case studies.[31] We added Hong Kong to our analysis because it has recently addressed the equal protection questions that we study.[32] It also has a legal system that is familiar to, and respected by, many American lawyers.[33] Part II identifies convergences between these jurisdictions' laws and recent developments in American equal protection jurisprudence. These are convergences that have, until now, been overlooked in the scholarly literature.[34]

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26. *See infra* Part II.

27. *See infra* Part III.B.

28. *See infra* Part III.C.

29. *See* Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 353 (2004). Levinson states:

> One obviously need not believe that there is an *obligation* to be bound by . . . foreign experience—indeed, I know of no one who makes such a foolish argument—in order to believe that it is simply prudent practice to become knowledgeable about such experience and to apply the lessons one finds there to comparable dilemmas facing us here in the United States.

Id.

30. Other commentators have identified some of the specific data points that comprise these developments. *See, e.g.*, Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 19 (2015) (noting that dicta in *Obergefell* helps to blur the line between facial discrimination and disparate impact). This Article builds on those insights by discussing how various data points come together to form major trajectories of change.

31. Canada, South Africa, and the Council of Europe (i.e., the European Court of Human Rights) have developed reputations for respecting the rule of law and producing court opinions that are frequently cited across borders because of their persuasive reasoning. *See infra* notes 224–26 and accompanying text.

32. *See infra* notes 227–28 and accompanying text.

33. *See infra* note 229 and accompanying text.

34. This is the first Article to focus squarely on convergences between U.S. equal protection doctrine and global developments. Other commentators have written about other aspects of global convergence. *See, e.g.*, David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1187–90 (2011) (reporting on empirical data that show convergences among written constitutions); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 803 (2011) (arguing that dormant Commerce Clause

Part III takes a prescriptive turn. It discusses what the developments described in Part II should mean for the future of American constitutional law. In this Part, we suggest that, while foreign law certainly is not binding on the United States, the experiences of foreign jurisdictions should encourage the United States to continue bridging the divide between facial discrimination and disparate impact and to continue collapsing tiered review. Moreover, we contend that future Supreme Court opinions should engage with foreign law more directly and transparently. Doing so would enhance the strength and clarity of the Court's reasoning.

Finally, the Conclusion contextualizes this Article's claims by situating them before the backdrop of the Supreme Court's shifting composition. With Justice Gorsuch's recent appointment to the Court and the possibility of other Supreme Court Justices leaving it soon, our conclusion will explore what the Court's future composition may mean for the jurisprudential trajectories currently underway.[35]

I. EMERGING TRAJECTORIES IN AMERICAN EQUAL PROTECTION JURISPRUDENCE

The common law often "decides the case first and determines the principle afterwards," observed Oliver Wendell Holmes.[36] "It is only after a series of determinations on the same subject-matter, that it becomes necessary . . . by a true induction[,] to state the principle which has until then been obscurely felt."[37]

Constitutional scholars have since observed that, like the common law, constitutional doctrine also emerges from inductive reasoning that connects the dots among earlier cases.[38] In this Part, we build on that tradition. We draw from recent equal protection cases to reveal two emerging trajectories in doctrinal reform. American equal protection doctrine has long been characterized by two components: (1) the distinction between facial discrimination and disparate impact and (2) tiered levels of judicial scrutiny.[39] Both of these components have begun to fray. These changes can be difficult to see, however, because they are happening beneath the surface

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jurisprudence and aspects of various forms of U.S. constitutional review converge with the "proportionality analysis" commonly engaged in by foreign courts).

35. *See* Kermit Roosevelt III & Patricia Stottlemyer, *The Fight for Equal Protection: Reconstruction-Redemption Redux*, 83 U. CHI. L. REV. ONLINE 36, 36 (2016) (discussing the possibility of a major change in the Court's composition).

36. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870).

37. *Id.*

38. *See, e.g.*, David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 860–75 (2007) (discussing the inductive reasoning behind landmark constitutional decisions including *Brown v. Board of Education*, 347 U.S. 483 (1954), *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

39. For an overview of these aspects of equal protection, see CHEMERINSKY, *supra* note 6, at 751–823; *infra* notes 41–62, 134–48 and accompanying text.

of recent judicial opinions.[40] The following discussion seeks to bring these changes to light.

To be clear, we make no claim about whether Supreme Court Justices have been *consciously* blurring the distinction between facial discrimination and disparate impact, or *consciously* collapsing the tiered levels of scrutiny. The Justices may have been focused on particularities of specific cases, and these cases may relate to each other and constitute trajectories that the Justices did not envision. Nonetheless, we submit that we can make logical sense of recent equal protection cases by identifying, through induction, the emerging doctrinal trajectories discussed below.

A. Blurring the Line Between Facial Discrimination and Disparate Impact

In recent cases, the Supreme Court has begun to blur the line between facial discrimination and disparate impact. Before examining these recent cases, it is helpful to review earlier cases that established the distinction between these two types of cases. The 1973 decision in *Frontiero v. Richardson*[41] is a good place to start. In *Frontiero*, the plaintiffs challenged a spousal-benefits policy for military personnel and alleged that it impermissibly discriminated based on sex.[42] The entire Court easily answered the threshold question whether there was sex discrimination at issue because the policy explicitly distinguished men from women and treated them differently in determining spousal benefits.[43] In other words, there was facial discrimination. The plurality subjected this facial discrimination to heightened scrutiny and struck down the personnel policy.[44]

The following year, in the case of *Geduldig v. Aiello*,[45] Carolyn Aiello and three other women challenged the State of California's insurance fund for employees with temporary disabilities because it excluded from coverage all disabilities resulting from pregnancy.[46] The plaintiffs alleged that this exclusion amounted to unconstitutional sex discrimination.[47] California's law, however, was facially neutral with respect to sex.[48] The law did not treat women as a class of people but instead impacted certain women based on the condition of pregnancy.[49] In light of these circumstances, the Court adopted

40. This phenomenon is similar to changes in the common law, which Holmes described as "obscurely felt." *See* Holmes, *supra* note 36, at 1.

41. 411 U.S. 677 (1973).

42. *Id.* at 680 (plurality opinion).

43. *Id.* at 689–90; *id.* at 691 (Stewart, J., concurring); *id.* (Rehnquist, J., dissenting); *id.* (Powell, J., concurring).

44. *Id.* at 689–90 (plurality opinion). A majority of the Court later agreed in *Craig v. Boren*, 429 U.S. 190 (1976), that sex discrimination receives heightened scrutiny. *Id.* at 197. This Article uses "heightened scrutiny" as an umbrella term referring to standards of judicial scrutiny that are more stringent than rational basis review.

45. 417 U.S. 484 (1974).

46. *Id.* at 486–90.

47. *Id.*

48. *Id.* at 496–97.

49. *Id.*

a narrow and formalistic definition of discrimination. Because the insurance policy did not facially ban either sex from coverage, the Court decided that the insurance policy did not discriminate based on sex.[50]

Geduldig barely acknowledged that California's disability policy adversely impacted women.[51] The Court was also unclear about whether disparate impact could ever count as discrimination that triggers heightened scrutiny.[52] In *Washington v. Davis*,[53] however, the Court took the opportunity to elaborate on the difference between facial discrimination and disparate impact.[54] In *Davis*, two African Americans who applied to join the Washington, D.C., police force challenged a written personnel test for screening applicants.[55] Neither the test nor the requirement to take the test overtly differentiated between applicants based on race.[56] The plaintiffs, however, argued that the test bore no relationship to job performance and that it disproportionately prevented African Americans from joining the force.[57] The Court ruled against them and held that disparate racial impact does not trigger the strict scrutiny applied to overt racial discrimination unless plaintiffs can show that the government was motivated by "discriminatory intent"[58] or, put differently, "invidious discriminatory purpose."[59]

The Court later clarified in *Personnel Administrator of Massachusetts v. Feeney*[60] that plaintiffs must prove that the government enacted a policy "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[61] With this requirement, the Court defined discriminatory purpose so narrowly that it has become virtually impossible to prove.[62] State actors that harbor malicious intent can easily offer pretexts that mask invidious motives, leaving opponents with the uphill battle of proving that the proffered reasons for a law were pretextual.[63]

In short, the Court's jurisprudence has created two categories of cases. The first category involves laws that facially discriminate. Laws that facially

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50. *Id.*

51. The Court briefly acknowledged that "only women can become pregnant." *Id.* at 496 n.20. It still concluded, however, that "[t]he California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." *Id.*

52. The Court did suggest, briefly in a footnote, that it would be unconstitutional for lawmakers to use "distinctions involving pregnancy . . . [as] mere pretexts designed to affect an invidious discrimination against the members of one sex or the other." *Id.* at 496 n.20.

53. 426 U.S. 229 (1976).

54. *See id.* at 238–48.

55. *Id.* at 233.

56. *Id.* at 235.

57. *Id.*

58. *Id.* at 237.

59. *Id.* at 242.

60. 442 U.S. 256 (1979).

61. *Id.* at 258 (refusing to apply heightened scrutiny to preferential treatment granted to veterans despite its adverse impact on women).

62. *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 764 (2011) ("In the vast run of cases after *Feeney*, only facial discrimination has drawn heightened scrutiny under the equal protection guarantees.").

63. *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 386–90 (2007) (describing the difficulty of satisfying *Feeney*'s requirement of proving malice).

discriminate based on certain characteristics, such as race and sex, trigger rigorous judicial review. The second category of cases involves laws that are facially neutral but create disparate impacts. Cases in this second category almost never receive rigorous judicial scrutiny because of the requirement that plaintiffs must prove invidious intent for alleged disparate impact to receive that review.[64] A technically neutral law or government policy is likely to receive minimal judicial review no matter how egregiously it affects traditionally subordinated groups, such as women or people of color.[65]

The wall that the Supreme Court constructed between disparate impact and facial discrimination in constitutional cases has long frustrated civil rights advocates.[66] This is not only because invidious intentions can be masked by pretext but also because laws with harmful discriminatory effects may arise from unconscious biases.[67] This wall, however, has developed significant cracks. Justice Sandra Day O'Connor put the first crack in the wall in her concurring opinion in *Lawrence v. Texas*,[68] even though little attention was drawn to the blow she delivered.[69] Although she did not mention *Geduldig* explicitly, her reasoning in *Lawrence* contrasts sharply with that of the earlier opinion.[70]

Lawrence addressed Texas's criminalization of same-sex sodomy.[71] The majority struck down the law based on substantive due process,[72] but Justice O'Connor wrote a concurring opinion in which she rejected the criminal prohibition based on equal protection; she found that the sodomy ban impermissibly discriminated based on sexual orientation.[73] From early in the litigation, however, there was debate over the threshold question whether the statute actually discriminated based on sexual orientation.[74] Just as not all women are, or ever will become, pregnant, not all gay men engage in same-

64. It is worth noting that, prior to the Supreme Court distinguishing facial discrimination from disparate impact in equal protection cases, many lower courts rigorously scrutinized racial disparate impact without first requiring plaintiffs to prove invidious intent. *See* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 11–13 (2013) (discussing lower-court disparate impact cases from the 1960s and 1970s).

65. *See id.* at 47–48 ("Because it is extremely difficult to prove discriminatory purpose and nearly always possible to find some reason for a government policy with a racial disparate impact other than a purpose to harm the group, the *Davis-Feeney* framework allows courts to immunize most government action against equal protection challenge."); Yoshino, *supra* note 62, at 764 ("If legislators have the wit—which they generally do—to avoid words like 'race' or the name of a particular racial group in the text of their legislation, the courts will generally apply ordinary rational basis review.").

66. *See* Johnson, *supra* note 63, at 375 n.5 (listing articles that have criticized the limited scope of colorable disparate impact claims).

67. For a discussion on the pervasiveness of biases that people hold unconsciously, also known as implicit biases, see Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465–89 (2010).

68. 539 U.S. 558 (2005).

69. *See id.* at 583–84 (O'Connor, J., concurring).

70. *See id.*

71. *Id.* at 562 (majority opinion).

72. *See id.* at 572.

73. *See id.* at 579–85 (O'Connor, J., concurring).

74. *See* Lawrence v. State, 41 S.W.3d 349, 353 (Tex. App. 2001), *rev'd*, 539 U.S. 558 (2003).

sex sodomy.[75] Meanwhile, the lower state court in Texas explained: "Persons having a predominately heterosexual inclination may sometimes engage in homosexual conduct. Thus, the statute's proscription applies, facially at least, without respect to a defendant's sexual orientation."[76]

Justice O'Connor rejected the idea that the statute did not discriminate based on sexual orientation.[77] She did not resort to analyzing motive as required by *Washington v. Davis*.[78] Indeed, she said nothing about the motive behind Texas's sodomy ban. Instead, she tersely stated that engaging in same-sex sodomy is "closely correlated with being homosexual" and, therefore, that the law is discriminatory.[79] Put differently, Justice O'Connor's conclusion stems from the nature of the law's impact on homosexuals, regardless of the law's motivations.

Obergefell v. Hodges,[80] the case that struck down states' same-sex marriage bans, further blurred the line between facial discrimination and discriminatory impact. Opponents of same-sex marriage have long argued that banning same-sex marriage does not discriminate based on sexual orientation, and some judges have endorsed this reasoning.[81] In this view, same-sex marriage bans are facially neutral with respect to sexual orientation because they prohibit both gay and straight people from marrying partners of the same sex; meanwhile, gay and straight people alike have the right to marry someone of the opposite sex.[82] *Obergefell*, however, did not even bother to address that the law technically treated gay and straight individuals the same.[83]

Despite the facial neutrality of same-sex marriage bans,[84] *Obergefell* held that excluding same-sex couples from marriage violated not only due process

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75. Commentators have long noted the fact that discourse on gay identity often wrongly conflates conduct (sodomy) with status (being gay). *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Law*, 35 HARV. C.R.-C.L.L. REV. 103, 174–77 (2000).

76. *Lawrence*, 41 S.W.3d at 353.

77. *Lawrence*, 539 U.S. at 583–84 (O'Connor, J., concurring).

78. For our earlier discussion of *Washington v. Davis*'s motive-based requirement, see *supra* notes 54–62 and accompanying text.

79. *Lawrence*, 539 U.S. at 583–84.

80. 135 S. Ct. 2584 (2015).

81. *See* Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012); *In re* Marriage Cases, 183 P.3d 384, 465 (Cal. 2008) (Baxter, J., concurring in part and dissenting in part); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 521 n.11 (Conn. 2008) (Zarella, J., dissenting); Dean v. District of Columbia, 653 A.2d 307, 362–63 (D.C. 1995) (Steadman, J., concurring); Baehr v. Lewin, 852 P.2d 44, 51 n.11 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting); Hernandez v. Robles, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring); Andersen v. King County, 138 P.3d 963, 997 (Wash. 2006) (Johnson, J., concurring).

82. For further discussion of this rationale, see generally Peter Nicolas, *Gay Rights, Equal Protection, and the Classification-Framing Quandary*, 21 GEO. MASON L. REV. 329 (2014).

83. *See generally Obergefell*, 135 S. Ct. 2584.

84. To be sure, same-sex marriage bans are facially discriminatory with respect to couples. The bans treat same-sex couples and different-sex couples differently. Yet, for the reasons described above, the bans are technically neutral with respect to gays and lesbians as individuals. Note that *Obergefell* did not focus on the facial discrimination against same-sex couples; it was ultimately concerned about the bans' adverse impact on gays and lesbians

but also equal protection.[85] In its equal protection analysis, the Court was troubled by same-sex marriage bans' adverse impact on gays and lesbians, regardless of whether there was invidious intent underlying the bans.[86] The Court never stated that same-sex marriage bans were motivated by invidiousness.[87] To the contrary, the Court stated that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises."[88] The Court also stated that the "nature of injustice is that we may not always see it in our own times."[89] This implied that the state's traditional exclusion of same-sex couples from marriage was probably not consciously motivated by a desire to harm gays and lesbians because, until recently, such harm was not understood.

