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## ARTICLES

# ILLUSIONS OF LIBERTY AND EQUALITY: AN “ALIEN’S” VIEW OF TIERED SCRUTINY, AD HOC BALANCING, GOVERNMENTAL POWER, AND JUDICIAL IMPERIALISM

*Michael A. Scaperlanda*<sup>†</sup>

Doctrinal messiness marked the end of the Supreme Court’s 2002 term. In *Grutter v. Bollinger*,<sup>1</sup> the Court was strictly deferential, reaffirming the use of strict scrutiny of all race-based classifications while deferring to the University of Michigan Law School’s judgment that diversity was a compelling reason to use racial criteria in its admissions policy.<sup>2</sup> And in *Lawrence v. Texas*,<sup>3</sup> the Court applied rational basis review in an uncharacteristically nondeferential way to strike down Texas’s sodomy restrictions on substantive due process grounds, concluding that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>4</sup>

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1. 539 U.S. 306 (2003).

2. *Compare id.* at 326 (“We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’ This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. ‘Absent searching judicial inquiry into the justification for such race-based measures,’ we have no way to determine what ‘classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ We apply strict scrutiny to all racial classifications to “smoke out” illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” (alteration in original) (citations omitted)), *with id.* at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions. . . .”), *and id.* at 329 (“[G]ood faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’” (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978))).

3. 539 U.S. 558 (2003).

4. *Id.* at 578.

*Grutter* and *Lawrence* are but the latest in a series of cases trending away from several decades of categorical balancing<sup>5</sup> and toward a new regime of ad hoc or sliding scale balancing<sup>6</sup> in the Supreme Court's equal protection and substantive due process jurisprudence.<sup>7</sup> These cases follow *Plyler v. Doe*,<sup>8</sup> *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>9</sup>

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5. Categorical balancing (assigning a particular level of judicial scrutiny, i.e., rational basis, intermediate scrutiny, or strict scrutiny, to a case) involves a judicial predetermination of the relative weight to be given to the contending individual and governmental interests.

6. Ad hoc balancing is a more freewheeling case-by-case weighing of the contending interests. In the First Amendment context, it has been said that “[a]n ad hoc approach weighs, in each particular case, the interests served by the speech against the asserted state interest in prohibition or regulation.” Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 673 (1983). In contrast, “a rule emerges from definitional balancing which can be employed in future cases without the occasion for further weighing of interests.” Melville B. Nimmer, *The Right To Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 944-45 (1968). “That is, the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as ‘speech’ within the meaning of the first amendment.” *Id.* at 942. “A categorical approach resembles a definitional balancing approach. Those approaches have been distinguished on the basis that definitional balancing expressly involves balancing of interests but categorical approaches do not.” F. Jay Dougherty, *All the World's Not a Stooge: The “Transformativeness” Test for Analyzing a First Amendment Defense to a Right of Publicity Claim Against Distribution of a Work of Art*, 27 COLUM. J.L. & ARTS 1, 41-42 (2003) (internal quotations omitted); see also Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 293-94 (1992) (“Categorization is the taxonomist’s style—a job of classification and labeling. When categorical formulas operate, all the important work in litigation is done at the outset. Once the relevant right and mode of infringement have been described, the outcome follows, without any explicit judicial balancing . . . . Balancing is more like grocer’s work (or Justice’s)—the judge’s job is to place competing rights and interests on a scale and weigh them against each other. Here the outcome is not determined at the outset, but depends on the relative strength of a multitude of factors.”).

7. Speaking of constitutional interpretation more broadly, Professor Aleinikoff concluded eighteen years ago that “balancing . . . has become widespread, if not dominant, over the last four decades.” T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44 (1987); see also Sullivan, *supra* note 6, at 296 (“Even if Aleinikoff overstated his case, he is certainly right that balancing has long been in ascendancy.”). Although Aleinikoff doesn’t view the *Lochner* era as an age of balancing, Aleinikoff, *supra*, at 951, I would suggest that it, with its Brandeis briefs, was a classic period of balancing. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); see also Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57, 95 (2003) (“*Lochner* . . . is an example of the use of a balancing test.”); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1158 (2002) (explaining that in *Lochner*, the Court “engage[d] in the very same kind of interest-balancing, scrutinizing the needfulness of the law at issue”).

8. 457 U.S. 202 (1982).

9. 473 U.S. 432 (1985).

*Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>10</sup> and *Romer v. Evans*.<sup>11</sup> Is this shift in constitutional doctrine a vindication of Justice Thurgood Marshall? He disagreed “with the Court’s rigidified approach to equal protection analysis.”<sup>12</sup> Instead, he favored a more flexible, sliding scale approach:

A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.<sup>13</sup>

My answer is no, Marshall has not been vindicated, at least not fully. An examination of the Court’s record in equal protection and due process cases reveals that the Court’s rhetoric of protecting discrete and insular minorities from a tyrannical majority<sup>14</sup> and protecting the fundamental liberty interests of individuals<sup>15</sup> from that same unruly

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10. 505 U.S. 833 (1992).

11. 517 U.S. 620 (1996).

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

13. *Id.* at 98-99; see also *Cleburne Living Ctr.*, 473 U.S. at 460 (Marshall, J., concurring in the judgment in part and dissenting in part); *Doe*, 457 U.S. at 231 (Marshall, J., concurring); cf. David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1528 (1992) (“Once a challenger is successful in establishing the existence of a constitutional right . . . the Court intercedes to review the majority’s actions under a level of scrutiny that varies with the perceived importance of the right.”).

14. See, e.g., *Doe*, 457 U.S. at 213 (“[E]ach aspect of the Fourteenth Amendment reflects an elementary limitation on state power. . . . The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”); see also Andrew A. Beerworth, Lead Article, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 375 (2004) (“The essential function of equal protection is to prevent the democratic majority from inflicting injuries or imposing burdens on racial minorities without inflicting the same injuries or imposing the same burdens on itself.”).