Rather than focusing on intent, the Court focused on impact. The Court started by asserting that the fundamental right to marry encompasses the right to marry a partner of the same sex.[90] Instead of mechanistically stating that infringing fundamental rights triggers strict scrutiny,[91] the Court elaborated on the ways in which marriage bans harm gays and lesbians and their families.[92] The Court explained that the bans inflict potential tangible harms, such as financial insecurity, upon same-sex couples and their children.[93] The Court further explained that barring same-sex marriage "demeans,"[94] "disrespect[s,] and "subordinate[s]"[95] gays and lesbians. After fleshing out these adverse impacts, the Court concluded that same-sex marriage bans violate equal protection.[96]

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generally. It emphasized that banning same-sex marriage inflicts "disability on gays and lesbians [and] serves to disrespect and subordinate them." *Id.* at 2604. In other writing, one of us has argued that facial discrimination against same-sex couples should, in and of itself, be considered a form of impermissible discrimination. *See generally* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271 (2006). Additionally, commentators have argued that, although same-sex marriage bans are facially neutral with respect to *sexual orientation*, they are facially discriminatory with respect to *sex*. *See generally* Nan D. Hunter, *The Sex Discrimination Argument in Gay Rights Cases*, 9 J.L. & POL'Y 397 (2001). *Obergefell*, however, did not adopt this line of reasoning.

85. *Obergefell*, 135 S. Ct. at 2597–604.

86. *See id.* at 2602–12.

87. *See generally id.*

88. *See id.* at 2602 (emphasis added). The Court also said, with respect to opponents of same-sex marriage, that "neither they nor their beliefs are disparaged [in this decision]." *Id.*

89. *Id.* at 2598.

90. *Id.* at 2604–05.

91. For an example of an older case where the Court reasoned mechanistically that infringing the fundamental right to marry triggers heightened scrutiny, see *Zablocki v. Redhail*, 434 U.S. 374, 383, 388 (1978) (discussing the marriage rights of noncustodial parents who owe child support). For an example of a lower court adopting this mechanistic review more recently, see *Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (reasoning mechanistically that denying the fundamental right to marry triggers strict scrutiny in equal protection analysis).

92. *See Obergefell*, 135 S. Ct. at 2602–04.

93. *Id.* at 2601 (discussing marriage rights' relation to taxation, inheritance, survivorship, and other property rights).

94. *Id.* at 2602.

95. *Id.* at 2604.

96. *Id.*

In recent scholarship, other commentators have observed that the Court has integrated liberty and equality analyses in cases such as *Obergefell*.[97] This integration comports with our claim that the Court is concerned about impact in equality cases: the Court's attention to liberty is essentially attention to impact. By recognizing that a fundamental liberty was at stake—not just an ordinary liberty interest—*Obergefell* underscored the gravity of the adverse impact of same-sex marriage bans.[98]

We can compare *Obergefell* with the *Geduldig* case discussed earlier. *Geduldig* concluded that there was no sex discrimination because not all women are, or ever will be, pregnant.[99] In contrast, *Obergefell* was much less concerned about the fact that some gays and lesbians are neither interested nor ever will be interested in getting married.[100] *Obergefell* did not bother grappling with this facially neutral element of same-sex marriage bans.[101] It focused instead on discriminatory impact, and such analysis of impact was missing from *Geduldig*.[102]

The most recent case to suggest the Court has begun to conflate facial discrimination and disparate impact is *Fisher v. University of Texas at Austin* (*Fisher II*).[103] *Fisher II* involved a challenge to an admissions policy at the University of Texas that filled around 25 percent of its incoming class each year by reviewing applicants holistically and taking into account numerous factors, including race.[104] Abigail Fisher, a white applicant who was denied admission, argued that this process violated equal protection because it overtly considered candidates' race.[105] She believed that the University could have, and should have, recruited a diverse student body through means other than overt considerations of race.[106] Specifically, she argued that the University should have expanded the number of students that it admitted through its "percentage plan" approach.[107] Under its existing percentage plan, the University admitted all students who graduated from a Texas high school in the top ten percent of their class.[108] Because Texas high schools

97. *E.g.*, Tribe, *supra* note 30, at 29–32; Yoshino, *supra* note 62, at 748.
98. *See Obergefell*, 136 S. Ct. at 2602–04.
99. Geduldig v. Aiello, 417 U.S. 484, 496 n. 20 (1974).
100. *See supra* notes 90–98 and accompanying text.
101. *See supra* notes 90–98 and accompanying text.
102. *See supra* notes 90–98 and accompanying text.
103. 136 S. Ct. 2198 (2016). After *Fisher II*, the Court has decided a few equal protection cases that did not shed any new light on the relationship between facial discrimination and disparate impact. For example, *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), was a case of facial sex discrimination, which did not require the Court to elaborate on the relationship between facial discrimination and disparate impact. *Id.* at 1697–98. Likewise, the Court decided the race discrimination case of *Cooper v. Harris*, 137 S. Ct. 1455 (2017), in which the Court did not focus its attention on the significance of discriminatory impact. *See id.* Instead, the Court found that lawmakers were impermissibly motivated by race when they drew legislative districts. *Id.* at 1481–82. The Court found that lawmakers impermissibly packed black voters into a few legislative districts to diminish the power of black voters. *Id.*
104. *Fisher II*, 136 S. Ct. at 2206.
105. *Id.* at 2207.
106. *Id.* at 2212.
107. *Id.* at 2213.
108. *Id.* at 2205.

tend to be racially segregated, the percentage plan had the effect of ensuring a racially heterogeneous group of admitted students, even though the percentage plan was facially neutral.[109] Fisher argued that expanding the percentage plan approach to admissions would be preferable to the University's current approach, which admitted 25 percent of each incoming class through a holistic review process that considered race.[110]

The Court rejected Abigail Fisher's contention and stated that expanding the percentage plan would not make the University's admissions program more race neutral in spirit.[111] This was because "boost[ing] minority enrollment" was a goal undergirding the percentage plan.[112] Thus, the Court likened the facially race-neutral percentage plan to the overtly race-conscious holistic review. Previously, the Court had only likened disparate impact to facial discrimination when the government sought to use a facially neutral law in invidious ways.[113] *Fisher II* further blurs the line between facial discrimination and disparate impact. In this case, the Court drew a close comparison between facial discrimination (in the holistic review program) and disparate impact (from the percentage plan), even though the motivations behind the disparate impact were benevolent, not malicious.[114]

Fisher II might lead courts to consider facial discrimination and disparate impact similarly in future cases. For example, the State of North Carolina argued that its controversial "bathroom bill," commonly referred to as H.B. 2,[115] did not discriminate against individuals based on gender identity because, regardless of whether an individual is transgender or cisgender, the law required the individual to use a restroom that corresponds to the individual's assigned sex at birth.[116] This formalistic reasoning is troubling because transgender people face particular adversity when forced to use a restroom that corresponds with their birth sex as opposed to their gender identity.[117] In other words, even though H.B. 2 was facially neutral with

109. *Id.* at 2213.
110. *Id.*
111. *Id.*
112. *Id.*
113. Indeed, commentators have interpreted *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), as requiring legislative malice in order for disparate impact to trigger the same judicial review as facial discrimination. *See, e.g.*, Johnson, *supra* note 63, at 388; Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997).
114. *See Fisher II*, 136 S. Ct. at 2213.
115. According to H.B. 2, individuals who wish to use single-sex restrooms at public agencies and public schools must use the restroom that comports with their biological sex assigned at birth. *See* H.R. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016); *supra* notes 13–15 and accompanying text.
116. *See* Brief of Defendant-Appellee and Intervenor/Defendants-Appellees at 36 n.11, Carcaño v. McCrory, No. 16-1989 (4th Cir., dismissed Nov. 21, 2016) ("HB2 does not 'facially' discriminate against transgender people; it 'facially' classifies everyone on the basis of biological characteristics.").
117. Compared with cisgender people, transgender people who are forced to use restrooms that correspond with their birth sex face a unique risk of being denied access and being harassed or assaulted. *See generally* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 16 J. PUB. MGMT. & SOC. POL'Y 65 (2013). For discussion of the "growing push by state legislators

respect to gender identity, it created adverse effects based on gender identity. North Carolina, however, asserted that the motivation behind H.B. 2 was not to subordinate transgender people but rather to achieve the benevolent goal of protecting the privacy expected by cisgender people.[118] Assuming arguendo that benevolent concerns animated H.B. 2, *Fisher II* suggests that such benevolent intentions should not prevent courts from likening the facially neutral policy to overt discrimination.[119] Although North Carolina recently repealed H.B. 2, at least sixteen states considered passing similar laws in 2017, and the constitutionality of such efforts is an ongoing concern.[120]

To be sure, the facially neutral percentage plan was not the main focus in *Fisher II*; accordingly, *Fisher II* did not speak in detail about bridging the divide between facial discrimination and disparate impact.[121] Nonetheless, we can see a trend line between *Fisher II*'s discussion of the percentage plan, Justice O'Connor's concurrence in *Lawrence*, and the majority opinion in *Obergefell*.[122] These three opinions chip away at the wall that previously divided facial discrimination and disparate impact.

According to this trajectory, at least some instances of disparate impact should trigger the same rigorous review that facial discrimination receives, even if invidious intent cannot be proven.[123] Whether disparate impact receives rigorous review should be determined at least in part by the severity of the disparate impact and not solely by the intent of the state actor. Based on the recent cases we have examined, however, it is unclear how severe a disparate impact must be to warrant rigorous review. Justice O'Connor's concurrence in *Lawrence* suggests that courts should consider the quantitative aspect of impact.[124] To reach her conclusion that the facially neutral sodomy law discriminated based on sexual orientation, she invoked statistics and noted that the law's impact "closely correlated" with being gay.[125] The majority in *Obergefell* looked beyond statistics and drew attention to the qualitative aspect of impact.[126] It noted that marriage bans, which were facially neutral with respect to sexual orientation, harmed gay

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to regulate trans bathroom use," see Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 8–12 (2017).

118. *See* Answer and Counterclaims of the State of North Carolina, Governor Patrick L. McCrory, and the North Carolina Department of Public Safety at 25, United States v. North Carolina, 1:16-CV-00425 (M.D.N.C. dismissed June 2, 2016).

119. Recall that, in *Fisher II*, the facially neutral percentage plan was motivated by benevolent race-consciousness, and the Court likened the percentage plan to the University's holistic review program, which overtly considered race. *See Fisher II*, 136 S. Ct. at 2213.

120. *See* Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/TEG7-WYYB].

121. *See Fisher II*, 136 S. Ct. at 2213.

122. For a discussion of *Lawrence* and *Obergefell*, see *supra* notes 77–102 and accompanying text.

123. *See supra* notes 69–102 and accompanying text.

124. Lawrence v. Texas, 539 U.S. 558, 579–85 (2003) (O'Connor, J., concurring).

125. *Id.*

126. Obergefell v. Hodges, 135 S. Ct. 2584, 2602–04 (2015).

people in both tangible and intangible ways.[127] While these two opinions demonstrate that courts could examine disparate impact from both quantitative and qualitative perspectives, they do not clearly delineate a point at which disparate impact becomes significant enough to warrant rigorous judicial review.

It is worth emphasizing again that the blurring of facial discrimination and disparate impact is very recent—the Court did not decide *Obergefell* until 2015,[128] and Fisher was decided in 2016.[129] For decades prior, the Court and lower federal courts subjected disparate impact to minimal judicial review because invidious intent could not be proven in accordance with *Feeney*.[130] For example, courts have applied minimal review to facially neutral criminal laws that adversely affect persons of color and to facially neutral school districting policies that create de facto racial segregation.[131] It is yet to be seen whether courts will note that the line between facial discrimination and disparate impact has become blurred and then further blur that line.[132] In Part III, we argue in favor of continuing this trajectory of change.

B. Collapsing Standards of Review

In addition to examining the distinction between facial discrimination and disparate impact, courts traditionally have also considered the characteristic on which a law discriminates to determine the standard of review in equal protection cases.[133] It is conventional wisdom that different characteristics—such as race, sex, and sexual orientation—trigger a different tier of review. We contend, however, that this tiered system has begun to collapse.

Before discussing how tiers of equal protection review have collapsed, an examination of how the Court constructed tiers in the first place is in order. It is generally understood that the Court has explicitly articulated three standards of review in equal protection cases: strict scrutiny, intermediate scrutiny, and rational basis review.[134] Each standard has its own means-ends test for evaluating whether the state has violated the Constitution. To justify a discriminatory law under strict scrutiny, the state must prove that the law is "narrowly tailored" to achieve a "compelling government interest."[135]

127. *Id.*
128. *Id.* at 2584.
129. Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2198 (2016).
130. *See* Siegel, *supra* note 64, 22–23, 47–50 (discussing various litigation concerning de facto school segregation and racial impact in the criminal justice system).
131. *See id.*
132. Further, even if courts agree that laws can trigger rigorous review because of their disparate impact regardless of legislative intent, courts might fail to see the intangible ways in which some laws impact groups of people differently. *Cf.* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 22–24 (2017) (arguing that the Supreme Court has largely failed to recognize the dignity interests of marginalized social groups).
133. *See* CHEMERINSKY, *supra* note 6, at 699–702.
134. *See id.*
135. *See* 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.").

According to intermediate scrutiny, the state must show that its discriminatory law is "substantially related" to an "important government interest."[136] Under rational basis review, a law violates equal protection if it is not "reasonably related" to any "legitimate government interest."[137]

Commentators refer to these standards as "tiers" because, for a long time, it was conventionally understood that each standard corresponded with a different level—or tier—of rigor with which the Court would review and strike down laws.[138] Commentators have called strict scrutiny "fatal in fact" because, in the past, laws were extremely unlikely to pass such a rigorous test.[139] In contrast, the Court was unlikely to strike down laws under rational basis review.[140] Meanwhile, intermediate scrutiny has fallen somewhere in between, requiring the Court to engage in a balancing act.[141]

In this Article, we pay particular attention to race, sex, and sexual orientation discrimination because they have been the primary subjects of the Court's recent equal protection jurisprudence.[142] The Court has acknowledged that race, sex, and sexual orientation have served as bases for unfair subordination throughout much of history.[143] The Court has also said

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136. *See* United States v. Virginia, 518 U.S. 515, 533 (1996) ("[T]he [defender of the challenged action] must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" (third alteration in original) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))); Craig v. Boren, 429 U.S. 190, 197 (1976) (stating that, for sex discrimination to be justified, it "must serve important governmental objectives and must be substantially related to achievement of those objectives").

137. *See* 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.").

138. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 483 (2004); Stearns, *supra* note 21 (manuscript at 3–4); Yoshino, *supra* note 62, at 755–57.

139. *E.g.*, Gunther, *supra* note 20, at 8; Yoshino, *supra* note 62, at 755 n.61.

140. *See, e.g.*, Goldberg, *supra* note 138, at 489 ("[Under] rational basis review, the Court highlights its deferential approach to the law and policymaking branches."); Yoshino, *supra* note 62, at 755–56 ("[R]ational basis review generally results in the validation of state action.").

141. "'Intermediate scrutiny,' unlike the poles of the two-tier system, is an overtly balancing mode." Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

142. The doctrinal trajectories that we discuss began to emerge over the past decade or two. During this time, the Court's landmark equal protection cases focused on race, sex, and sexual-orientation discrimination. A notable exception is *Bush v. Gore*, 531 U.S. 98 (2000). Commentators believe that *Bush v. Gore* was framed so narrowly that it has virtually no precedential value. *See, e.g.*, Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 386–87 (2001) (arguing that the Supreme Court limited its language in *Bush v. Gore* so explicitly and "extraordinar[ily]" to the facts of that case that it "appeared to dismiss any precedential value this case may have for future election law cases"); Spencer Overton, *Rules, Standards, and* Bush v. Gore*: Form and the Law of Democracy*, 37 HARV. C.R.-C.L.L. REV. 65, 70–71 (2002) (commenting that *Bush v. Gore* has an explicit statement of its lack of precedential value).

143. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015) (emphasizing that gays and lesbians have suffered "a long history of disapproval of their relationships"); Boerne v. Flores, 521 U.S. 507, 526 (1997) (acknowledging "widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination"); Frontiero

that race, sex, and sexual orientation are all "immutable," thus suggesting that these traits usually cannot be changed without imposing a great deal of hardship on individuals.[144] Despite recognizing these similarities, the Court has designated different tiers of review to these statuses.

The Court says it applies strict scrutiny to race discrimination and intermediate scrutiny to sex discrimination.[145] This difference reflects the Court's understanding that race discrimination is "so seldom relevant" to government goals,[146] while "natural differences between the sexes are sometimes relevant and sometimes wholly irrelevant."[147] Meanwhile, the Court has applied rational basis review to sexual orientation discrimination but has also avoided explicitly identifying its standard of review in recent sexual orientation cases.[148]

The tiered framework of review has sparked widespread criticism.[149] A frequent critique is that, despite what the Court says it is doing, it has actually developed more than just three tiers of review and that the proliferation of tiers has become unwieldy.[150] Commentators have argued that, as a de facto matter, the Court has been applying four, five, six, or even seven different

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v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion) (acknowledging "a long and unfortunate history of sex discrimination").