15. See, e.g., *Witney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“[I]t is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.”), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In a formula that seems a bit dated post-*Lawrence*, the Court said “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty,’ such

majority is but an illusion, masking a reality that gives primacy of consideration to governmental interests above those of the individual, locating ultimate power and authority in the “non-political” branch of the federal government. The implicit starting point of the Court’s analysis in equal protection and substantive due process is neither “the constitutional and societal importance of the interest adversely affected” nor the “invidiousness of the . . . particular classification.”<sup>16</sup> Marshall had it backwards. What drives the analysis initially is the Court’s perception of the political branches’ need for flexibility in governing in a particular situation. Where the Court perceives that the government needs little or no flexibility, then it is free to consider more readily the importance of the liberty interest or the invidiousness of the classification.<sup>17</sup> But, when the Court thinks that the governing authority must be free to decide among a broad range of options, the interests and classifications suddenly become less important in the Court’s analysis.<sup>18</sup>

The alienage cases provide a particularly powerful lens through which to examine this counterintuitive phenomenon because in this area the Court explicitly decreases the level of scrutiny as the state and federal governments’ interests increase.<sup>19</sup> These cases will be the focus of Part I. From there, we can branch out to other areas, and I will argue that the same phenomenon is at play throughout the Court’s equal protection and substantive due process jurisprudence, albeit more subtly. Parts II and III of the Article will explore the rise and now decline of categorical balancing in equal protection and substantive due process. The Court’s shift from categorical to ad hoc balancing can be explained by its desire to increase its own flexibility and power. Categorical balancing, while

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that ‘neither liberty nor justice would exist if they were sacrificed.’” *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted).

16. *Rodriguez*, 411 U.S. at 99 (Marshall, J., dissenting).

17. See Faigman, *supra* note 13, at 1523, 1580. Faigman explains:

The search for the meaning of the constitutional text often includes a review of the government interests at stake. Because the threshold question regarding the existence of constitutional rights has become infected with the government’s countervailing interests, those individual rights have lost much of their vitality, if not their very existence.

*Id.* at 1523. “[I]n multitiered balancing contexts[, for example,] the Court employs government interests to dilute the definition of rights, rather than scrutinize those interests to determine whether they justify the infringement of defined rights.” *Id.* at 1580.

18. See *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944). *Korematsu*, the infamous case ushering in strict scrutiny and the two-tiered system of categorical balancing, betrayed this reality. In *Korematsu*, the Court held that racial classifications should be subject to strict judicial scrutiny but then turned a blind eye on the interned Japanese-Americans, deferring to the military’s judgment that interment was required to safeguard national security. *Id.* at 216, 223-24.

19. See *infra* note 23 and accompanying text.

minimizing the perception that the Court was illegitimately engaged in *Lochner*-like judicial legislation,<sup>20</sup> ended up boxing the Court into a corner with its use of rigid categories. To counter the rigidity of the tiered system, the Court first attempted to develop another (middle) tier of scrutiny,<sup>21</sup> but ended up (or so it would appear) abandoning, if not formally then functionally, the categorical system altogether. With the increasing use of ad hoc balancing, the Court has created more space for itself, making it the ultimate beneficiary of a gradual power shift.

To reiterate, my first thesis is that the Court implicitly gives primacy of consideration to the governments' interest in equal protection and substantive due process cases despite its rhetoric to the contrary. My second thesis is that the move from categorical to ad hoc balancing unmask a desire by the Court to locate maximum governmental power within the judiciary as the Court gives itself more flexibility to mediate between the political branches' claims of the need for flexibility in governing and the individual's claim to be free from discriminatory or oppressive legislation. If, as I suggest, the Court sides with the political branches of government when it perceives the need for governmental flexibility, it is important to dig beneath the surface and to expose the Court's implicit anthropological assumptions that govern its view of the role of law and lawmaking in shaping the lives of individuals living in our community. The Article's concluding section draws some tentative conclusions, suggesting that the current Court has been well schooled in liberal egalitarian philosophy and is in the process of developing a system of ad hoc balancing to maximize its ability to shape our national identity around that philosophy.<sup>22</sup>

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20. See, e.g., David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1127 (2001) ("[T]he Court has sought to replace the meandering value judgments of the *Lochner* era with the fixed directives of modern fundamental rights analysis."); Sullivan, *supra* note 6, at 296 ("In equal protection and substantive due process law, for example, the two-tiered system was meant to enshrine penitence for the sins of the *Lochner* era.").

21. See Sullivan, *supra* note 6, at 297-99.

22. In contrast, the *Lochner* Court seemed schooled in laissez-faire economics and social Darwinism. See, e.g., John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 499 (2002) ("[I]n the *Lochner* era the reigning laissez-faire theories of the day and even Herbert Spencer's Social Statics influenced the Court."); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 460 (1985) (explaining that in *Lochner*, "the Court claimed only to be applying neutral, objective law while actually imposing laissez-faire economics upon society"). But see, e.g., David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12-13 (2003) ("[T]he basic motivation for *Lochnerian* jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and that the Fourteenth Amendment's Due Process Clause protected those rights. . . . [T]herefore, *Lochner* was the progenitor of modern substantive due process cases such as *Griswold v.*

## I. VINDICATION OF MARSHALL?: A LOOK AT THE ALIEN CASES

The Supreme Court's alienage jurisprudence runs the spectrum of standards from strict scrutiny to flirtation with the political question doctrine and a near renunciation of any judicial role in reviewing governmental action affecting noncitizens.<sup>23</sup> In those heady days of the late 1960s and early 1970s, when the Court was expanding both procedural<sup>24</sup> and substantive rights,<sup>25</sup> as well as promoting various notions of equality,<sup>26</sup> it addressed, on equal protection grounds, the question of whether a state could discriminate against lawful resident aliens in the distribution of welfare benefits.<sup>27</sup> In holding that such discrimination violates the Equal Protection Clause, the Court categorized aliens as "a prime example of a 'discrete and insular' minority for whom . . .

*Connecticut, Roe v. Wade, and Lawrence v. Texas . . .*" (footnotes omitted)); Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560-61 (1997) ("The Four Horsemen were themselves closet liberals. It appears that they struck a reactionary pose in celebrated cases in order to retain the good graces of the conservative sponsors to whom they owed their positions and whose social amenities they continued to enjoy, while in legions of low-profile cases they quietly struck blows for their own left-liberal agendas.").

23. See Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 752 (1996) ("The alienage cases are unique because they exhibit the full range of doctrinal options currently used by the judiciary."); Michael A. Scaperlanda, *The Paradox of a Title: Discrimination Within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043, 1054-80 [hereinafter Scaperlanda, *Paradox of a Title*] (exploring the development and range of standards of review in alienage cases).

24. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) ("[W]hen welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."). See generally Randy Lee, *Twenty-Five Years After Goldberg v. Kelly: Traveling From the Right Spot on the Wrong Road to the Wrong Place*, 23 CAP. U. L. REV. 863 (1994).

25. See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (right to an abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (right of marital privacy regarding contraceptive use).

26. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (plurality opinion) (heightened scrutiny to protect illegitimate children); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (heightened scrutiny to protect women); *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972) (right of individual, regardless of marital status, to contraception); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (right to travel), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974).

27. *Graham v. Richardson*, 403 U.S. 365, 366 (1971) ("These are welfare cases. They provide yet another aspect of the widening litigation in this area. The issue here is whether the Equal Protection Clause of the Fourteenth Amendment prevents a State from conditioning welfare benefits either (a) upon the beneficiary's possession of United States citizenship, or (b) if the beneficiary is an alien, upon his having resided in this country for a specified number of years." (footnote omitted)).

heightened judicial solicitude is appropriate.”<sup>28</sup> It said that “the Court’s decisions have established that classifications based on alienage, like those based on nationality or race, are . . . subject to close judicial scrutiny.”<sup>29</sup>

Taking the Court’s reasoning at face value<sup>30</sup> and given the reasons it employs strict scrutiny in cases where a government discriminates against a discrete and insular minority,<sup>31</sup> one might expect the Court to employ strict scrutiny in all cases of alienage classifications to ensure that the discrimination against the targeted vulnerable population was not invidious.<sup>32</sup> And, in one type of alienage case it has done so. Following

28. *Id.* at 372 (citation omitted) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). Characterizing aliens as a discrete and insular minority in need of special judicial protection from potentially invidious legislation has generated controversy. Several have argued that alienage is not an immutable trait. *See, e.g.*, Volker Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 DUKE L.J. 871, 899 n.166; Matthew Poppe, Comment, *Defining the Scope of the Equal Protection Clause with Respect to Welfare Waiting Periods*, 61 U. CHI. L. REV. 291, 314 (1994). Others have suggested that even without the franchise, aliens are often not politically powerless because surrogates take up their interests. *See, e.g.*, Mitchell Kurfis, Note, *The Constitutionality of California’s Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129, 153 (1995). Still others have noted the wide disparity in the treatment of aliens, which is often dependent on national origin, ethnicity, and reasons for migrating. *See, e.g.*, Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 135 (1990).

29. *Graham*, 403 U.S. at 371-72 (footnotes omitted). “The classifications involved in the instant cases . . . are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right [the right to travel,] is impaired.” *Id.* at 376.

30. *See id.* at 376-77 (“An additional reason why the state statutes at issue in these cases do not withstand constitutional scrutiny emerges from the area of federal-state relations.”).

31. *See infra* text accompanying notes 98-99.

32. This was the principle at work in the affirmative action case of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). In *Adarand Constructors*, the Court said that its cases

had established three general propositions with respect to governmental racial classifications. First, skepticism: “Any preference based on racial or ethnic criteria must necessarily receive a most searching examination.” Second, consistency: “[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,” . . . . And third, congruence: “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

*Id.* at 223-24 (holding unclear) (first alteration in original) (citations omitted). In the immigration context,

[w]hatever the rationales which support suspect class status in the context of state discrimination, those rationales must support it as well with respect to



*Graham v. Richardson*,<sup>33</sup> for example, the Court invalidated New York's civil service law, which limited eligibility in the state's civil service to citizens.<sup>34</sup> In striking down this law, the Court recognized the "State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'"<sup>35</sup> Employing strict scrutiny, the Court rejected New York's proffered justification because the civil service statute was not narrowly drawn so as to create a close nexus between the means chosen and the state's important and desired end of generating a defined political community. "The citizenship restriction sweeps indiscriminately," bringing within its discriminatory fold "the sanitation man, . . . the typist, . . . the office worker, as well as . . . the person who directly participates in the formulation and execution of important state policy."<sup>36</sup> In short, the statute seemed designed to protect and enhance the economic prospects of the dominant group at the expense of a vulnerable population. The use of strict scrutiny allowed the Court to unmask this invidious goal.

Given its desire to ensure that the state's reasons for discriminating against aliens are compelling and that "the means [employed by the state] be precisely drawn in light of the acknowledged purpose,"<sup>37</sup> we could have expected the Court to employ strict scrutiny when it reviewed a California statute that prohibited noncitizens from obtaining

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federal discrimination: "Aliens stand in the same position with respect to the federal government as they do with respect to the states. The same problem of stigma is involved. They are as effectively excluded from the political process at the national level. Indeed, given their greater vulnerability to hostile federal action, especially deportation, they are even less likely to adopt an overly political role. And aliens have suffered as long a history of purposeful unequal treatment at the hands of the federal government as they have at the hands of the states."

Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1105 n.250 (1994) (quoting Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 314).

33. 403 U.S. 365 (1971).