144. *See Obergefell*, 135 S. Ct. at 2596 (calling sexual orientation "a normal expression of human sexuality and immutable"); *Frontiero*, 411 U.S. at 686 ("[S]ex, like race and national origin, is an immutable characteristic."). Although the Supreme Court has not defined "immutability" clearly, some lower courts have said that calling a trait immutable does not necessarily mean that the trait is unchangeable; instead, immutability means that the trait is at least difficult for many people to change. *See* Clarke, *supra* note 22, at 34–35. Other courts have expanded the definition of immutability by stating that a trait should be considered immutable whenever it would be unfair to ask someone to change that aspect of themselves. *See id.* at 25–26, 35–36.

145. *E.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (applying intermediate scrutiny to women's exclusion from a military academy); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (applying strict scrutiny to a race-conscious affirmative action program).

146. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440, 442 (1985) (discussing why discrimination based on mental disability is to be distinguished from discrimination based on race, national origin, and alienage).

147. Michael M. v. Superior Court, 450 U.S. 464, 497 n.4 (1981) (Stevens, J., dissenting) (describing the majority's reason for subjecting sex discrimination to intermediate scrutiny in a case concerning gender bias in statutory rape laws).

148. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (stating that the Court would analyze whether the disputed state measure, which discriminated against gays and lesbians, "bears a rational relation to some legitimate end"); *infra* notes 173–87 and accompanying text (discussing the Court's failure to identify its standard of review in recent sexual orientation cases); *see also* Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CALIF. L. REV. CIR. 107, 113–14 (2015) (explaining that it is unclear what level of scrutiny the Court will apply to sexual-orientation discrimination in future cases).

149. For critiques of the tiered framework of review, see generally Sarah Erickson-Muschko, *What Is the Purpose? Affirmative Action, DOMA, and the Untenable Tiered Framework for Equal Protection Review*, 101 GEO. L.J. ONLINE 44 (2013); Fleming, *supra* note 21; Goldberg, *supra* note 138; Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984); Stearns, *supra* note 21; Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

150. *E.g.*, Fleming, *supra* note 21, at 2304; Smith, *supra* note 20, at 2774; Stearns, *supra* note 21 (manuscript at 4).

tiers.[151] Many commentators believe that a fourth tier of scrutiny is apparent in sexual-orientation discrimination cases.[152] Consider, for example, *United States v. Windsor*.[153] There, the Court did not explicitly identify the tier of review that it used to strike down part of the Defense of Marriage Act (DOMA) for discrimination based on sexual orientation.[154] Under conventional wisdom, rational basis review is the default if the Court does not state that is applying intermediate or strict scrutiny.[155] In *Windsor*, however, the Court's actions did not comport with traditional understandings of rational basis review. It held that section 3 of DOMA violated equal protection because it stemmed from animus, despite the government's contentions to the contrary.[156] The government claimed that DOMA grew out of a desire for administrative ease and that creating a uniform definition of marriage advanced that interest.[157] In rejecting this argument, the Court implied that the claim was pretext and did not defer to the government as rational basis review would traditionally require.[158] Thus, commentators have labeled this search for animus a new tier of review—sometimes called "rational basis with bite"[159] or "a more searching form of rational basis review."[160]

While rational basis review "with bite" destabilizes the Court's official three-tier framework, the framework is also destabilized by the weakening of strict scrutiny. In *Fisher II*, the Court purported to apply strict scrutiny, but many commentators contend that the Court applied a less rigorous standard instead.[161] In analyzing the University of Texas's holistic admissions

151. *See* Fleming, *supra* note 21, at 2304 (listing six tiers); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 226 (2002) (listing seven tiers); Smith, *supra* note 20, at 2774 (listing four tiers); Stearns, *supra* note 21 (manuscript at 4) (listing five tiers).

152. *E.g.*, Fleming, *supra* note 21, at 2308; Smith, *supra* note 20, at 2774; Stearns, *supra* note 21 (manuscript at 43–45).

153. 133 S. Ct. 2675 (2013).

154. This may be a sign that the Court has grown ambivalent about its tiers of review. *See* Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 530 n.7 (2014) (listing examples of commentators who interpret the Court's gay rights cases to indicate a shift away from tiered review).

155. *See* CHEMERINSKY, *supra* note 6, at 698–702.

156. *Windsor*, 133 S. Ct. at 2693.

157. *Id.* at 2690.

158. *See id.* at 2694; *see also* Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 247 (explaining that when the Court has found indicia of animus behind a law, such as DOMA, it does not defer to the government's assertion of interests as it would under traditional rational basis review).

159. *See, e.g.*, Smith, *supra* note 20, at 2774.

160. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). For an argument that rational basis review has long fluctuated in intensity despite the conventional depiction of rational basis review as being uniformly weak, see Katie Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. (forthcoming 2018).

161. Commentators from both sides of the ideological spectrum have alleged that the Court applied a less rigorous standard than usual strict scrutiny. *See, e.g.*, The Editors, *In* Fisher, *Another Blow to Equal Opportunity*, NAT'L REV. (June 23, 2016, 6:22 PM), http://www.nationalreview.com/article/437047/fisher-v-ut-supreme-court-gets-it-wrong [https://perma.cc/K34H-7QTX]; Richard Lempert, *In* Fisher, *Affirmative Action Survives*

program, the Court deferred substantially to the University's belief that it had a compelling interest in securing a diverse student body and that race-based affirmative action was necessary to achieve that goal.[162] By taking such a relaxed approach to strict scrutiny, the Court's strict scrutiny analysis begins to look less rigorous.[163]

The three-tier framework of equal protection has outlived its helpfulness. The Court struggles with situating cases into the rigid tiers.[164] Perhaps this is why, in recent sexual-orientation cases, the Court has chosen not to speak of the tiered framework at all.[165] Likewise, in its most recent sex discrimination case, *Sessions v. Morales-Santana*,[166] the Court did not once utter the phrase "intermediate scrutiny."[167] The gradual collapse of the tiered

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Again, BROOKINGS INSTITUTION (June 24, 2016), https://www.brookings.edu/blog/fixgov/2016/06/24/in-fisher-affirmative-action-survives-again [https://perma.cc/A6DD-TWES]; George A. Nation III, *Something Strange Indeed*, INSIDE HIGHER ED (June 27, 2016), https://www.insidehighered.com/views/2016/06/27/problems-justice-anthony-kennedys-opinion-fisher-ii-case-essay [https://perma.cc/S6BX-YB2A]; Mark Joseph Stern, *Supreme Court Affirms Constitutionality of Texas Affirmative Action Program*, SLATE (June 23, 2016, 10:49 AM), http://www.slate.com/blogs/the_slatest/2016/06/23/fisher_v_texas_supreme_court_affirms_constitutionality_of_affirmative_action.html [https://perma.cc/3XCY-FCBH].

162. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2208 (2016) (stating that the Court would grant some deference to the University's definition of the educational goals served by affirmative action and that the University need not exhaust all race-neutral alternatives to race-based affirmative action). Prior to *Fisher II*, the Court wavered on how rigorously it should review race-based affirmative action programs. At one point, the Court applied only intermediate scrutiny to such programs. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564 (1990). The Court eventually replaced intermediate scrutiny with strict scrutiny. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Still, the Court fluctuated regarding how to define strict scrutiny. In the affirmative action case of *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court was quite deferential to the University of Michigan, defined "narrow tailoring" loosely, and stated that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative." *Id.* at 339. In *Fisher v. University of Texas at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013), the Court cast some doubt on whether it would preserve *Grutter*'s deferential approach, *id.* at 2418–19, but *Fisher II* eventually confirmed this deferential approach, *Fisher II*, 136 S. Ct. at 2208. For a more detailed discussion of this line of cases, see generally Stearns, *supra* note 21.

163. *See supra* note 161 and accompanying text. For arguments that strict scrutiny has been less rigorous than conventionally understood, even prior to *Fisher II*, see generally Ozan O. Varol, *Strict in Theory, but Accommodating in Fact?*, 75 MO. L. REV. 1243 (2010); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

164. *See supra* notes 149–50 and accompanying text.

165. Numerous commentators have interpreted the Court's gay rights cases as a shift away from tiered review. *See, e.g.*, Eyer, *supra* note 154, at 530 n.7 (listing sources that adopt this interpretation of the Court's gay rights jurisprudence). In this Article, we build on this literature by showing that the Court is not only moving away from tiered review but is gradually replacing tiered review with a unitary balancing test that, in some respects, resembles the proportionality analyses that foreign jurisdictions commonly perform in equality cases.

166. 137 S. Ct. 1678 (2017).

167. *See id.* Instead, *Morales-Santana* used the phrase "heightened scrutiny," which commentators have employed as an umbrella term to describe any scrutiny that is more rigorous than rational basis review. *See, e.g.*, Goldberg, *supra* note 138, at 483 n.11 (referring to heightened scrutiny as "all levels of review above rational basis"); Christopher R. Leslie, *Embracing* Loving*: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L.

framework has left lower courts with unclear doctrine that is difficult to follow. As Nan Hunter has suggested, the Court is in an "interregnum"—an interval between doctrinal reigns.[168] The reign of tiered review seems near its end, but the Court has yet to name its successor.

Even so, a new doctrinal approach is beginning to emerge. Instead of seeing recent cases as a proliferation of tiers, as some commentators do,[169] we believe the existing tiers are collapsing into a unitary balancing test.[170] To be clear, the pattern that we see thus far emerges from the Court's recent cases, which pertain to discrimination based on personal characteristics that are difficult to change—namely race, sex, and sexual orientation.[171] Thus, we are unable to say whether the emergence of a unitary standard will also apply to discrimination based on characteristics that are either not personal or not difficult to change, such as the differential treatment of licensed optometrists and ophthalmologists versus unlicensed opticians at issue in the old case of *Williamson v. Lee Optical Co*.[172]

In recent U.S. equal protection cases, the Court seems to consider the same four key factors, regardless of whether it is reviewing a law concerning race, sex, or sexual orientation. These factors are (1) the role of prejudice, in the form of animus or stereotyping behind the law, (2) the seriousness of harm caused by the law, (3) governmental goals behind the law, and (4) the extent to which the law is related to achieving those government interests.

The last two factors reflect the means-ends analysis that is conventional in equal protection analyses. As a de jure matter, the Court says it calibrates the means-ends analysis based on the ground of discrimination at issue (race, sexual orientation, or sex) because it assigns a tier of scrutiny according to the discriminatory ground. As a de facto matter, however, the Court's means-ends analysis is not calibrated as such. Instead, the Court adjusts its means-ends analysis based on the first two factors.

REV. 1077, 1084 (2014) ("Both strict and intermediate scrutiny are forms of heightened scrutiny.").

168. *See* Nan D. Hunter, *Twenty-First Century Equal Protection: Making Law in an Interregnum*, 7 GEO. J. GENDER & L. 141, 141 (2006).

169. *See supra* note 151 and accompanying text.

170. *See* Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 946 (2004) ("[T]he neat compartments of tiered scrutiny are beginning to collapse."); Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 476 (1997) ("[T]he Rehnquist Court is moving away from this [tiered] framework toward a more flexible approach.").

171. *See supra* note 142 and accompanying text (discussing the scope of Supreme Court equal protection cases over the past two decades). While the Supreme Court has decided recent cases concerning *statutory* prohibitions of discrimination based on personal characteristics beyond race, sex, and sexual orientation, the Court has not addressed such discrimination from the equal protection angle in recent years. *See* Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 529 (2014) (noting that Court has not decided a disability discrimination case based on equal protection since 1985).

172. 348 U.S. 483 (1955). The court in *Lee Optical Co.* applied rational basis review to a law that discriminated between licensed optometrists and ophthalmologists on the one hand, and unlicensed opticians on the other. *Id.* at 483.

Consider the example of sexual orientation. In recent cases, the Court has refused to assign any of the three traditional tiers of means-ends analysis to sexual-orientation discrimination.[173] Instead, in cases of sexual-orientation discrimination, the Court's means-ends analysis has been part of a larger analysis that considers all four of the factors identified above. In *Windsor*, the Court noted that it struck down section 3 of DOMA because "no legitimate purpose overcomes the purpose and effect [of DOMA] to disparage and to injure" same-sex couples.[174] This statement reflects the Court's consideration of animus (i.e., the purpose to disparage and injure) as well as DOMA's harmful effects. After *Windsor* found that DOMA was motivated by animus and had injurious effects,[175] the Court seemed to ratchet up its means-ends analysis, although it did not acknowledge this explicitly. The government claimed that DOMA advanced a legitimate government interest in administrative clarity because maintaining a uniform definition of marriage allowed the federal government to avoid difficult choice-of-law problems.[176] The Court in *Windsor*, however, did not defer to the government's assertion. Instead, it conducted a more rigorous means-ends analysis than rational basis would usually require and ultimately rejected the state's purported interest in promoting uniformity.[177] *Windsor* thus calibrated its means-ends analysis in light of the animus behind the law and the law's harmful effects; more rigorous evidence of DOMA advancing a legitimate government goal was needed to counterbalance the Court's concerns about animus and DOMA's injurious effects.

The Court's other landmark same-sex marriage case, *Obergefell*, also reflects a judicial consideration of the four factors we identified. First, *Obergefell* acknowledged that same-sex marriage bans are not necessarily motivated by animus or stereotypes.[178] Next, however, *Obergefell* emphasized the grave injury of denying same-sex couples the fundamental right to marry.[179] Interestingly, *Obergefell* did not reason mechanistically that infringing on a fundamental right triggers "strict scrutiny," which the Court had done in earlier cases.[180] The Court never once says it is applying

173. *See generally* Hunter, *supra* note 148 (tracing the trajectory of the Court's gay rights cases).

174. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013).

175. *See id.* at 2693 ("This is strong evidence of [DOMA] having the purpose and effect of disapproval of a class recognized and protected by state law.").

176. The dissenting opinions by Chief Justice Roberts and Justice Scalia both accepted this contention about uniformity and stability. *See id.* at 2696 (Roberts, J., dissenting); *id.* at 2708 (Scalia, J., dissenting).

177. For thoughtful elaboration on this point, see Carpenter, *supra* note 158, at 247.

178. For our earlier discussion about *Obergefell*'s acknowledgement that same-sex marriage bans do not necessarily stem from animus, see *supra* notes 86–89 and accompanying text.

179. For our earlier discussion about *Obergefell*'s elaboration on the harms of same-sex marriage bans, see *supra* notes 90–98 and accompanying text.

180. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383, 388 (1978) (discussing the marriage rights of noncustodial parents who owe child support).

"strict scrutiny" in its opinion.[181] Instead, the Court engaged in a more fluid analysis of whether the infringement could be justified.[182]

The Court discussed two purported government goals behind banning same-sex marriage. The state-defendants first argued that the government had an interest in "proceed[ing] with caution" by taking more time to implement social change.[183] In rejecting this argument, the Court did not speak in terms of "strict scrutiny," "compelling interest," or "narrow tailoring."[184] Instead, the Court reasoned that the government's interest in using marriage bans to promote incrementalism did not outweigh the "injuries" and dignitary wounds inflicted by marriage bans.[185] The Court also rejected the government's claim that same-sex marriage bans help to prevent declining rates of marriage among different-sex couples.[186] There was simply no evidence to show that legalizing same-sex marriage would have an effect on different-sex couples' decision-making about marriage.[187] In sum, *Obergefell* struck down marriage bans after the weighing of four factors—the lack of animus, the bans' harmful effects, the governments' goals, and the insufficient connection of marriage bans to those goals.

The collapsing of tiered review is also evident in *Fisher II*. As we discussed earlier, *Fisher II* paid lip service to strict scrutiny when it seemed to engage in a more lenient standard of review instead.[188] The Court was opaque as to why it deviated from traditional strict scrutiny. To understand this deviation, it is helpful to remember that, for a brief period, the Court had explicitly applied a lesser standard of review—intermediate scrutiny—to race-based affirmative action programs.[189] During this time, Justice William Brennan reasoned that affirmative action programs only trigger intermediate scrutiny because the programs' use of racial classifications were benevolent.[190] One way to understand *Fisher II* is to view it as a de facto retreat back toward Justice Brennan's reasoning.