34. See *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973). Since *Graham* and *Sugarman*, the Court has used strict scrutiny to strike down several state laws that discriminated based on alienage. See, e.g., *Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984) (state cannot discriminate against aliens in licensing notaries); *Nyquest v. Mauclet*, 432 U.S. 1, 12 (1977) (state cannot discriminate against aliens in providing financial aid for higher education); *Examining Bd. of Eng'rs, Architects, & Surveyors v. Flores de Otero*, 426 U.S. 572, 606 (1976) (state cannot prevent aliens from being licensed as civil engineers); *In re Griffiths*, 413 U.S. 717, 718, 729 (1973) (state cannot prohibit aliens from becoming lawyers).

35. *Sugarman*, 413 U.S. at 642 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

36. *Id.* at 643 (citation omitted) (internal quotation marks omitted).

37. *Id.*

employment as peace officers, to determine whether this law was under- or overinclusive; whether it was mere rank economic protectionism, which had been disallowed in *Graham*; and whether the state could show that the law was necessary to achieve a compelling state interest. If the Court had used strict scrutiny, California's statute limiting peace officer positions to citizens would have been invalidated. Following dicta in *Sugarman v. Dougall*,<sup>38</sup> the Court in *Cabell v. Chavez-Salido*<sup>39</sup> concluded that California had a strong interest in reserving probation officer positions for citizens as part of the State's ongoing efforts "in establishing its own form of government."<sup>40</sup> Assuming, arguendo, that this state's interest was compelling, under strict scrutiny the statute should still have been struck down because it was not narrowly tailored to achieve the compelling end. The problematic nature of the state's case should have been revealed here, in the examination of the nexus between means and ends. At the time that plaintiffs were denied jobs as probation officers, the statutory definition of peace officer included some seventy positions, including "cemetery sextons, furniture and bedding inspectors, livestock identification inspectors, and toll service employees,"<sup>41</sup> as well as "individuals charged with enforcement of the alcoholic beverage laws, the food and drug laws, fire laws, . . . park rangers, [and] welfare-fraud or child-support investigators."<sup>42</sup> The sweeping nature of the law suggests that

California's statutory exclusion of aliens is fatally overinclusive and underinclusive. It bars aliens from employment in numerous public positions where the State's proffered justification has little, if any, relevance. At the same time, it allows aliens to fill other positions that would seem naturally to fall within the State's asserted purpose.<sup>43</sup>

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38. 413 U.S. 634 (1973).

39. 454 U.S. 432 (1982).

40. *Id.* at 438 (quoting *Sugarman*, 413 U.S. at 642).

41. *Id.* at 442, 450-51.

42. *Id.* at 443 (citation omitted).

43. *Id.* at 455 (Blackmun, J., dissenting). "Before 1961, California did not require any of its peace officers to be citizens." *Id.* at 451.

In 1961, without stating any rationale, "in one fell swoop, the legislature . . . applied the mandatory citizenship requirement to all the [peace officer] positions . . ." The legislature apparently made no attempt to include on the "peace officer" list all positions for which citizenship arguably might be relevant or to exclude all positions for which it plainly would be irrelevant.

*Id.* at 452 (citation omitted). This statute was "an unthinking and haphazard exercise of state power" that was both under- and overinclusive according to the dissent. *Id.* at 454. It was overinclusive because many of the "70 'peace officer' positions . . . 'cannot be considered members of the political community no matter how liberally that category is viewed.'" *Id.* (quoting *Chavez-Salido v. Cabell*, 490 F. Supp. 984, 987 (C.D. Cal. 1980)). It

Instead of applying strict scrutiny and striking down the law, the Court created a new, more deferential standard,<sup>44</sup> “conclud[ing] that strict scrutiny is out of place when the [citizenship] restriction primarily serves a political function.”<sup>45</sup> To determine which test to apply, the Court examines the nature of the state government’s purported interest.<sup>46</sup> In the Court’s perception, citizens and permanent resident aliens are functional equivalents when it comes to enjoying the state’s economic largesse and natural resources.<sup>47</sup> Therefore, the state needs no flexibility in distinguishing between citizens and permanent resident aliens in economic matters, and the Court can apply strict scrutiny to protect this discrete and insular minority. “[A]lthough citizenship is not a relevant ground for the distribution of economic benefits, it is a relevant ground for determining membership in the political community.”<sup>48</sup> Therefore, “in those areas the State’s exclusion of aliens need not ‘clear the high hurdle of “strict scrutiny,” because [that] would “obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship.””<sup>49</sup> Instead of holding that the formation of a

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was underinclusive because “California has long permitted aliens to teach in public schools, to be employed on public works, and to serve in most state, city, and county employment positions—all positions arguably within the political community.” *Id.*

44. *Id.* at 440 (majority opinion). When

a particular restriction on legally resident aliens serves political and not economic goals [it] is to be evaluated in a two-step process. First, the specificity of the classification will be examined: a classification that is substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. . . . Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to “persons holding state elective or important nonelective executive, legislative, and judicial positions,” those officers who “participate directly in the formulation, execution, or review of broad public policy” and hence “perform functions that go to the heart of representative government.”

*Id.* (citation omitted) (quoting *Sugarman*, 413 U.S. at 647).

45. *Id.* at 439 (“[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State’s constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.” (alterations in original) (quoting *Sugarman*, 413 U.S. at 648)).

46. *See, e.g., id.*

47. *Id.* at 437-38. For an examination of the now defunct “special public interest doctrine,” which had allowed states to discriminate against aliens in order to protect the state’s economic resources, see Scaperlanda, *Paradox of a Title*, *supra* note 23, at 1057-60.

48. *Cabell*, 454 U.S. at 438.

49. *Id.* at 439 (alteration in original) (quoting *Foley v. Connelie*, 435 U.S. 291, 295 (1978) (citation omitted)). This is true only if Professor Gunther’s dicta, *see* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972), which was rejected by the Court in *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), is accurate. That is, the Court’s statement that applying strict scrutiny would “obliterate the

political community is a compelling interest and judging to ensure that the means chosen are necessary to achieve that end, the Court changes the game plan, lowering the standard.

When we move from state to federal discrimination on alienage grounds, the Court's perception of the need for political branch flexibility grows to the point of completely obliterating the rights of the individual alien. In language eerily reminiscent of an infamous nineteenth century membership case in which the Court said that blacks,<sup>50</sup> "whether emancipated or not, . . . had no rights or privileges but such as those who held the power and the Government might choose to grant them,"<sup>51</sup> the Court has said that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>52</sup> Under

distinctions between citizens and aliens," *Cabell*, 454 U.S. at 439 (quoting *Foley*, 435 U.S. at 295 (citation omitted)), would only be true if strict scrutiny truly was "strict" in theory and fatal in fact," Gunther, *supra*, at 8. This dilemma faced by the Court in *Cabell* illustrates my thesis that the Court boxed itself in by its categorical approach. See *infra* Parts II, III.

50. I use the word "black" here rather than "African-American" because a vital point of the *Dred Scott* case was to reject the idea that blacks, even free blacks, were members of the American (U.S.) political community. According to the Court, they were not American. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 454 (1857), *superseded* by U.S. CONST. amend. XIV, § 1.

51. *Id.* at 405. Some contemporary scholars continue to follow *Dred Scott*, maintaining the view that membership in a political community means everything and that non-members are owed no respect or dignity save that given by the grace of political community. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 74 (1980) ("Citizenship . . . is a concept in political—not biological—theory."). "[A]ll people who fulfill the dialogic and behavioral conditions have an unconditional right to demand recognition as full citizens of a liberal state." *Id.* at 88 (emphasis omitted). But "the fate of noncitizens will be an appropriate subject for majoritarian politics." *Id.* at 71. This troubling view rejects The Declaration of Independence's proposition that all human beings have certain inalienable rights. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."); see also Abraham Lincoln, Speech on the *Dred Scott* Decision at Springfield, Illinois (June 26, 1857), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS: 1832-1858, at 390, 398 (Don E. Fehrenbacher ed., 1989) ("[The Founders] defined with tolerable distinctness, in what respects they did consider all men created equal—equal in 'certain inalienable rights, among which are life, liberty and the pursuit of happiness.' . . . They meant to set up a standard maxim for free society."); Pope John Paul II, *Post-Synodal Apostolic Exhortation: Ecclesia in America* pt. 57 (Jan. 22, 1999), [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_exhortations/documents/hf\\_jp-ii\\_exh\\_22011999\\_ecclesia-in-america\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_22011999_ecclesia-in-america_en.html). ("This dignity is common to all, without exception, since all have been created in the image of God.")

52. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (upholding the denial of entry without a hearing for the alien wife of an American soldier on national security related grounds). No hearing was granted on the ground that the hearing itself would compromise national security. *Id.* For more on Knauff's plight, see ELLEN RAPHAEL KNAUFF, *THE ELLEN KNAUFF STORY* (1952); Charles D. Weisselberg, *The*

this reasoning even an alien who had lived a “life of unrelieved insignificance”<sup>53</sup> for more than a quarter of a century in Buffalo, New York, could be detained indefinitely on Ellis Island without a hearing upon attempting to reenter the country.<sup>54</sup>

Perceiving no need for federal governmental flexibility to treat noncitizens differently from citizens in the criminal justice system, the Court has held that aliens are entitled to the same constitutional rights as citizens before criminal punishment can be imposed.<sup>55</sup> But, outside of the criminal procedure arena, the Court has placed its imprimatur upon a wide range of congressional and executive decisions that violate domestic constitutional norms and would be found unconstitutional but for the Court’s perception that the political branches of the federal government need a great deal of flexibility in dealing with noncitizens.<sup>56</sup> Rejecting *Graham* and *Sugarman*’s use of strict scrutiny, the Court in *Mathews v. Diaz* upheld federal legislation that employed alienage discrimination to deny some permanent resident aliens federal welfare benefits<sup>57</sup> and assumed that Congress and the president had the power to prohibit aliens from receiving jobs in the federal civil service.<sup>58</sup> The Court has

*Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955-64 (1995).

53. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 219 (1953) (Jackson, J., dissenting).

54. *See id.* at 214-15 (majority opinion); *see also* Weisselberg, *supra* note 52, at 955-57.

55. *See* *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). The Court has held, however, that an alien sitting in a United States prison is not entitled to the Fourth Amendment’s exclusionary rule protection for a search conducted in Mexico. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-75 (1990); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 912 (1991); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* *United States v. Verdugo-Urquidez?*, 56 MO. L. REV. 213, 224 (1991).

56. *See* *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (“The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government.”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 563 (1990) (“Institutional constraints, especially the judiciary’s sensitivity to its limited factfinding capability and attenuated electoral responsibility, make courts reluctant to issue a constitutional command to the political branches of government.”).

57. *See* *Mathews v. Diaz*, 426 U.S. 67, 83-85 (1976); *see also* *Soskin v. Reinertson*, 353 F.3d 1242, 1256-57 (10th Cir. 2004) (holding that a state does not violate the Constitution when it cuts some legal aliens from welfare roles when it has the federal government’s permission).

58. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976). In *Hampton*, the Court invalidated the Civil Service Commission rule that restricted employment in the federal civil service to citizens on the ground that the commission “has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies.” *Id.* at 114. Following the *Hampton* decision, President Ford, through an executive order, reinstated the ban on alien employment in

also deferred to the political branches, sanctioning the discriminatory exclusion and/or deportation of aliens on the basis of race,<sup>59</sup> speech,<sup>60</sup> and gender.<sup>61</sup> One could contend that in cases such as these the Court ought to employ strict scrutiny to ensure that the federal government is not engaged in invidious discrimination against this discrete and insular minority, and that its lines are narrowly drawn to serve compelling state interests. When the federal government excludes or deports an alien on grounds of race, speech, or gender, the First and Fifth Amendments supply additional grounds for heightened judicial review of such action.<sup>62</sup>

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the competitive civil service, and this order was upheld by lower courts. See *Vergara v. Hampton*, 581 F.2d 1281, 1286-87 (7th Cir. 1978); *Santin Ramos v. U.S. Civil Serv. Comm'n.*, 430 F. Supp. 422, 424-25 (D.P.R. 1977); *Mow Sun Wong v. Hampton*, 435 F. Supp. 37, 44-46 (N.D. Cal. 1977), *aff'd sub nom.* *Mow Sun Wong v. Campbell*, 626 F.2d 739 (9th Cir. 1980).