In *Fisher II*, the Court accepted that the University's use of racial categories was benevolent.[191] The program was intended to ameliorate, rather than perpetuate, racial animus and stereotyping.[192] Indeed, the Court accepted that the program's purposes and effects included "the destruction of

181. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2584–611 (2015).
182. *See id.* at 2605–07.
183. *Id.* at 2605.
184. *See generally id.*
185. *See id.* at 2606.
186. *See id.*
187. *See id.* at 2607.
188. *See supra* notes 161–63 and accompanying text.
189. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 600 (1990) (holding that the FCC's "minority preference policies" passed intermediate scrutiny).
190. In a dissent, Justice Brennan argued for intermediate scrutiny. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, J., dissenting). He later joined a plurality opinion applying intermediate scrutiny, s*ee* Fullilove v. Klutznick, 448 U.S. 448, 517 (1980), and applied intermediate scrutiny in a majority opinion, *see Metro Broad.*, 497 U.S. at 600–01.
191. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2210–11 (2016).
192. *Id.* at 2211.

stereotypes, the promot[ion of] cross-racial understanding, [and] the preparation of a student body for an increasingly diverse workforce and society."[193] Moreover, the Court suggested that these beneficial consequences of having a diverse student body outweighed the harms alleged by the dissenting Justices.[194] Reading *Fisher II* through the lens of Justice Brennan's earlier decisions leads one to believe that the benevolent purposes and salutary effects of the University's admissions program led the Court to relax its so-called strict scrutiny of the program.[195] In this view, *Fisher II* comports with the multifactor analysis that we have identified.[196]

Fisher II contrasts with *Cooper v. Harris*,[197] which the Court decided a year later.[198] Both cases concerned race, but the Court calibrated strict scrutiny differently. The Court did not explicitly acknowledge or explain this difference, but one way to understand the difference is to view the calibrations as linked to considerations of intent and harm, in accordance with the multifactor analysis identified above.[199] *Harris* invalidated two legislative districting maps that North Carolina redrew based predominately on race.[200] The Court exercised a less deferential form of review than it did in *Fisher II*, perhaps because of the harms posed by the districting maps.[201] The maps harmed African American voters by packing them into two districts and diminishing their political power in neighboring districts.[202] North Carolina had claimed that it needed to pack African Americans into the two districts to empower African American voters within those districts in compliance with the Voting Rights Act.[203] Instead of deferring to North Carolina, the Court held that North Carolina lacked any "good reason" to

193. *Id.*

194. Three dissenting Justices claimed that the University's admissions program harmed Asian American applicants and other applicants who did not receive a "boost" based on race. *See id.* at 2227 n.4 (Thomas, J., dissenting).

195. For Justice Brennan's opinions applying intermediate scrutiny to benign racial classifications, see *supra* note 190 and accompanying text.

196. Recall that we believe that the Court is modulating its means-ends analysis based not on the ground of discrimination (e.g., race, sex, and sexual orientation) but based instead on consideration of prejudice in the form of animus or stereotypes and the seriousness of injury created by the discrimination. *See supra* notes 169–72 and accompanying text.

197. 137 S. Ct. 1455 (2017).

198. *See id.* at 1481–82 (finding legislative maps for North Carolina Districts 1 and 12 to be unconstitutional).

199. *See supra* notes 169–72 and accompanying text.

200. *Harris*, 137 S. Ct. at 1468 (affirming the trial court's finding that North Carolina drew both legislative districts based predominately on race.).

201. *Id.* at 1481–82.

202. *See* Adam Liptak, *Justices Reject 2 Districts in North Carolina, Citing Packing of Black Voters*, N.Y. TIMES (May 22, 2017), https://www.nytimes.com/2017/05/22/us/politics/supreme-court-north-carolina-congressional-districts.html [https://perma.cc/YA8Z-DXMC] (relating *Harris* to earlier cases in which the Court acknowledged that packing African American voters into a small number of districts dilutes their voting power).

203. North Carolina asserted this justification with respect to District 1. *See Harris*, 137 S. Ct. at 1468. With respect to District 12, North Carolina argued that its map was not racially motivated instead of arguing that the consideration of race was justified. *See id.* at 1473.

believe its claim to be true because African Americans already wielded sufficient power within the two districts to elect their preferred candidates.[204]

Finally, the Court's three most recent sex discrimination cases also seem to fit the multifactor analysis that we have identified. In *United States v. Virginia*,[205] the Court applied a version of intermediate scrutiny that seemed rather strict and ultimately struck down the exclusion of women from the Virginia Military Institute.[206] The Court noted that the means-ends analysis must be "exceedingly persuasive."[207] By contrast, in *Nguyen v. INS*,[208] the Court applied intermediate scrutiny in a much less exacting manner, which led commentators to allege that the Court had abandoned the spirit of requiring "exceedingly persuasive justifications" for differential treatment based on sex.[209] *Nguyen* ultimately upheld immigration rules that treated unmarried mothers and unmarried fathers differently.[210] More recently, the Court again applied a rigorous form of heightened scrutiny in *Morales-Santana* and struck down a different immigration rule that also discriminated between unwed mothers and fathers.[211]

The tension in these sex discrimination cases can be reconciled by focusing on the Court's concerns about gender stereotypes. On one hand, the Court believed that the exclusion of women from the Virginia Military Institute was based on harmful gender stereotypes.[212] Likewise, in *Morales-Santana*, the Court found that the immigration rule at issue, which imposed a longer residency requirement on unwed fathers seeking to confer citizenship on their children, reflected gender stereotypes about parenting.[213] On the other hand, the majority in *Nguyen* found that the challenged immigration rule distinguished between men and women because of "real" biological differences as opposed to stereotypes.[214]

It seems that the Court relaxed its means-ends analysis in *Nguyen* because it believed that the immigration policy was motivated by neither stereotype nor animus.[215] By juxtaposing these three sex discrimination cases, we see more signs that the Court is concerned with the four factors we identified. In

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204. *Id.* at 1482.
205. 518 U.S. 515 (1996).
206. *See id.* at 558.
207. *Id.* at 531.
208. 533 U.S. 53 (2001).
209. *See* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 830–32 (2004); Stearns, *supra* note 21 (manuscript at 19); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 741 n.48 (2002).
210. *Nguyen*, 533 U.S. at 72–73.
211. *Id.*
212. *Virginia*, 518 U.S. at 549–50.
213. Sessions v. Morales-Santana, 137 S. Ct. 1678, 1684–85 (2017).
214. *Nguyen*, 533 U.S. at 54.
215. For elaboration on this observation, see Mayeri, *supra* note 209, at 803–32; Stearns, *supra* note 21 (manuscript at 19–20); Sullivan, *supra* note 209, at 741 n.48. For a discussion on how the majority and dissenting opinions in *Nguyen v. INS* rejected gender stereotyping in principle but disagreed on whether the immigration policy at issue stemmed from stereotypes, see Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 469–72 (2007).

these cases, the Court seems to be calibrating its means-ends analysis based on the relevance of stereotyping, and stereotyping's attendant harms, to the case at hand.[216] The Court is not calibrating its means-ends analysis based on the existence of a sex-based classification per se, but it is instead calibrating the analysis based on whether there are indicia of stereotyping behind the sex-based categories.

In sum, if we look at the Court's recent equal protection cases—which have addressed discrimination based on sexual orientation, race, and sex—we see that the tiered system of review has begun to fray. In sexual-orientation cases, the Court has chosen not to assign sexual orientation to any specific tier of scrutiny.[217] Meanwhile, in the race and sex discrimination cases, the Court seems to be using the tiered structure in name only.[218] The case law seems muddled and confusing. We can make sense of these cases, however, if we understand them as the beginning of a jurisprudential trajectory away from tiered analysis toward a unitary standard of review. Under this standard, the Court calibrates its mean-ends analysis not based on the grounds of discrimination at issue but on considerations of animus and stereotyping as motivations for the challenged law and on the harm the law inflicts on people's lived experiences.

If the Court continues along this jurisprudential trajectory, it should be more explicit about jettisoning tiered review of discrimination based on personal characteristics. The Court should also speak more clearly about how the four factors that we have identified interrelate in the Court's evaluation of equal protection. Further, the Court should clarify whether the emerging standard applies to personal characteristics beyond race, sex, and sexual orientation. We believe it should apply at least to additional characteristics that are difficult to change and have a history of being the bases of prejudice—features that the Court has emphasized when talking about race, sex, and sexual orientation.[219] It is less clear, however, whether the same

216. *See Nguyen*, 533 U.S. at 68; *Virginia*, 518 U.S. at 549–50.

217. *See supra* notes 173–87 and accompanying text.

218. *See supra* notes 188–216 and accompanying text.

219. *See supra* notes 142–44 and accompanying text. For example, we believe that the emerging standard should apply to disability because disability status has long been a basis of prejudice and an individual's disabilities are difficult to change. *Cf.* Waterstone, *supra* note 171, at 572–73 (arguing that the logic of recent equal protection cases concerning sexual orientation should be extended to cases concerning disability discrimination). Although commentators sometimes contend that a group's political power (or lack thereof) should be a factor in determining what tier of scrutiny that group receives, we do not believe that political power should guide whether to apply the Court's emerging unitary standard. It is beyond the scope of this Article to engage in a full discussion on the relationship between political powerlessness and equal protection; it is worth noting, however, that we agree with commentators who have concluded that political powerlessness is already no longer a required factor in equal protection analysis. *See, e.g.*, Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) (arguing that political powerlessness is not a necessary factor for determining the tier of review in equal protection cases); William N. Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 7–10 (2010) (contending that political powerlessness is not necessary to equal protection analysis).

unitary standard of review would apply to discrimination based on characteristics that are not personal or not difficult to change.[220]

To be sure, some Justices have argued explicitly for a unitary approach to equal protection. Justices Thurgood Marshall and John Paul Stevens argued for unitary standards in concurring and dissenting opinions years ago.[221] Neither Justice, however, had the opportunity to thoroughly explain what a unitary standard should look like. In the following Parts, we demonstrate that foreign jurisdictions have developed a great deal of case law that applies unitary tests to equal protection cases. This body of jurisprudence can help the Supreme Court to clarify the direction of its own doctrinal development.

II. GROWING GLOBAL CONVERGENCE

In blurring the distinction between facial discrimination and disparate impact and in collapsing tiered review of equal protection cases, the Supreme Court has brought the United States closer in line with major foreign jurisdictions. In other words, the two jurisprudential trajectories that we identified in the previous Part combine to form a third trajectory: global convergence.

In Part III of this Article, we turn to the prescriptive significance of the United States' emerging convergence with foreign jurisdictions. We argue that, in the future, the Supreme Court should engage foreign equality jurisprudence more openly and directly.[222] Foreign law certainly is not binding on the United States, but the Supreme Court can improve its own reasoning by drawing on information from abroad.[223] Before we turn to that prescriptive claim, however, we lay the groundwork by illustrating the ways in which the United States is already converging with foreign peers. Part II.A sheds light on convergence with respect to the bridging of facial discrimination and disparate impact. Part II.B illuminates convergence with respect to replacing tiered review with a unitary standard of review.

In this Article, we do not purport to survey all the jurisdictions of the world. Instead, we focus on three jurisdictions that are commonly viewed as jurisprudential leaders in the global arena: Canada, South Africa, and the Council of Europe.[224] These jurisdictions have developed reputations for

220. *See supra* note 172 and accompanying text.

221. *See* Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (critiquing the tiered approach to equal protection because "[t]here is only one Equal Protection Clause"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (expressing dissatisfaction with tiered review because "this Court's decisions in the field of equal protection defy such easy categorization").

222. *See infra* Part III.

223. *See* Levinson, *supra* note 29, at 353 (discussing the value of foreign law as persuasive authority).

224. The Council of Europe is a regional organization that focuses on human rights issues. The Council of Europe predates, and should not be confused with, the European Union. The European Convention on Human Rights (ECHR) is binding on members of the Council of Europe. See *ECHR—Introduction*, ECHR-ONLINE.INFO, http://echr-online.info/echr-introduction [https://perma.cc/4C8B-8FH7] (last visited Nov. 17, 2017). The Council of Europe's most well-known institution is the European Court of Human Rights (ECtHR), which interprets the ECHR and serves as a court of last resort for human rights claims in Europe.

respecting the rule of law and producing court opinions that are frequently cited across borders because of their persuasive reasoning.[225] These jurisdictions have also become frequent case studies in comparative constitutional law scholarship.[226] Our analysis below of Canada, South Africa, and the Council of Europe shows how the United States' equal protection doctrine is converging with equality jurisprudence of these leaders in the global arena.

To provide additional texture to our analysis, we also discuss developments in Hong Kong. Although Hong Kong is not one of the "usual suspects" in comparative analysis,[227] its recent case law has addressed the distinction between facial discrimination and disparate impact and has refined Hong Kong's standard of review for equal protection.[228] Hong Kong is also a jurisdiction familiar to many American lawyers because of its reputable legal system and the role of English as a *lingua franca* in Hong

For more background on the Council of Europe, see COUNCIL EUR., http://www.coe.int [https://perma.cc/69YY-JRQ9] (last visited Nov. 17, 2017).

225. Among national apex courts, "[t]he South African and Canadian constitutional courts have both been highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts." Anne-Marie Slaughter, *A Brave New Judicial World*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 277, 289 (Michael Ignatieff ed., 2005). According to Anne-Marie Slaughter, one reason these courts have become so influential is that they have been effective at drawing lessons from across the globe; these courts "capture and crystallize the work of their fellow constitutional judges around the world." *Id.*; *see also* Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, *in* GOVERNANCE IN A GLOBALIZING WORLD 253, 258 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) ("[I]deas and constitutionalists of Canada have been disproportionately influential."); Adam Liptak, *U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES (Sept. 17, 2008), http://www.nytimes.com/2008/09/18/us/18legal.html [https://perma.cc/7ZHT-BQVP] ("Many legal scholars singled out the Canadian Supreme Court and the Constitutional Court of South Africa as increasingly influential."). The Council of Europe's adjudicatory body, ECtHR, is frequently cited as persuasive authority around the world. John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1, 16 (1995) (noting that the ECtHR "may be becoming a sort of world court of human rights"); *see also* Liptak, *supra* ("These days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment, said Harold Hongju Koh, the Dean of the Yale Law School.").

226. For some recent examples of scholarship using these jurisdictions as case studies, see generally Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016); Robert Leckey, *The Harms of Remedial Discretion*, 14 INT'L J. CONST. L. 584 (2016).

227. Some commentators believe it is important to look beyond the usual suspects in selecting case studies in comparative law scholarship. *See, e.g.*, RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 205–23 (2014).

228. The Hong Kong Court of Final Appeal recently discussed the standard of review for constitutional equality claims in two cases concerning discrimination based on residency status. *See* Kong Yunming v. Dir. of Soc. Welfare, [2013] 16 H.K.C.F.A.R. 950 (C.F.A.); Fok Chun Wa v. Hosp. Auth., [2012] 15 H.K.C.F.A.R. 409 (C.F.A.). Courts in Hong Kong have also elaborated on the constitutional protection of equality through a series of gay rights cases. *See* Sec'y for Justice v. Yau Yuk Lung Zigo, [2007] 10 H.K.C.F.A.R. 335 (C.F.A.); Leung T C William Roy v. Sec'y for Justice, [2006] 4 H.K.L.R.D. 211 (C.A.); QT v. Dir. of Immigration, [2016] 2 H.K.L.R.D. 583 (C.F.I.); Leung Chun Kwong v. Sec'y for the Civil Serv., [2017] 2 H.K.L.R.D. 1132 (C.F.I.).

Kong's judiciary.[229] Thus, we supplement our analysis of Canada, South Africa, and the Council of Europe by examining developments in Hong Kong. This sample of foreign jurisdictions cuts across four continents and diverse cultural contexts.[230]

A. The Bridge Between Facial Discrimination and Disparate Impact

The foreign jurisdictions we studied have all eliminated the gap between facial discrimination and disparate impact in constitutional law,[231] although they sometimes do so under different terminology. Facial discrimination, for example, is sometimes referred to as "direct discrimination," and disparate impact is sometimes referred to as "indirect discrimination" or "adverse impact" discrimination.[232] The differences in terminology notwithstanding, all of these jurisdictions have similarly bridged the gap between the two categories of cases.

Canada led the way in bridging the gap. The text of Canada's constitutional provision concerning equality is worded vaguely.[233] As such, it could be interpreted to cover only cases of facial discrimination,[234] but the

229. *Cf*. Tanna Chong, *Foreign Firms May Flee If Reforms Go Wrong Way: Top US Lawyer*, S. CHINA MORNING POST (Nov. 5, 2013), http://www.scmp.com/news/hong-kong/article/1347760/foreign-firms-may-flee-hong-kong-if-reforms-go-wrong-way-top-us [https://perma.cc/8J5Q-JETV] (noting that many international law firms choose to work in Hong Kong because of Hong Kong's "regulatory schemes and strong, independent courts" but noting that this preference might change depending on Hong Kong's growing tension with mainland China).