59. *E.g.*, *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (“If . . . the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed . . .”); *Fong Yue Ting*, 149 U.S. at 730-32 (upholding the expulsion of Chinese citizens). *The Chinese Exclusion Case* is still cited as authoritative precedent today. See, *e.g.*, *Soskin*, 353 F.3d at 1255; *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 685-86 (6th Cir. 2002); *Hall v. INS*, 253 F. Supp. 2d 244, 248 (D.R.I. 2003). These cases and race-based immigration policies have come under heavy criticism. See, *e.g.*, Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257, 260-64 (2000); Kevin R. Johnson, *The Antiterrorism Act, The Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833, 843 (1997); Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 347-51 (2001).

60. *E.g.*, *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972) (upholding exclusion based on political opinion); *Galvan v. Press*, 347 U.S. 522, 528-32 (1954) (upholding deportation because of prior membership in Communist Party); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92 (1952) (same); see also Johnson, *supra* note 59, at 841-69; Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1, 39-41 (2002).

61. *E.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 68-73 (2001) (upholding a citizenship statute that treats the father-child relationship less favorably than the mother-child relationship); *Fiallo v. Bell*, 430 U.S. 787, 797-800 (1977) (upholding a law that treated the relationship between a natural mother and her offspring more favorably than the relationship between a natural father and his offspring for immigration purposes). See generally Cornelia T. L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1; Erin Chlopak, Comment, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship Law*, 51 AM. U. L. REV. 967 (2002).

62. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). Justice Marshall, in his *Fiallo* dissent, said: “The class of citizens denied

Despite multiple reasons for applying heightened scrutiny, the Court chooses to defer to the federal government's political branches in these cases.

So, why the shift in standard? Are aliens less likely to suffer invidious discrimination at the hands of the federal government? Are our national leaders more virtuous than our state leaders, and, therefore, in less need of scrutiny from the judiciary? Or, is something else at play? As with the political function exception to strict scrutiny in the state alienage cases, the Court is very clear that the level of scrutiny depends not upon the type of classification but on the nature of the governmental action and the perceived need for governmental flexibility:

[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.<sup>63</sup>

Recognizing that *Graham* "provide[d] the strongest support for [the aliens'] position,"<sup>64</sup> the Court found *Graham's* use of strict scrutiny inapplicable in a case involving federal discrimination against aliens.

*Graham*

involve[d] significantly different considerations because it concern[ed] the relationship between aliens and the States rather than between aliens and the Federal Government.

Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. . . . [W]hereas, a comparable classification by the Federal

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the special privilege of reunification in this country is defined on the basis of two traditionally disfavored classifications—gender and legitimacy. Fathers cannot obtain preferred status for their illegitimate children; mothers can." *Fiallo*, 430 U.S. at 809 (Marshall, J., dissenting). For a look at Justice Marshall's alienage jurisprudence, see Michael Scaperlanda, *Justice Thurgood Marshall and the Legacy of Dissent in Federal Alienage Cases*, 47 OKLA. L. REV. 55 (1994).

63. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (footnote omitted). "This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Fiallo*, 430 U.S. at 792 (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

64. *Mathews*, 426 U.S. at 84.

Government is a routine and normally legitimate part of its business.<sup>65</sup>

*Mathews v. Diaz* “illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.”<sup>66</sup> Explicitly recognizing that the standard of review changes with the government’s interest, the Court continued:

Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.<sup>67</sup>

It may seem obvious to the informed observer that the political branches of the federal government need more flexibility when interfacing with noncitizens than do the state governments,<sup>68</sup> but what is interesting for the purposes of this Article, is how the Court formulates doctrine to bring this distinction to life given *Graham*’s classification of aliens as a discrete and insular minority. Strict scrutiny, with the aura of “‘strict’ in theory and fatal in fact,”<sup>69</sup> proved too rigid to accommodate the federal government’s recognized interest in regulating the admission,

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65. *Id.* at 84-85 (footnote omitted). “[I]t is not ‘political hypocrisy’ to recognize that the Fourteenth Amendment’s limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.” *Id.* at 86-87. *But see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-24 (1995) (“Despite lingering uncertainty in the details, however, the Court’s cases through *Croson* had established three general propositions with respect to governmental racial classifications. . . . [T]hird, congruence: ‘Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.’” (citations omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976))).

66. *Mathews*, 426 U.S. at 81.

67. *Id.* at 81-82 (footnotes omitted).

“[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.”

*Id.* at 81 n.17 (alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) (footnote omitted)).

68. Although it may seem obvious today that the federal government has almost exclusive jurisdiction in alienage cases, no specific constitutional text gives it control over immigration, and it did not legislate in the immigration area until 1875. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1835-40 (1993). Prior to that time, states regulated immigration. *See id.*

69. Gunther, *supra* note 49, at 8.



exclusion, and deportation of noncitizens.<sup>70</sup> In response, the Court simply ignored its own characterization and applied a more deferential standard, ignoring the possibility that the federal government was behaving in an invidious manner toward a vulnerable and often marginalized population.<sup>71</sup> What the Court has done explicitly in the alienage context, it has also done throughout equal protection and, to a lesser extent, substantive due process jurisprudence.<sup>72</sup> When the Court perceives the need for governmental flexibility, it employs a more deferential scrutiny, even if this entails sacrificing its own previously stated criteria. In the next section, I explore this phenomenon.