230. Some commentators believe cross-cultural convergence on a particular human rights approach makes that approach especially strong because the convergence suggests that the approach transcends specific cultural biases. *See, e.g.*, Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63, 103–04 (2007) (summarizing literature on cross-cultural convergence as an indication of reasoning free of cultural bias); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 153 (2006) ("As long as the societies allow free debate, the very fact that very different societies come to the same conclusions increases one's confidence that the norms are genuinely universal and transcend merely historical or institutional differences.").

231. There are examples of cases from these jurisdictions that approach disparate impact similarly to overt discrimination. *See* Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143 (Can.); D.H. v. Czech Republic, App. No. 57325/00 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/eng?i=001-83256 [https://perma.cc/7MBS-JAM2]; Leung T C William Roy v. Sec'y for Justice, [2006] 4 H.K.L.R.D. 211 (C.A.); *City Council v. Walker* 1998 (3) BCLR 257 (CC) (S. Afr.). These cases will be discussed in greater detail below.

232. *See* Jonnette Watson Hamilton & Jennifer Koshan, *Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination Under Section 15 of the Charter*, 19 REV. CONST. STUD. 191, 194–98 (2015) (providing a primer on terminology).

233. In Canada, the constitutional right to equality is enshrined in section 15(1) of the Canadian Charter of Rights and Freedoms, which states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms § 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

234. *Cf*. SANDRA FREDMAN, EUR. COMM'N, COMPARATIVE STUDY OF ANTI-DISCRIMINATION AND EQUALITY LAWS OF THE US, CANADA, SOUTH AFRICA AND INDIA 49–51

Supreme Court of Canada rejected that approach.[235] The court first expounded on adverse impact discrimination in 1989 in *Andrews v. Law Society of British Columbia*.[236] Although the case concerned overt discrimination against bar applicants based on nationality, the court took this case as an opportunity to speak about equality more generally.[237] It stated: "The 'similarly situated should be similarly treated' approach will not necessarily result in equality nor will every distinction or differentiation in treatment necessarily result in inequality."[238] It further noted that "[d]iscrimination is a distinction which, whether intentional or not[,] . . . has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society."[239]

In subsequent cases, the Supreme Court of Canada relied on *Andrews* to strike down facially neutral laws because of their discriminatory effects.[240] For example, in *Eldridge v. British Columbia*,[241] the court acknowledged that government health-care providers were, as a formal matter, not treating anyone differently by refusing to provide sign-language interpreters.[242] The court concluded, however, that the policy's adverse impact on deaf persons was unconstitutional discrimination regardless of whether the policy involved invidious intent.[243] The Canadian court's decision not to distinguish between facial discrimination and disparate impact was a philosophical decision not dictated by Canada's constitutional text, which refers to equality only in vague terms.[244] The Supreme Court of Canada reasoned from a philosophical perspective that, in order for constitutional protection of equality to be meaningful, it must focus on "substantive" equality by examining laws' effects on people's lived experiences.[245] Accordingly, the court must scrutinize laws that disadvantage people based on protected grounds,[246] regardless of whether discrimination is intentional,

(2012) (explaining that most constitutions, including Canada's, do not elaborate on the meaning of equality and discrimination).

235. *See Andrews*, 1 S.C.R. at 145.

236. [1989] 1 S.C.R. 143 (Can.).

237. *See id.* at 145.

238. *Id.* at 168.

239. *Id.* at 174 (emphasis added).

240. *See generally* Vriend v. Alberta, [1998] 1 S.C.R. 493 (Can.) (holding that an antidiscrimination statute that omitted sexual orientation as a protected category was unconstitutional because of its discriminatory effects); Eldridge v. British Columbia, [1997] 3 S.C.R. 624 (Can.) (concluding that a government health care program created an unconstitutional adverse impact based on disability).

241. [1997] 3 S.C.R. 624 (Can.).

242. *Id.* at 626.

243. *Id.* at 629.

244. *See supra* notes 233–34 and accompanying text.

245. *Eldridge*, 3 S.C.R. at 627–29.

246. The Canadian Charter of Rights and Freedoms lists the following protected grounds: "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms § 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Through case law, the Supreme Court of Canada has extended protection to "analogous" grounds. *See* Vriend v. Alberta, [1998] 1 S.C.R. 493, 495 (Can.) (treating sexual orientation as a protected ground).

because indirect discrimination inflicts injuries that are comparable to the injuries of intentional discrimination.[247]

Inspired by the Canadian experience, South Africa has also bridged the gap between overt discrimination and discriminatory impact.[248] The South African constitution's Equality Clause explicitly provides that state and private actors "may not unfairly discriminate directly or indirectly."[249] After South Africa's Apartheid, equality was a core concern shared by the drafters of both South Africa's current constitution as well as the interim constitution put into place immediately after Apartheid.[250] Their constitution's explicit reference to indirect discrimination was intended to ensure comprehensive protections against discrimination.[251]

The Constitutional Court of South Africa elaborated on the prohibition of indirect discrimination in the seminal case of *City Council v. Walker*.[252] There, the plaintiff challenged the city of Pretoria's public-utility policies, which varied by neighborhood.[253] The Court held that the city violated the constitutional protection of equality by selectively taking legal action against nonpaying residents of a predominantly white neighborhood.[254] Although this enforcement policy was based on geography, and therefore was technically race neutral, it indirectly discriminated based on race.[255] Writing for the majority, Justice Pius Langa stated that the constitution "recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination"[256] and that "[t]o ignore the racial impact of the [geographic] differentiation is to place form above substance."[257] Furthermore, he concluded that proof of discriminatory intent was not required for the court to find the indirect discrimination unconstitutional.[258]

Like the Supreme Court of Canada and the Constitutional Court of South Africa, the European Court of Human Rights ("ECtHR") has also recognized that a facially neutral law can be deemed impermissible regardless of whether

247. *See* Hamilton & Koshan, *supra* note 232, at 196–97 (summarizing Supreme Court of Canada case law that discusses the similarities between direct and indirect discrimination).

248. *See* Arthur Chaskalson, Brown v. Board of Education*: Fifty Years Later*, 36 COLUM. HUM. RTS. L. REV. 503, 510–11 (2005) (noting that South Africa's approach to adverse impact cases has been inspired by the experiences of Canada and the European Court of Justice).

249. S. AFR. CONST., 1996 ch. 2, § 9 (emphasis added). The interim constitution also explicitly barred unfair discrimination, direct or indirect. *See* S. AFR. (INTERIM) CONST., 1993 ch. 3, § 8.

250. *See* RICHARD SPITZ & MATTHEW CHASKALSON, THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT 301 (2000); Catherine Albertyn & Janet Kentridge, *Introducing the Right to Equality in the Interim Constitution*, 10 S. AFR. J. HUM. RTS. 149, 149 (1994).

251. *See* SPITZ & CHASKALSON, *supra* note 250, at 303; Albertyn & Kentridge, *supra* note 250, at 166–67.

252. *City Council v. Walker* 1998 (3) BCLR 257 (CC) (S. Afr.).

253. *Id.* paras. 5–6.

254. *Id.* para. 91.

255. *Id.* para. 32.

256. *Id.* para. 31.

257. *Id.* para. 33.

258. *Id.* para. 43.

the law was motivated by invidious intent.[259] Although the text of the European Convention on Human Rights (ECHR) addresses discrimination, it neither defines "discrimination" nor specifically mentions indirect discrimination.[260] Over a series of cases, however, the ECtHR has clarified that indirect discrimination can violate the ECHR regardless of whether the law stemmed from invidious intentions.[261] For example, in *Hoogendijk v. Netherlands*,[262] a facially neutral income requirement for disability benefits was found to burden women disproportionately.[263] The court stated, "where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be regarded as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[264] According to *Hoogendijk*, where an applicant is able to make a prima facie case of adverse effect, the respondent state actor bears the burden of justifying that effect.[265] The ECtHR ultimately found that the disparate impact in *Hoogendijk* was justified.[266]

The ECtHR later extended *Hoogendijk*'s reasoning to race in *D.H. v. Czech Republic*.[267] In this case, the ECtHR found that the Czech government's disproportionate assignment of Roma children to special education programs was a form of indirect discrimination that violated the ECHR.[268] Once the claimants in *D.H.* proved a discriminatory effect based on the numbers of Roma children in special-education schools, the burden shifted to the government to justify the discrimination pursuant to the same standard of review that the ECtHR applies to direct racial and ethnic discrimination.[269]

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259. *See infra* notes 263–72 and accompanying text.

260. Article 14 of the ECHR states, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221. Article 1 of the ECHR's Protocol No. 12 states, "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 2000, E.T.S. 177.

261. *See infra* notes 261–71 and accompanying text.

262. App. No. 58641/00 (Eur. Ct. H.R. 2005), http://echr.ketse.com/doc/58641.00-en-20050106/view/ [https://perma.cc/R66H-K6XT].

263. *Id.* at 21–22.

264. *Id.*

265. *Id.*

266. *Id.*

267. D.H. v. Czech Republic, App. No. 57325/00 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/eng?i=001-83256 [https://perma.cc/7MBS-JAM2]; *see also* OLIVIER DE SCHUTTER, EUR. COMM'N, THE PROHIBITION OF DISCRIMINATION UNDER EUROPEAN HUMAN RIGHTS LAW 29 (2011) (discussing the relationship between *D.H.* and *Hoogendijk*).

268. *D.H.*, App. No. 57325/00 paras. 187–95.

269. With respect to both direct and indirect racial discrimination, the ECtHR asks whether the government policy under review has a "legitimate aim" and whether there is a "reasonable relationship of proportionality" between the law and that aim. *Id.* paras. 195–96, 208. Many commentators have recognized *D.H.* as a landmark case because it made clear the ECtHR's view that disparate impact could constitute impermissible discrimination regardless of whether there is discriminatory intent. *See, e.g.*, Rory O'Connell, *Substantive Equality in the European*

The ECtHR reiterated that it did not require any finding of discriminatory intent.[270] ECtHR cases after *D.H.* have confirmed that the gap between overt discrimination and disparate impact has closed.[271] In bridging this gap, *D.H.* cited legal developments across Europe and at the United Nations as persuasive authority to show growing recognition that direct and indirect discrimination are similarly injurious.[272]

Finally, in the sodomy case of *Leung v. Secretary for Justice*,[273] the Hong Kong High Court of Appeal demonstrated that Hong Kong's constitutional law protects people against both direct and indirect discrimination.[274] This case concerned a criminal provision that set the age of consent for sodomy higher than the age of consent for vaginal intercourse.[275] The penalty for violating the age requirement for sodomy was also much more severe.[276] The government argued that the disparate age-of-consent laws did not discriminate based on sexual orientation because the harsher regulation of sodomy applied to both same-sex couples and different-sex couples who engage in sodomy.[277] The Court rejected this contention.[278] It reasoned that harsher regulation of sodomy does in fact discriminate based on sexual

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Court of Human Rights?, 107 MICH. L. REV. FIRST IMPRESSIONS 129, 131 (2009); Julie Suk, *Disparate Impact Abroad*, *in* A NATION OF WIDENING OPPORTUNITIES?: THE CIVIL RIGHTS ACT AT 50, at 283, 294 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015).

270. *D.H.*, App. No. 57325/00 paras. 184, 194.

271. *See* Lavida v. Greece, App. No. 7973/10 (Eur. Ct. H.R. 2013), http://hudoc.echr.coe.int/eng?i=001-120188 [https://perma.cc/4MZN-KQVD] (examining a facially neutral policy that disproportionately impacted Roma schoolchildren); Horvath & Kiss v. Hungary, App. No. 11146/11 (Eur. Ct. H.R. 2013), http://hudoc.echr.coe.int/eng?i=001-116124 [https://perma.cc/M5S7-UD4P] (same).

272. The ECtHR cited nonbinding authority from other branches of the Council of Europe, the Court of Justice of the European Community (now the European Court of Justice), and member states' domestic legal developments. *See D.H.*, App. No. 57325/00, pts. III–VI. Interestingly, the court also cited United States' statutory ban on employment discrimination. *Id.* para. 107. As discussed above, the United States handles disparate impact cases very differently in constitutional law as opposed to cases involving statutory protections against discrimination. *See supra* note 11.

273. [2006] 4 H.K.L.R.D. 211 (C.A.).

274. While Hong Kong's statutory bans on discrimination explicitly bar indirect discrimination, Hong Kong's constitutional texts (i.e., the Basic Law and Bill of Rights Ordinance) do not expressly address indirect discrimination. Carole J. Petersen, *Sexual Orientation and Gender Identity in Hong Kong: A Case for the Strategic Use of Human Rights Treaties and the International Reporting Process*, 14 ASIAN-PAC. L. & POL'Y J. 28, 46–51 (2013). In the case of *Leung*, however, the judiciary interpreted constitutional law to prohibit indirect discrimination as well. *Leung*, 4 H.K.L.R.D. paras 134–35. According to one commentator, *Leung*'s conceptualization of indirect discrimination is more capacious than that in Hong Kong's statutory antidiscrimination laws. *See* Petersen, *supra*, at 50 n.128.

275. The age of consent for "buggery" (i.e., sodomy) between men was twenty-one. *Leung*, 4 H.K.L.R.D. para. 6. A parallel provision criminalized buggery between different-sex partners with a female under twenty-one. *Id.* Interestingly, the parallel provision on heterosexual buggery did not stipulate any age of consent for the male partner. *See id.* Meanwhile, the age of consent for vaginal sex was sixteen. *Id.* para. 9.

276. *See id.* paras. 6–9 (noting that violating the age of consent for sodomy could result in life imprisonment, whereas violating the age consent for vaginal sex was only punishable by imprisonment up to five years).

277. *Id.* para. 48.

278. *Id.*

orientation because it "significantly affects homosexual men in an adverse way compared with heterosexuals. The impact on the former group is significantly greater than on the latter."[279]

From the U.S. perspective, it is noteworthy that *Leung* did not require a finding of invidious intent to determine that the disparate impact in that case constituted sexual-orientation discrimination.[280] It came to this conclusion even though, like the U.S. Constitution, the equality provision in the Hong Kong bill of rights does not expressly state that indirect discrimination is impermissible.[281] Once the court found there to be sexual-orientation discrimination, it applied the same rigorous review that it would have applied to direct discrimination.[282] *Leung* has helped to shape Hong Kong's legal landscape beyond sexual-orientation discrimination cases. As explained by Carole Petersen, an expert on Hong Kong's equality laws, "This [case] was highly significant, not only for gay men, but also for others who may seek to rely upon the concept of indirect discrimination when challenging statutes and government policies that apply to all, but have a disproportionate and adverse affect [sic] on one group."[283]

Recently, in *Leung Chun Kwong v. Secretary for the Civil Service*,[284] the High Court's Court of First Instance reiterated that "equality provisions in the Basic Law and Hong Kong Bill of Rights could be violated by either direct or indirect discrimination."[285] The court found that the government's provision of spousal benefits for civil servants indirectly discriminated based on sexual orientation.[286] Even though the government policy was neutral on its face, it created an adverse impact based on sexual orientation because the Hong Kong government did not recognize same-sex spouses.[287] The Court ultimately found the discrimination to be unconstitutional.[288]

The preceding examples illustrate that, in bridging the gap between facial discrimination and disparate impact, the United States is converging with Canada, South Africa, the Council of Europe, and Hong Kong. In these foreign jurisdictions, courts made the normative decision to treat direct and indirect discrimination similarly because the two types of discrimination harm people in comparable ways. The Canadian constitution, the ECHR, and

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279. *Id.*
280. *See id.*
281. The Hong King Bill of Rights Ordinance states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Hong Kong Bill of Rights Ordinance, No. 59, (1991) 1 O.H.K., § 22.
282. *See Leung*, 4 H.K.L.R.D. paras. 44–51 (applying the court's standard proportionality test).
283. Petersen, *supra* note 274, at 50.
284. [2017] 2 H.K.L.R.D. 1132 (C.F.I.).
285. *Id.* para. 57.
286. *Id.* para. 58.
287. *Id.*
288. *Id.*

Hong Kong's bill of rights do not expressly address indirect discrimination.[289] Nonetheless, the courts interpreting these texts have decided that facial discrimination and disparate impact must be addressed similarly.[290] While the South African constitution expressly protects people against indirect discrimination, the Constitutional Court of South Africa elaborated on indirect discrimination by clarifying that discriminatory motive need not underlie indirect discrimination for it be impermissible.[291] Like these courts abroad, the Supreme Court must interpret an equal protection clause that is textually vague. In doing so, the Court seems to be blurring the distinction between facial discrimination and disparate impact, as courts abroad already have.

B. Unitary Standards of Review

The U.S. Supreme Court is also converging with foreign courts by collapsing its standards of review in equal protection cases. The jurisdictions that we studied all apply a unitary standard to a wide range of discrimination cases, including cases based on race, sex, and sexual orientation.[292] Viewing these jurisdictions from a higher level of abstraction, they arguably apply two standards of review: one standard to discrimination based on personal traits such as race, sex, and sexual orientation[293] and another to discrimination based on characteristics that courts have not considered to be deeply personal, such as differential treatment of military units or differential treatment based on residential location.[294] Our focus here is on the former category of cases. As a de jure matter, the Supreme Court applies different tiers of review to discrimination cases in this first category.[295] As a de facto matter, the United States is beginning to collapse its tiered framework into a unitary standard, while the foreign jurisdictions studied above already apply a unitary standard.[296] The foreign jurisdictions discussed all refer to this unitary standard of review as a "proportionality analysis," but that analysis manifests differently across jurisdictions.[297]

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289. *See supra* notes 246, 249, 260 and accompanying text.

290. *See supra* notes 246, 249, 260 and accompanying text.

291. *See supra* notes 252–58 and accompanying text.

292. We highlight foreign approaches to race, sex, and sexual orientation because cases concerning these statuses have become paradigmatic examples of tiered review in the United States. *See supra* notes 143–48 and accompanying text.

293. *See infra* notes 310, 315–17, 327, 332 and accompanying text.

294. *See, e.g.*, Kong Yunming v. Dir. of Soc. Welfare, [2013] 16 H.K.C.F.A.R. 950 (C.F.A.) (addressing discrimination based on residency status); Beian v. Romania, App. No. 30658/05 (Eur. Ct. H.R. 2007), http://hudoc.echr.coe.int/eng?i=001-83822 [https://perma.cc/PM2E-ADJQ] (addressing differential treatment of military units).

295. *See supra* note 143–144 and accompanying text.

296. *See supra* Part II.B.

297. Commentators often trace these jurisdictions' proportionality analysis to German roots. Germany first developed proportionality analysis as a component of administrative law. Proportionality doctrine has since expanded to other doctrinal areas, including constitutional rights, and to other countries including the ones that this Article studies. For background on the German roots of proportionality doctrines, see Moshe Cohen-Aliya & Iddo Porat, *American Balancing and German Proportionality: The Historic Origins*, 8 INT'L J. CONST. L.

In Canadian constitutional law, section 1 of the Charter of Fundamental Rights and Freedoms makes clear that constitutional rights are not absolute.[298] In the seminal case of *R. v. Oakes*,[299] the Supreme Court of Canada developed the proportionality analysis that it uses in most cases to determine whether a rights infringement is justified.[300] *Oakes* itself was not an equality case, but the court has since extended the *Oakes* test to equality jurisprudence.[301]

In equality cases, the Supreme Court of Canada will first ask whether the state has discriminated—either directly or indirectly—based on protected grounds.[302] If there is discrimination, the court will evaluate whether the discrimination can be justified.[303] In accordance with *Oakes*, the discriminatory measure can be justified only if it is proportionally related to achieving a "pressing and substantial" government objective.[304] To satisfy the proportionality requirement, (1) the discriminatory measure must be rationally connected to the government objective, (2) it should impair protected rights as little as possible, and (3) there must be proportionality between the deleterious effects of the discriminatory measure and the objective served.[305] The court will analyze each of these steps sequentially.[306] The third step of this analysis requires the court to consider how harmful the discrimination is.[307] If the government deprives people of

263, 263 (2010); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 98–111 (2008).

298. Canadian Charter of Rights and Freedoms § 1, Part 1 of the Constitution Act, 1982, *being* Schedule B to Canada Act, 1982, c 11 (U.K) ("The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

299. [1986] 1 S.C.R. 103 (Can.).

300. Although the Supreme Court of Canada uses the *Oakes* test to analyze most disputes about constitutional rights, there are some contexts in which the *Oakes* test does not apply. *See generally* Doré v. Barreau du Québec, [2012] 1 S.C.R. 395 (Can.) (declining to apply the *Oakes* test to administrative law); R. v. Stone, [1999] 2 S.C.R. 290 (Can.) (applying an analysis other than the *Oakes* test to a particular criminal context).

301. *See generally* Trociuk v. British Columbia (Att'y Gen.), [2003] 1 S.C.R. 835 (Can.) (striking down a law that excluded a father's information from his child's birth registration); Vriend v. Alberta, [1998] 1 S.C.R. 493 (Can.) (striking down Alberta's Individual Rights Protection Act for excluding sexual orientation as a prohibited ground of discrimination).

302. *See* Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143, 153–54 (Can.). Canada has recognized numerous protected grounds and subjects all of these grounds to the same analysis rather than different tiers of analysis. In Canadian constitutional law, protected grounds of discrimination include race, national or ethnic origin, color, religion, sex, age or mental or physical disability, sexual orientation, citizenship, marital status, and off-reserve aboriginal status. *See* Canadian Charter of Rights and Freedoms § 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). For background on how these grounds were identified, see *infra* note 312 and accompanying text.

303. *Andrews*, 1 S.C.R. at 153–54.

304. *See id.* at 153.

305. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 105–06 (Can.); *see also* Reference re Pub. Serv. Emp. Relations Act (Alta.), [1987] 1 S.C.R. 313, 373–74 (Can.) (restating the *Oakes* test). For further discussion on applying the *Oakes* test to equality cases, see Fredman, *supra* note 234, at 72–73.

306. *See Oakes*, 1 S.C.R. at 105.

307. This third step is sometimes referred to as evaluating "proportionality in the strict sense" or "proportionality in the narrow sense." Sweet & Mathews, *supra* note 297, at 75, 105.

a particularly important right or benefit, the discrimination is especially harmful.[308] Accordingly, the government will need to show that a correspondingly strong objective is being served by the discrimination.[309]

Canadian courts apply the *Oakes* test to all protected categories of discrimination, including race, sex, and sexual orientation.[310] The Charter on Fundamental Rights and Freedoms explicitly enumerates certain protected grounds of discrimination: "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[311] In addition, the Canadian Supreme Court has identified sexual orientation, citizenship, marital status, and off-reserve aboriginal status as additional protected grounds.[312] Canadian constitutional law applies the *Oakes* test to all these different categories.[313]

South Africa also eschews tiered review for a unitary proportionality analysis.[314] The South African Constitutional Court has applied the same proportionality test to cases of race discrimination,[315] sex discrimination,[316] and sexual-orientation discrimination.[317] These categories of discrimination are among the sixteen categories explicitly protected by the South African constitution.[318] The constitutional court has also expanded the list of

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For a discussion on the importance of this step, see *id.* at 75–76. Sometimes commentators refer to this step as the fourth (as opposed to third) step in analysis because they count identification of a pressing and substantial government objective as the first step of analysis. *See id.*

308. *See id.*

309. *See id.*

310. *See, e.g.*, Bear v. Canada (Attorney General), [2003] 3 F.C. 456 (Can.) (striking down an act that prohibited Indians from participating in a universal pension plan); M. v. H., [1999] 2 S.C.R. 3 (Can.) (striking down legal provisions that barred same-sex couples' access to spousal support); Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358 (Can.) (striking down immigration regulations that discriminated against fathers because of sex stereotypes);.

311. Canadian Charter of Rights and Freedoms § 15, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

312. The Supreme Court of Canada refers to these protected grounds as "analogous" protected grounds, as opposed to "enumerated" protected grounds. *See generally* Corbiere v. Canada (Minister of Indian and N. Affairs), [1999] 2 S.C.R. 203 (Can.) (off-reserve aboriginal status); Egan v. Canada, [1995] 2 S.C.R. 513 (Can.) (sexual orientation); Miron v. Trudel, [1995] 2 S.C.R. 418 (Can.) (marital status); Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143 (Can.) (citizenship). A common theme among the enumerated and analogous grounds of protection is that "they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity." *Corbiere*, 2 S.C.R. at 206.

313. *See* Fredman, *supra* note 234, at 72–73; *supra* note 301 and accompanying text.

314. *See* Fredman, *supra* note 234, at 35–36.

315. *City Council v. Walker* 1998 (3) BCLR 257 (CC) (S. Afr.) para. 81 (holding that a policy of selective enforcement of debt recovery amounted to unfair race discrimination).

316. *President v. Hugo* 1997 (6) BCLR 708 (CC) (S. Afr.) para. 2 (upholding a policy giving the president authority to grant incarcerated mothers prison sentence remissions).

317. *Minister of Home Affairs v. Fourie* 2006 (1) SA 524 (CC) (S. Afr.) (concluding that barring same-sex couples from marrying violated constitutional rights to equality and dignity).

318. S. AFR. CONST., 1996 ch. 2, § 9 (listing protection categories including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth).

protected grounds through case law.[319] The proportionality test is a unitary standard that applies to all of these different categories of discrimination.[320]

There are differences between Canada's and South Africa's proportionality tests. Unlike the *Oakes* test, which requires analyzing proportionality through a series of discrete steps,[321] South Africa's proportionality test is a "single-stage, multi-factored balancing" exercise.[322] The Constitutional Court of South Africa first developed its proportionality test in a case challenging the death penalty as violating South Africa's post-Apartheid interim constitution's ban on cruel, inhuman, and degrading punishment.[323]

Subsequently, South Africa enshrined the constitutional court's proportionality test in the "Limitation of Rights" section of the post-Apartheid final constitution, and the proportionality test now applies to equality cases.[324] The constitution lays out five factors that should be weighed to determine whether an infringement of equality rights is justified.[325]

The European Court of Human Rights has also adopted a proportionality analysis for equality cases. Discrimination violates article 14 of the ECHR "if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[326] In analyzing proportionality, the ECtHR will usually require "very weighty reasons" to justify discrimination on grounds of race, sex, sexual orientation, nationality, religion, and nonmarital birth.[327]

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319. *See, e.g.*, *Hoffmann v. S. African Airways* 2001 (1) SA 1 (CC) (S. Afr.) (recognizing discrimination based on HIV status as a protected category).

320. *See* Fredman, *supra* note 234, at 35–36.

321. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 105–06 (Can.); Sweet & Mathews, *supra* note 316, at 117.

322. *See* Sweet & Mathews, *supra* note 297, at 127.

323. *See S. v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.).

324. The Constitution of South Africa does not use the term "proportionality," but it requires a balancing of five factors in its Limitation of Rights Clause. *See* S. AFR. CONST., 1996 ch. 2, § 36.

325. The five factors to be weighed include the nature of the right, the importance of the purpose of limiting the right, the nature and extent of the limitation, the relation between the limitation and its purpose, and the existence of less restrictive means to achieve the purpose. *Id.*

326. Religionsgemeinschaft der Zeugen Jehovas v. Austria, App. No. 40825/98 para. 87 (Eur. Ct. H.R. 2008), http://hudoc.echr.coe.int/eng?i=001-88022 [https://perma.cc/HJ69-S2PC]; *see also* Belgian Linguistic Case, App. No. 1677/62, 1 Eur. H.R. Rep. 252 para. 10 (1968) (providing an earlier articulation of the same test).

327. For elaboration on how requiring "very weighty reasons" for these categories of discrimination differs markedly from the United States' rigid multitiered approach to categories of discrimination, see Aaron Baker, *Proportional, Not Strict, Scrutiny: Against a U.S. "Suspect Classifications" Model Under Article 14 ECHR in the U.K.*, 56 AM. J. COMP. L. 847, 888–89 (2008). For further background on the "very weighty reasons" requirement, see Rory O'Connell, *Cinderella Comes to the Ball: Art. 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211, 214 (2009). For a case acknowledging that "very weighty reasons" are required to justify differential treatment based on religion, sex, sexual orientation, birth status, and nationality, see Vojnity v. Hungary, App. No. 29617/07 para. 36 (Eur. Ct. H.R. 2013), http://hudoc.echr.coe.int/eng?i=001-116409 [https://perma.cc/N7JG-98KM].

The ECtHR has also identified additional factors for calibrating the proportionality analysis. For example, it will defer more to state governments through its doctrine of "margin of appreciation" if the challenged law deals primarily with economic policy.[328] The ECtHR will also defer more to state governments if the legal challenge concerns an area of policy-making about which there is little sign of consensus among European states.[329] For the purposes of this Article's comparisons with the United States, it is worth underscoring the fact that the ECtHR applies the same proportionality analysis to discrimination based on different personal traits including race, sex, or sexual orientation.[330]

Hong Kong also applies a unitary standard of review for constitutional equality cases concerning personal characteristics. In *Secretary for Justice v. Yau*,[331] which addressed disparate criminalization of public sex based on sexual orientation, Hong Kong's Court of Final Appeal stated that discrimination based on race, sex, and sexual orientation are all subject to the same proportionality analysis, which requires "intense scrutiny" of discrimination.[332] Bearing some similarity to the Canadian test discussed above, the proportionality test in *Yau* dictates that, in order for discrimination to be justified, the difference in treatment must (1) "pursue a legitimate aim"; (2) "be rationally connected to the legitimate aim"; and (3) "be no more than is necessary to accomplish the legitimate aim."[333] The court subsequently clarified that this proportionality review extends to discrimination based on other personal characteristics as well, such as religion, politics, and social

328. *See, e.g.*, Stec v. United Kingdom, App. No. 65731/01 para. 52 (Eur. Ct. H.R. 2006), http://hudoc.echr.coe.int/eng?i=001-73198 [https://perma.cc/Q78P-VYV6] (stating that state policies concerning macroeconomics, including social security policies, warrant deference through the margin of appreciation doctrine). *See generally* HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996).

329. *See, e.g.*, Schalk & Kopf v. Austria, App. No. 30141/04 para. 105 (Eur. Ct. H.R. 2010), http://hudoc.echr.coe.int/eng?i=001-99605 [https://perma.cc/7AKP-SHPJ] (adjusting the court's analysis of sexual-orientation discrimination based on the lack of consensus concerning same-sex marriage); *see also* Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L.J. 1730, 1734–45 (2011); Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TUL. L. REV. 259, 271–72, 312–15 (2016).

330. *See* Baker, *supra* note 327, at 888–89 (contrasting the ECtHR's proportionality analysis with traditional tiered review in the United States). Although the ECtHR applies the same proportionality analysis to different personal traits, the court's deference to states through its consensus doctrine may end up ratcheting down the intensity of review for personal traits that are arguably more controversial, such as sexual orientation. For example, even though the ECtHR has said that it usually requires "very weighty reasons" to justify sexual orientation discrimination, this demand for rigorous review has been countered by the court's deference to states on the issue of same-sex marriage due to the lack of European consensus on same-sex marriage. *See* Chapin & Charpentier v. France, App. No. 40183/07 para. 51 (Eur. Ct. H.R. 2016), http://hudoc.echr.coe.int/eng?i=001-163436 [https://perma.cc/C2MG-UVA8] (reiterating the holding from *Schalk & Kopf* because there was still no consensus regarding same-sex marriage); *Schalk & Kopf*, App. No. 30141/04 para. 105 (holding that the ECtHR's protection of equality does not require states to allow same-sex marriage).

331. Sec'y for Justice v. Yau Yuk Lung Zigo, [2007] 10 H.K.C.F.A.R. 335 (C.F.A.).

332. *Id.* paras. 20–21.

333. *Id.* para. 20.

origin.[334] It stated, however, that a less rigorous standard of review would apply to differential treatment based on factors that it did not consider personal characteristics, such as the location of one's residency.[335]

In sum, the four jurisdictions we studied all apply a single standard of review—a unitary proportionality analysis—to cases concerning discrimination based on personal characteristics. These jurisdictions have been aware that the United States' multitiered system exists as an alternative approach, but they have chosen a unitary and flexible proportionality analysis instead.[336] Consider, for example, a speech that Canadian Chief Justice Beverley McLachlin delivered at a judicial colloquium at the Hong Kong Court of Final Appeal in 2015.[337] Chief Justice McLachlin directly contrasted Canada's approach to constitutional law with that of the United States, which relies more on rigid categories.[338] In U.S. equal protection cases, this means separating different types of discrimination by category and applying a different legal test to each category.[339]

Chief Justice McLachlin acknowledged that proponents of the United States' approach believe that the U.S approach "offers more certainty and provides less scope for judicial law-making."[340] She argued, however, that

334. Fok Chun Wa v. Hosp. Auth., [2012] 15 H.K.C.F.A.R. 409 para. 5 (C.F.A.) (drawing a distinction between discrimination based on "core-values, including those relating to personal or human characteristics such as race, colour, gender, sexual orientation, religion, politics or social origin" and discrimination based on other grounds including residency status, which was at issue in the instant case).