## II. CATEGORICAL BALANCING: A RETROSPECTIVE

During the late 1930s and the early 1940s, a chastised Court held that in an ordinary case, the Court would defer to the judgment of the political arms of government, upholding laws that were rationally related to a legitimate governmental interest.<sup>73</sup> The burden was placed on the one challenging the law to demonstrate that either the end was not legitimate or the means chosen were not rational.<sup>74</sup> Before life was totally drained from *Lochner v. New York*<sup>75</sup> and its progeny, however, the Court hinted at the dawning of a new era of judicial creativity. While most ordinary legislation and regulation would be met by the judiciary with a presumption of constitutionality,<sup>76</sup> the Court suggested that “more searching judicial inquiry” would be appropriate in some cases, including those involving “prejudice against discrete and insular minorities [because such prejudice] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>77</sup>

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70. See *supra* note 67 and accompanying text.

71. See Johnson, *supra* note 59, at 850-57; Weisselberg, *supra* note 52, at 954-64.

72. See *infra* notes 257-71 and accompanying text.

73. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938) (upholding a law prohibiting the interstate transportation of skimmed milk disguised to imitate milk or cream).

74. See, e.g., *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398, 414 (1947) (“In the absence of some compelling evidence that the [National Labor Relations] Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest.”), *superseded by statute*, 29 U.S.C. § 159(b)(3) (2000).

75. 198 U.S. 45 (1905).

76. See, e.g., *Carolene Prods.*, 304 U.S. at 152-53.

77. *Id.* at 153 n.4. Footnote four has sparked much scholarly commentary. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75-77, 151-53 (1980); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Milner S. Ball, *Judicial Protection of Powerless Minorities*, 59 IOWA L. REV. 1059, 1059-64 (1985); Lea Brilmayer, *Carolene, Conflicts and the Fate of the “Insider-Outsider,”* 134 U. PA. L. REV. 1291 (1986); Robert M. Cover, *The*

Additionally, the Court intimated a “narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”<sup>78</sup> In these cases, the burden would be on the government to show that its legislative or regulatory end was compelling and that the means it chose were necessary to achieve the compelling end.<sup>79</sup>

For one attempting to challenge or defend state action on equal protection or substantive due process grounds, the critical question becomes: into what category does my case fall—the ordinary one with its corresponding deference to the political actors or those special categories begging for more searching judicial review? In this two—later expanded to three—tiered system, all interesting and relevant balancing of individual and state interests is done by the Court in its decision to categorize the case as one subject to rational basis, intermediate scrutiny, or strict scrutiny review. Once the case is assigned a category, a nearly mechanical application ensues, with the result virtually preordained.<sup>80</sup>

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*Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L. J. 1287, 1289-1309 (1982); Noel T. Dowling, *The Methods of Mr. Justice Stone in Constitutional Cases*, 41 COLUM. L. REV. 1160, 1176-77 (1941); Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 20-21 (1942).

78. *Carolene Prods.*, 304 U.S. at 152 n.4.

79. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality opinion) (subjecting a “facially content-based restriction on political speech in a public forum” to strict scrutiny review); *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (applying strict scrutiny to laws infringing upon certain unenumerated rights); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to classifications harming discrete and insular minorities).

80. See Jeffrey M. Shaman, *Essay: Constitutional Interpretation: Illusion and Reality*, 41 WAYNE L. REV. 135, 138 (1994) (“Categories posit differences of kind, rather than differences of degree, and they purport to make bright-line delineations.”); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992) (“Thus, in true categorical fashion, two-tier review generally decides cases through characterization at the outset, without the need for messy explicit balancing. The classification [system] at the threshold cuts off further serious debate: ‘this is an x case and therefore the government (or rightholder) wins.’”); see also Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 SUPREME CT. ECON. REV. 75, 76 (2004) (“The most casual examination of [*Grutter* and *Lawrence*] reveals a certain level of deep irony about them. For many years it has been assumed that setting the appropriate level of review was a matter of constitutional destiny.”); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 945 (2004) (“Tiered scrutiny was held together by the idea that courts could detect which legislative or executive actions were presumptively void, and subject them to searching inquiry . . .”).

*A. Equal Protection: Classification Based on Personal Characteristics*

The Court's strict scrutiny jurisprudence in the equal protection arena is built upon an understanding that, at its core, the Fourteenth Amendment's Equal Protection Clause was meant to end state-sanctioned discrimination against racial minorities.<sup>81</sup> Since there are no relevant reasons to classify in such a way as to harm racial minorities and no relevant reasons to classify in such a way as to benefit Caucasians, the Court created a particularly stringent standard for reviewing governmental classifications that harm racial minorities.<sup>82</sup> In arriving at this heightened standard of review, the Court considered several centuries of racial injustice, the stigmatic harm associated with racial discrimination, and the relative power imbalance between the majority race and racial minorities.<sup>83</sup> In short, it considered the invidiousness of governmental classifications that harm racial minorities. But precisely because it could think of no or almost no noninvidious reasons for using racial criteria in such a way as to impose burdens on racial minorities, the Court could afford to impose a high and rigid burden of justification on the government. In other words, the strict scrutiny standard can be used because the government requires no flexibility in maneuvering in this arena as it develops and implements policy.

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81. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 290 (1964) (Goldberg, J., concurring) (“[I]t is an inescapable inference that Congress, in recommending the Fourteenth Amendment, expected to remove the disabilities barring Negroes” . . .); *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879) (“What is [the Fourteenth Amendment] but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color?”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1873) (“[A]nd on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.”); Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 *FORDHAM L. REV.* 485, 486 (1991) (“The fourteenth amendment restructured basic law by recognizing and accounting for a class of citizens that had been slighted in the original drafting process and demeaned by subsequent jurisprudence.”).

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

83. See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that heightened scrutiny follows history of discrimination, immutability of defining characteristics, and political powerlessness); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954) (finding stigmatic harm).