335. *See id.*; Kong Yunming v. Dir. of Soc. Welfare, [2013] 16 H.K.C.F.A.R. 950 paras. 40–41 (C.F.A.). It is worth noting that, in 2016, the Court of Final Appeal modified its proportionality test in the context of protecting constitutional property rights. *See* Hysan Dev. Co. v. Town Planning Bd., [2016] 19 H.K.C.F.A.R. 372 paras. 64–88 (C.F.A.). The Court of Final Appeal added an additional step to proportionality analysis, so the test now operates even more similarly to the Canadian *Oakes* test. *Id.* Whether Hong Kong courts will apply this revised proportionality test to equality cases is yet to be seen. In at least one case, the Court of First Instance has signaled that the modified test in *Hysan* should be applied in equality cases. *See* Leung Chun Kwong v. Sec'y for the Civil Serv., [2017] 2 H.K.L.R.D. 1132 para. 36 (C.F.I.). *But see* Kelley Loper, *Constitutional Adjudication and Substantive Gender Equality in Hong Kong*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 149, 157–58 (Beverley Baines et al. eds., 2012) (contending that, in Hong Kong, the doctrinal test for justifying differential treatment might differ from proportionality tests with respect to infringement of other constitutional rights).

336. Indeed, the jurisdictions that we studied regularly cite U.S. precedent, but they have chosen not to adopt the United States' tiered approach to equal protection. *Cf.* Liptak, *supra* note 225 (noting that courts around the world have looked to the U.S. Supreme Court for inspiration, but have become, over time, less influenced by U.S. jurisprudence).

337. *See* Beverley McLachlin, Chief Justice of the Supreme Court of Can., Address at the Hong Kong Court of Final Appeal Judicial Colloquium 2015: Proportionality, Justification, Evidence and Deference: Perspectives from Canada (Sept. 24, 2015), http://www.hkcfa.hk/en/documents/publications/speeches_articles/index.html [https://perma.cc/9KUU-DTB5].

338. *See id.* at 10–11.

339. For background on this U.S. approach, see *supra* Part I.B. Outside the equal protection context, some other components of U.S. constitutional doctrine involve even stricter categorical tests. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (using a bright-line rule to define incitement of imminent unlawful action as a category of speech unprotected by the First Amendment).

340. McLachlin, *supra* note 337, at 10.

"these advantages may be more apparent than real."[341] Although Chief Justice McLachlin was speaking about U.S. constitutional law in general, her critique seems especially apt with respect to equal protection.[342] As discussed in Part II.B, the United States' tiered approach has failed to cabin judicial discretion in ways that would render constitutional law more predictable and certain.[343] The Canadian approach embodied in the *Oakes* test gives judges more room to weigh competing interests on a case-by-case basis and prompts judges to be open and honest about what they are doing.[344] Chief Justice McLachlin explained that Canada's flexible proportionality analysis "fosters transparency, accountability and trust."[345] Like Canada, the other three foreign jurisdictions discussed have also opted for a unitary proportionality analysis.

III. THE PATH AHEAD

Our discussion thus far has been primarily descriptive. We have mapped two trajectories in U.S. equal protection doctrine and illustrated these trajectories' convergence with foreign law. In this Part, we turn to the prescriptive question: What should be the significance of these developments going forward? We contend that, in future equal protection cases, the U.S. Supreme Court should engage foreign law much more directly and transparently. Doing so should encourage the United States to continue bridging the gap between facial discrimination and disparate impact and to continue collapsing tiered review. Foreign law should also inform the United States as it deliberates further about the standard of review that should replace tiered review.

This Part then draws on theoretical literature about judicial decision-making to develop three arguments about engaging foreign law in future equal protection jurisprudence. We refer to these three claims as (1) promoting judicial candor, (2) leveraging collective wisdom, and (3) learning from foreign jurisdictions as laboratories of doctrinal innovation. We will also address counterarguments that criticize judicial consideration of foreign law.

A. Judicial Candor

The current trajectories in U.S. law might already be informed by Supreme Court Justices' appreciation of foreign developments. It is possible that foreign law has inspired and influenced Supreme Court Justices, but that they

341. *Id.*
342. *See id.* at 10–11.
343. *See supra* notes 149–68 and accompanying text.
344. For our earlier discussion on the *Oakes* test's sequence of steps, see *supra* notes 300–13 and accompanying text.
345. McLachlin, *supra* note 337, at 14; *see also* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159–88 (2004) (praising *Oakes*'s structured proportionality test); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3113–14 (2015) (same).

are choosing to omit explicit references to foreign law.[346] Over a decade ago, the Supreme Court did overtly cite foreign law in some high-profile constitutional cases.[347] For example, to support striking down Texas's ban on same-sex sodomy in *Lawrence*, the Court cited the ECtHR, laws of United Kingdom, and an amicus brief surveying laws worldwide.[348] Likewise, in *Roper v. Simmons*,[349] the Court cited legal developments around the world to support striking down the juvenile death penalty.[350] These references to foreign law unleashed strong responses from critics, including dissenting Justices, who believed that foreign law should never be consulted in constitutional adjudication.[351] Perhaps this criticism has made Justices shy about openly referencing foreign law. Some Justices may continue to be inspired and influenced by foreign law, but they may choose to obscure those sources by not citing them.[352]

Indeed, there are good reasons to believe that Justices continue to be well aware of foreign constitutional doctrine. First, in constitutional cases over the past decade, the Justices have frequently received amicus briefs that present arguments based on foreign law.[353] Second, Justices often spend time speaking with foreign jurists at international events, such as conferences and summer teaching collaborations.[354] Third, some Justices have openly supported learning from foreign jurisdictions. For example, in public

346. For example, *Obergefell* comports with the doctrinal trends that this Article discusses, but it does not cite any foreign law. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

347. *See* Roper v. Simmons, 543 U.S. 551, 576 (2005); Lawrence v. Texas, 539 U.S. 558, 573 (2003).

348. *Lawrence*, 539 U.S. at 573, 576.

349. 543 U.S. 551 (2015).

350. *See id.* at 575–77.

351. *See, e.g.*, *id.* at 622 (Scalia, J., dissenting) (arguing that foreign and international law have no place in Eighth Amendment jurisprudence); Robert H. Bork, *Has the Supreme Court Gone Too Far?*, COMMENTARY, Oct. 2003, at 32 (calling the Supreme Court's citation to foreign law "absurd" and "flabbergasting."); Robert H. Bork, *Whose Constitution Is It, Anyway?*, NAT'L REV., Dec. 8, 2003, at 37 [hereinafter Bork, *Whose Constitution*].

352. At least one law review article has cited anonymous federal judges saying that they consciously avoid citing international law to avoid blowback. John Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 476 n.220 (2015).

353. *See, e.g.*, Brief for 54 International and Comparative Law Experts from 27 Countries and the Marriage and Family Law Research Project as Amici Curiae Supporting Respondents at 1, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574) (citing jurisprudence from South Africa, Canada, the ECtHR, and others); Brief for Foreign and Comparative Law Experts as Amici Curiae Supporting Petitioners at 1, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) (citing jurisprudence from Canada, the Council of Europe, Hong Kong, South Africa, and other parts of the world).

354. *See*, ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–100 (2004) (discussing networking among constitutional court judges around the world); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 548–49 (2001) (noting that U.S. Supreme Court Justices "confer with members of constitutional courts in other countries [at conferences and other meetings] and have spoken of the need to incorporate comparative constitutional law into American constitutional law" (footnote omitted)).

speeches, Justices Breyer and Ginsburg have both spoken in favor of learning from foreign law.[355]

If Justices are in fact inspired by foreign jurisprudence, they should be frank about it. They should not obscure what they are doing by omitting citations to foreign law. By and large, commentators have recognized the importance of judicial candor.[356] Judicial candor is important to the principle of publicity, which entails providing explanations to the public.[357] The public is entitled to know the background of judicial decisions to facilitate discussions and debates about the merits of the decisions.[358] The Court should therefore transparently defend drawing inspiration from abroad. As discussed in Parts III.B and C, there are principled reasons for drawing on foreign law specifically in the context of equal protection.

Judicial candor is important not only to facilitate public debate, but also because candor is essential to trust and institutional integrity. Judicial transparency about reasoning and sources of law establishes a "background norm of truthfulness" that is essential to upholding the integrity of the judiciary.[359] If we do not expect judicial candor when it comes to drawing from foreign laws, there could be a slippery slope, whereby judges feel they can distort their motivations in other ways to achieve their desired results. Such distortions would further undermine judicial integrity.[360]

To be sure, commentators have recognized some exceptional circumstances under which judicial candor should not be expected.[361] For example, if being candid about judicial reasoning would somehow undermine national security or cause extreme backlash that threatens the judiciary's independence, candor should not be expected.[362] Such severe threats, however, are generally not at issue when it comes to being candid about citing foreign law.

Of course, while we speculate that sitting Justices have drawn some inspiration from abroad in developing recent U.S. jurisprudence that converges with foreign law, we must emphasize that we do not know if this is in fact the case. To the extent that the Justices have been drawing

355. *See* Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), http://www.nytimes.com/2009/04/12/us/12ginsburg.html [https://perma.cc/GWJ4-8YVP]; David G. Savage, *A Justice's International View*, L.A. TIMES (June 14, 2008), http://articles.latimes.com/2008/jun/14/nation/na-scotus14 [https://perma.cc/X6U4-F2AB] (discussing Justice Kennedy's support of international law); *see also* Fontana, *supra* note 354, at 548 (noting Justice Sandra Day O'Connor's public statements in favor of learning from foreign law).

356. *See, e.g.*, Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 62 (2016); Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 721 (1979); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 674; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987).

357. Delaney, *supra* note 356, at 13.

358. Parrish, *supra* note 356, at 674.

359. Delaney, *supra* note 356, at 13–14.

360. *See* Shapiro, *supra* note 356, at 737.

361. *See, e.g.*, Delaney, *supra* note 356, at 14–15.

362. *See id.*

inspiration from abroad, however, we contend that they should be more transparent about this influence.

B. Collective Wisdom

Even if the Supreme Court Justices were not influenced by foreign law in developing the doctrinal trajectories that we discussed, they should engage with foreign law more directly in the future. One reason for doing so is the value of collective wisdom. The more that peer jurisdictions approach a particular question the same way, the more likely that approach will be correct.[363] Jeremy Waldron has referred to this as the "force of numbers" when he explained reasons the United States should learn from foreign law.[364] Aristotle articulated a version of this claim when he explained that there are benefits to the "wisdom of multitudes."[365] The same sentiment is also captured by the old adage "two heads are better than one"[366] and the phrase "wisdom of crowds," which James Surowiecki popularized to describe the superiority of aggregated wisdom of a group—even a small group—over that of individuals.[367]

To understand why aggregated wisdom is persuasive, one can consider Waldron's analogy between law and science.[368] If the United States were to address a difficult public health question, such as an epidemic, it would certainly look at how other countries have addressed the same epidemic.[369] The United States should not simply mimic other countries' responses because the epidemic might manifest differently in the United States, but it would be irresponsible for the United States not to leverage the accumulated wisdom of foreign countries.[370] At the very least, if the United States is leaning toward a particular approach, it can find reassurance in knowing that foreign countries have chosen the same approach after examining the problem from various vantage points.[371] Of course, when looking abroad, the United States should set its sights on trustworthy findings.[372] As Waldron put it, U.S. scientists "would not look to the work of suspect or disreputable laboratories."[373]

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363. *See* JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 87–89 (2012).

364. *Id.* at 85.

365. *See* ARISTOTLE, POLITICS, bk. 3, chap. 11, ll. 1281a43–b9 (C.D.C. Reeve trans., 1998). Although Aristotle did not apply his theory of the "wisdom of multitudes" to the context of courts citing foreign law, Jeremy Waldron has applied Aristotle's reasoning to that context. *See* WALDRON, *supra* note 363, at 87–89.

366. Lee, *supra* note 230, at 102.

367. *See* JAMES SUROWIECKI, THE WISDOM OF CROWDS 173–91 (2004) (discussing the benefits of collective wisdom in small groups, such as small committees and management teams).

368. *See* Jeremy Waldron, *Foreign Law and Modern* Ius Gentium, 119 HARV. L. REV. 129, 143–45 (2005).

369. *Id.* at 144.

370. *Id.*

371. *See id.*

372. *Id.* at 145.

373. *Id.*

In the equal protection context, Waldron's analogy is particularly apt. Many countries face the same generic problem: how to conceptualize constitutional protections of equality when the relevant constitutional provisions are textually vague.[374] It would make sense for the United States to learn from the peer jurisdictions that we studied because they are reputable jurisdictions, known for successfully implementing rule of law and liberal constitutional regimes.[375] In other words, they are not "suspect or disreputable laboratories."[376] The United States should find reassurance in the fact that these jurisdictions have reached a consensus about treating disparate impact like facial discrimination and rejecting tiered scrutiny.[377] While the United States has taken the first few steps in bridging facial discrimination and disparate impact and collapsing tiered scrutiny, the accumulated wisdom from reputable peer jurisdictions should make the United States feel more confident about continuing on its current path.[378] Foreign experience thus performs a confirmatory function.

The collective wisdom of a group is particularly persuasive when the group shares relevant similarities.[379] Youngjae Lee's hypothetical "Dignity Society" helps to elucidate this idea.[380] Imagine that we are part of this club because we place a high value on human dignity, as do all the other members of the club.[381] Indeed, the club consists of like-minded individuals.[382] If other people in the group reach a consensus that conflicts with our own stance on an issue, that should give us reason to reconsider our own position.[383] Likewise, as Youngjae Lee has noted, "if [we are] unsure about a moral issue that implicates dignity concerns, . . . [we] could come to a tentative conclusion about the issue and then seek to confirm it with others in the Society."[384] Furthermore, Lee explained: "We all have experiences of consulting members of various groups we belong to in order to test our intuitions about one matter or another. So this is one context in which 'consensus' is epistemically significant."[385]

While Lee's hypothetical involves individuals in a club, it is a metaphor for jurisdictions that belong to a shared school of thought. The United States

374. *See* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 705 (2005) (explaining that "[g]eneric [c]oncerns" give rise to "[g]eneric [d]octrine" in constitutional law around the world).

375. *See supra* notes 225, 229 and accompanying text.

376. *See* Waldron, *supra* note 368, at 145.

377. *See supra* note 371 and accompanying text.

378. For elaboration on these developments in U.S. doctrine, see *supra* Part II.

379. *See* Lee, *supra* note 230, at 99. Eric Posner and Cass Sunstein have applied the Condorcet jury theorem to comparative constitutional law, which suggests that consensus among foreign jurisdictions is particularly persuasive if three conditions are met, including the condition that the jurisdictions in agreement are sufficiently similar. Posner & Sunstein, *supra* note 230, 136. The two other conditions are that the jurisdictions must not be simply mimicking each other, and they must base their decisions on private information. *Id.*

380. *See* Lee, *supra* note 230, at 99.

381. *Id.*

382. *Id.* at 99–100.

383. *Id.* at 100.

384. *Id.*

385. *Id.*

is in a club of sorts, to which Canada, South Africa, the Council of Europe, and Hong Kong also belong. Courts in each of these jurisdictions have placed great weight on human dignity and liberal constitutionalism.[386] Accordingly, the club's emerging consensus on equality doctrine should bear epistemological weight on individual club members, including the United States.[387] To be sure, there are many illiberal jurisdictions around the world that have not taken equal protection seriously, but "force in numbers" among those jurisdictions should not be assigned persuasive weight.

We recognize that there is already robust debate within U.S. legal scholarship about whether to bridge facial discrimination and disparate impact and collapse the tiers of scrutiny.[388] It is beyond this Article's scope to fully engage that existing body of literature. Rather, our aim is to fill a gap in the domestic discourse. Our point is that the collective wisdom of foreign jurisdictions should be a factor that informs debate within the United States but that such consideration has been missing.

In sum, collective wisdom of foreign jurisdictions should encourage the United States to continue along its path of bridging facial discrimination and disparate impact and collapsing tiered review of discrimination based on personal characteristics. Like the Supreme Court, courts in peer jurisdictions have given meaning to concepts such as equality and discrimination, which are not defined neatly by their respective constitutions (or, in the case of the European Court of Human Rights, its treaty). The fact that the United States' recent steps toward doctrinal reform and peer jurisdictions' approaches to equality converge should reassure the United States that its emerging conceptualization of equality is proper.

C. Laboratories for Experimentation

While aggregate wisdom has persuasive value, individual foreign jurisdictions also provide helpful information. This is because, as Judge Richard Posner has explained, "Just as our states are laboratories for social experiments from which other states and the federal government can learn, so are foreign nations laboratories from whose legal experiments we can

386. *See generally* Anthony Mason, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong*, 37 H.K.L.J. 299 (2007) (discussing Hong Kong); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655 (2008) (discussing the European Court of Human Rights); Rory O'Connell, *The Role of Dignity in Equality Law: Lessons from Canada and South Africa*, 6 INT'L J. CONST. L. 267 (2008) (discussing Canada and South Africa); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011) (discussing the United States, among other jurisdictions).

387. *See supra* note 385 and accompanying text.

388. *See generally* Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059 (2011) (drawing on history from the Reconstruction era to critique the Court's jurisprudence on disparate impact and tiered review); Goldberg, *supra* note 138 (building on critiques of the tiered approach to equal protection cases); Johnson, *supra* note 63 (contributing to the debate concerning the divide between facial discrimination and disparate impact).

learn."[389] Sometimes, laboratories replicate each other's findings, and there is persuasive value to that aggregate information. We discussed such aggregate wisdom in the preceding section. Even if laboratories yield divergent results, we can learn from those results.[390]

If the United States continues down the path of collapsing tiered review in equal protection, foreign jurisdictions could serve as a helpful resource because they have been laboratories for experimentation. In Part I.A, we explained that, as a de facto matter, the Supreme Court seems to have collapsed tiered review into four factors that it uses to determine whether discrimination violates equal protection. We acknowledged, however, that the jurisprudence has yet to crystalize.[391] The Court has never explicitly articulated a de jure four-part test. Hopefully, the Court will soon offer clarification by expressly articulating a legal standard to replace tiered review. In doing so, the Court ought to draw from foreign experiences to strengthen its reasoning.

Although the four jurisdictions that we studied have all rejected multitiered review, they have adopted different versions of proportionality analysis in its place.[392] The United States ought to consider the advantages and drawbacks of these approaches as potential alternatives to the multifactor balancing act that we see currently emerging.[393] As Waldron explained, examining the experiences of foreign courts help judges in "exploring the options [available to them], and considering various possible models of analysis."[394] The United States should not feel pressured to adopt doctrinal innovation from abroad. However, if the Court considers a range of alternative options and then explains why it ultimately chooses the doctrinal framework that it does, such a practice would enhance the Court's reasoning and transparency.[395]

It is beyond this Article's scope to propose any specific standard of review to replace tiered analysis in the United States. We do, however, wish to offer a few thoughts about how the United States ought to engage the potential models developed abroad. The Court should not limit itself to citing foreign law only if it adopts a foreign doctrinal framework.[396] Instead, if the Court rejects alternative doctrinal frameworks developed abroad, it should explain that rejection.[397] For example, if the United States chooses not to adopt a

389. Richard Posner, *No Thanks, We Already Have Our Own Laws: The Court Should Never View a Foreign Legal Decision as a Precedent in Any Way*, LEGAL AFF. (July–Aug. 2004), https://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp [https://perma.cc/N2JD-HBW2].

390. *See* WALDRON, *supra* note 363, at 76 (noting that opinions from foreign jurisdictions can be persuasive either individually or collectively).

391. *See supra* note 168 and accompanying text (noting that the U.S. Supreme Court is in the process of transitioning to a new doctrinal framework).

392. *See supra* Part II.B.

393. *See supra* notes 169–220.

394. WALDRON, *supra* note 363, at 80.

395. *See id.* at 83 ("The transparent citation of reasons for arriving at a decision is one of the most important aspects of adjudication.").

396. *See* VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 71 (2010) (discussing the value of foreign law as negative or "aversive" authority).

397. *See id.*

sequential proportionality analysis such as Canada's *Oakes* test, it would be helpful to hear why.[398] Such transparent reasoning would enhance the depth and persuasiveness of U.S. jurisprudence.

South Africa's landmark death penalty case, *S. v. Makwanyane*,[399] illustrates the approach to comparative analysis we recommend.[400] In analyzing whether the death penalty should be unconstitutional, the Constitutional Court of South Africa referenced death penalty jurisprudence from Botswana, Canada, ECtHR, Germany, Hong Kong, Hungary, India, Jamaica, Tanzania, the United Nations Committee on Human Rights, the United States, and Zimbabwe.[401] The court's opinion explained why certain foreign approaches were not well suited for South Africa.[402] In particular, the court rejected U.S. Eighth Amendment jurisprudence as being inappropriate for South Africa.[403] *Makwanyane*'s comparative analysis has been heralded as a model of juridical sophistication.[404] The thoroughness of the court's analysis enhanced its persuasiveness. Similarly, the United States could enhance its equal protection jurisprudence by considering foreign doctrinal frameworks and thoroughly explaining why—*or why not*—such foreign developments are suitable for the United States.

D. Addressing Criticisms

Some commentators have adamantly opposed consulting foreign sources when interpreting the Constitution.[405] While it is beyond the scope of this Article to completely rehash the debate about whether U.S. courts should cite foreign law, this Part briefly addresses what we perceive to be the three most common arguments against citing foreign law in constitutional cases. These critiques center around concerns about (1) originalism, (2) opportunism, and (3) cultural particularism.

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398. *See supra* notes 299–313 and accompanying text.

399. 1995 (3) SA 391 (CC) (S. Afr.).

400. *Id.* (establishing that capital punishment violates constitutional rights).

401. *See id.* paras. 35, 40–42, 59–60, 70–79, 83, 100, 105–09, 148.

402. *See id.* para 77 (distinguishing South Africa from India); *id.* para. 102 (distinguishing South Africa from the United States).

403. *See id.* paras. 90–99 (discussing the significance of differences between the South African and U.S. constitutions).

404. *See, e.g.*, Bernard E. Harcourt, *Mature Adjudication: Interpretive Choice in Recent Death Penalty Cases*, 9 HARV. HUM. RTS. J. 255, 256 (1996) (calling the *Makwanyane* opinion's comparative law analysis "a visionary model of judicial decisionmaking—a model of 'mature adjudication'"); Mark S. Kende, *The Constitutionality of the Death Penalty: South Africa as a Model for the United States*, 38 GEO. WASH. INT'L L. REV. 209, 249 (2006) (encouraging the Supreme Court to "follow[] in the South African Constitutional Court's footsteps" from *Makwanyane*).

405. Justice Scalia was one of the most vocal opponents of citing foreign law. *See* Jimmy Hoover, *Scalia Sears Supreme Court for Foreign Law References*, LAW360 (May 29, 2015), https://www.law360.com/articles/661690/scalia-sears-supreme-court-for-foreign-law-references [https://perma.cc/5M53-H7KB] (reporting Justice Scalia's remarks against citing foreign law during a speech at George Mason University School of Law); *see also* Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 273 (2006) (quoting legislators who have spoken out against citing foreign law).

Some commentators oppose citing foreign law because they believe doing so undermines originalism.[406] Other commentators, however, have demonstrated that it is not at all clear that the framers of the Constitution would have opposed subsequent generations of Americans referring to foreign law for inspiration.[407] With regard to equal protection, specifically, original meaning is elusive and renders originalism indeterminate.[408] Indeed, some legal historians have argued that the framers and the public originally understood the Equal Protection Clause to be intentionally vague, thus deferring the development of a specific definition to future generations.[409] Because both the text and original meaning of the Equal Protection Clause are vague, the Court must give meaning to equal protection through judicially crafted principles.[410] In doing so, foreign law can be a helpful source of persuasive authority.[411]

The second basis of opposition to foreign law is a fear of opportunism. Because there are so many jurisdictions around the world, a U.S. judge can probably find some support somewhere in the world for any position that the judge wants to adopt.[412] As a result, some skeptics fear judges citing foreign law opportunistically, without any rhyme or reason other than to support their preferred positions. This logic, however, presupposes that all foreign jurisdictions are equal and that choosing among them really is arbitrary. To the contrary, this Article selected jurisdictions to study based on their status

406. *See generally* Bork, *Whose Constitution*, *supra* note 351; Hoover, *supra* note 405 (discussing Justice Scalia's claims regarding originalism).

407. *See, e.g.*, Fontana, *supra* note 354, at 579 ("According to either contemporary version of constitutional originalism, the evidence from the Founding seems to support the contemporary usage of comparative materials by judges."); David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249, 1251 (2007) (contending that "originalists must take into account contemporary views, foreign and domestic, in a limited set of cases where the meaning of the Constitution's universalist language is at stake.").

408. *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 456–57 (2007) (arguing that the Equal Protection Clause was understood by its contemporaries to be intentionally vague); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 593 (2008) (same). *But see* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247–48, 251 (1997) (contending that the Clause's framers intended to prohibit laws that "single out any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification" and that this intent should inform constitutional interpretation).

409. *See, e.g.*, Balkin, *supra* note 408, at 456–57; Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1253–54 (1997).

410. *Cf.* Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L L. REV. 317, 346–47 (2007) (providing examples of the Supreme Court's history of using judicially crafted principles to give meaning to vague constitutional provisions).

411. *See* Levinson, *supra* note 29, at 353 (drawing a distinction between foreign law as persuasive authority and binding authority).

412. Chief Justice Roberts exhibited this worry when, as a Supreme Court nominee, he said, "looking at foreign law for support is like looking out over a crowd and picking out your friends." Mark Tushnet, *When Is Knowing Less Better than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1276 (2006).

as peer jurisdictions from various parts of the world.[413] This status renders these jurisdictions particularly persuasive.[414] Instead of starting with a preferred domestic outcome and looking abroad for support, our method was to first identify peer jurisdictions worth examining and then see what we might learn from their experiences.[415] Judges can take the same approach, assuaging concerns that citation of foreign law is an opportunistic endeavor.

The third critique of citing foreign law is based on the belief that the U.S. constitutional law is culturally specific to the United States and, therefore, drawing inspiration from foreign sources of law is inappropriate.[416] This critique is, however, weak with respect to the equal protection issues we have discussed. As David Fontana suggested, comparative analysis should not raise concerns about U.S. particularism when the analysis "does not use comparative constitutional law in such a radical way as to displace the centrality of American sources."[417] This Article has advocated an approach that preserves the centrality of U.S. law. We started by tracing the development of U.S. equal protection doctrine. We then looked abroad to help us reflect on the current posture of U.S. doctrine. We argued that foreign developments could play a confirmatory role in advancing U.S. doctrine along its current paths. We also acknowledged that the U.S. Supreme Court may well reject doctrinal experiments from our foreign peers. In sum, this Article has advocated a "refined comparativism" that is not at odds with U.S. cultural particularism.

CONCLUSION

This Article has revealed and synthesized three emerging trajectories in the U.S. Supreme Court's equal protection jurisprudence. First, the Court has taken a few initial steps toward blurring the line between cases of facial discrimination and cases of disparate impact. Second, the Court has begun to collapse tiered review of discrimination based on personal characteristics. These two trajectories combine to produce a third trajectory: the growing convergence between U.S. equal protection doctrine and equality jurisprudence from abroad. The collective wisdom of foreign jurisdictions should encourage the United States to continue along its current trajectories

413. *See supra* notes 224–30 and accompanying text.

414. *See supra* notes 379–87 and accompanying text; *see also* Rex D. Glensy, *Quasi-Global Social Norms*, 38 CONN. L. REV. 79, 107 (2005) ("[T]he sources of persuasive authority on which U.S. courts will rely will not come from all nations, nor should they. . . . [T]his country need only concern itself with . . . societies [that] are based on a fundamental respect for human rights." (footnote omitted)); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 125 (2005) ("[P]ractices of countries with commitments to human rights, democracy, and the rule of law roughly comparable to ours are likely to have more positive persuasive value . . . ."); Holning Lau, *Sexual Orientation & Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67, 70–71 (2007) (explaining that jurisdictions are particularly persuasive if they are "at once ideologically similar and culturally different").

415. *See supra* notes 224–30 and accompanying text.

416. *See* Fontana, *supra* note 354, at 615–16.

417. *Id.* at 616.

of doctrinal reform. In devising a legal standard to replace tiered review, the United States could learn from various approaches adopted by foreign courts.

The Court's decision whether to continue bridging the impact-treatment divide and collapsing tiered review will impact many areas of ongoing controversy. For example, these doctrinal trajectories should impact litigation challenging North Carolina's moratorium on local governments enacting antidiscrimination ordinances.[418] They should influence the ways we view the discriminatory impact of pending "bathroom bills."[419] Doctrinal reform should influence ongoing equal protection challenges to affirmative action programs.[420] In addition, doctrinal reform may influence equal protection challenges to President Trump's bans on immigration and travel.[421]

At the outset, we noted that constitutional doctrine changes slowly and we acknowledged that the doctrinal trajectories we discussed are still in early stages of development.[422] Whether the United States continues along the trajectories we traced may depend on the future composition of the Court. Justice Gorsuch recently filled the seat of the late Justice Antonin Scalia.[423] This change might not substantially alter the trajectory of equal protection doctrine because Justice Scalia was not in the majority in most of the cases that constitute the trend lines that we traced.[424] Thus, the previous majorities are likely to remain intact.

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418. *See supra* notes 13–15, 115–19 and accompanying text.

419. *See supra* note 120 and accompanying text.

420. *See* Robert Barnes, *Plan to Shield Illegal Immigrants Suffers Loss: Justices Deliver Surprising Boost to Backers of Affirmative Action*, WASH. POST, June 24, 2016, at A1 (discussing the impact of *Fisher II* on pending lawsuits challenging affirmative action programs at Harvard University and the University of North Carolina).

421. President Trump's initial immigration order banned travel and refugee admission from seven predominantly Muslim countries. Exec. Order. No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017). Opponents of the ban claimed it violated equal protection (among other constitutional protections) by discriminating based on religion, even though the policy was facially neutral with respect to religion. *See* Washington v. Trump, 847 F.3d 1151, 1167–68 (9th Cir. 2017) (describing equal protection claim against the travel ban in a case that was later rendered moot). As we were writing this Article, President Trump replaced his initial ban with newer iterations of the ban. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); Presidential Proclamation, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats (Sept. 24, 2017), https://www.whitehouse.gov/thepress-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attemptedentry [https://perma.cc/R678-KL5F]. The ACLU and other advocates have announced their intention to file new litigation to challenge President Trump's most recent ban. *See* Matt Zapotosky, *ACLU and Others to Challenge Latest Trump Ban in Court*, WASH. POST (Sept. 29, 2017), https://www.washingtonpost.com/world/national-security/aclu-and-others-to-challenge-latest-trump-travel-ban-in-court/2017/09/29/8124a3fe-a556-11e7-8cfe-d5b912fabc99_story.html [https://perma.cc/9UBW-GR7E].

422. *See supra* note 25 and accompanying text.

423. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html [https://perma.cc/8CMM-XYKR].

424. *See, e.g.*, Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2198 (2016) (majority opinion); Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Scalia, J., dissenting). *Fisher II* was decided after Justice Scalia's death. *Fisher II*, 136 S. Ct. at 2198.

If, however, any of the three eldest Justices on the Court—Justices Ginsburg, Kennedy, and Breyer—retire in the near future, that would give President Trump an opportunity to replace them with a Justice similar to Justice Scalia.[425] This could potentially reverse the doctrinal trajectories that we discussed. For example, Justice Scalia has adamantly called for adherence to rigid tiers of scrutiny.[426] If multiple new Justices adopt that position, the collapse of tiered review may be halted. While tectonic shifts in the Court's composition are possible in the future, Justice Gorsuch's new position alone will not dramatically shift the Court's dynamics. Barring such a dramatic shift, this Article seeks to provide judges, advocates, and commentators with a clearer view of the doctrinal reforms that are already underway, such that those reforms can be extended in future cases in the spirit of common law constitutionalism.

425. David Morris, *The Next President Will Likely Appoint 4 Supreme Court Justices: Who Do You Want Picking Them?*, SLATE (July 29, 2016), http://www.salon.com/2016/07/29/the_next_president_will_likely_appoint_4_supreme_court_Justices_who_do_you_want_picking_them_partner/ [https://perma.cc/U86C-CCEL] (speculating that Justices Ginsburg, Kennedy, and Breyer will soon retire).

426. *See* Windsor v. United States, 133 S. Ct. 2675, 2697 (2013) (Scalia, J., dissenting).