Problems and questions with this methodology arose almost immediately.<sup>84</sup> Should strict scrutiny be employed when the discrimination is arguably benign and designed supposedly to help racial minorities?<sup>85</sup> What should count as unconstitutional action by state actors? And, could the work of judicially mandated equality through the use of heightened scrutiny be employed to protect other identifiable discrete and insular minorities from supposedly invidious discrimination by the government?

As the period of widespread overt official discrimination against racial minorities came to close, it seemed likely, given human nature, that governmental actors and bodies would continue to discriminate either covertly or subconsciously.<sup>86</sup> If intent to discriminate is too hard to prove in a period of more subtle prejudice, should discriminatory impact be used as a proxy for intent? The Court, however, was unwilling to draw such an inference, stating that although “[d]isproportionate impact is not irrelevant, . . . it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”<sup>87</sup>

When confronted with the very real possibility of covert or subconscious racism, the Court had to balance the possibility of and potential harm caused to an individual or group by this particularly hideous type of invidious discrimination against the need for governmental flexibility in drawing lines in the course of ordinary and

84. See *Korematsu*, 323 U.S. at 216-18. *Korematsu* was the first case to use the strict scrutiny language, upholding Japanese internment on national security grounds. See *id.*

85. For discussion of affirmative action, see *infra* Part III.B.

86. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (“It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals.”); *McCleskey v. Kemp*, 481 U.S. 279, 334 (1987) (Brennan, J., dissenting) (“[s]ubtle, less consciously held racial attitudes’ continue to be of concern . . . .” (citation omitted) (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986))); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”); cf. R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 847 (2004) (“Racial stigma, more than intentional discrimination or theories of unconscious racism, provides a frame for understanding the stubborn persistence of racism and racial inequality in this country.”).

87. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (citation omitted). To determine when a facially neutral statute ought to receive strict scrutiny the Court has developed a multi-factored test, which includes, as one factor, disparate impact. See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

legitimate policy making.<sup>88</sup> With the tiered system of categorization, this balancing occurred sub silentio. Once the Court assessed the strength of the competing interests, traditional categorization forced it to assign the case, and all similar cases, to one of two rigid categories. The doctrinal test for that category would then be applied mechanically, with the outcome pre-ordained by the initial categorical assignment.

In *Washington v. Davis*<sup>89</sup> and subsequent cases, the Court concluded that, on balance, maintaining governmental flexibility and discretion in regulating outweighed the need to protect racial minorities from secret and hard to detect vestiges of racism in our political bodies.<sup>90</sup> In *Davis*, which upheld the use of a civil service exam for police officers despite its effect of disproportionately disqualifying blacks from service on the police force, the Court said:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.<sup>91</sup>

And, in *McCleskey v. Kemp*,<sup>92</sup> which upheld a death sentence despite evidence (the Baldus study) that blacks who are convicted of killing whites have a disproportionately high possibility of receiving the death penalty,<sup>93</sup> the Court held that “[a]s legislatures necessarily have wide

88. See, e.g., *Davis*, 426 U.S. at 239-48.

89. 426 U.S. 229 (1976).

90. See *McCleskey v. Kemp*, 481 U.S. 279, 290-91 (1987); *Davis*, 426 U.S. at 246-48.

91. *Davis*, 426 U.S. at 248. In positing the slippery slope, the Court cited Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972), and William Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972).

92. 481 U.S. 279 (1987).

93. *Id.* at 290-91. “As did the Court of Appeals, we assume the study is valid statistically without reviewing the factual findings of the District Court.” *Id.* at 291 n.7. The dissent envisioned a conversation between McCleskey and his attorney:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims in Georgia are 4.3 times as likely to be sentenced to death as defendants charged with killing blacks. . . . Finally, the assessment would not be complete without the information that cases involving black defendants and white victims

discretion in the choice of criminal laws and penalties, and as there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment, we will not infer a discriminatory purpose on the part of the State of Georgia” from the fact that a black defendant accused of killing a white victim has the highest chance of receiving the death penalty.<sup>94</sup>

Although other factors may have contributed to the Court’s decision to categorize disparate impact cases as noninvidious and, therefore, not subject to microscopic judicial examination, it is clear that the political branches’ need for flexibility and discretion remained paramount in the Court’s collective mind. In a two-tiered system, applying strict scrutiny in this context would raise the cost of governing to intolerable levels; or so the Court concluded.

This same need for flexibility in governing permeates the Court’s venture into protecting other suspect and quasi-suspect classes. Having concluded that overt racial discrimination against minorities was invidious and should be subject to strict scrutiny review, the Court decided that its work could be expanded to protect other discrete and insular minorities from harmful majoritarian impulses.<sup>95</sup> Under the two-

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are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim.

*Id.* at 321 (Brennan, J., dissenting) (citations omitted).

94. *Id.* at 298-99 (majority opinion) (citation omitted). The desire to preserve the state’s flexibility and discretion appeared to be of paramount concern in the Court’s rejection of the strict scrutiny standard or even the more nuanced approach of *Batson v. Kentucky*, 476 U.S. 79 (1986). See *McCleskey*, 481 U.S. at 297 (“Implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused. The unique nature of the decisions at issue in this case also counsels against adopting such an inference from the disparities indicated by the Baldus study.”); *id.* at 314-15 (“McCleskey’s claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system. . . . [I]f we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.” (citations omitted)); *id.* at 315-17 (“[T]he claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender. Similarly, since McCleskey’s claim relates to the race of his victim, other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges.” (footnotes omitted)). In the area of jury selection, the Court has placed a greater emphasis on ensuring that competing interests are given voice in claims of discriminatory use of preemptory strikes. See *Batson*, 476 U.S. at 93-98. Justice Brennan’s dissent argued that the same consideration of competing interest that occurs with challenges to preemptory strikes should occur during sentencing. See *McCleskey*, 481 U.S. at 337 (Brennan, J., dissenting).

95. See, e.g., *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

tiered system of review, getting classified as a discrete and insular minority meant everything in any ensuing constitutional litigation. Receiving the discrete and insular minority label meant that the government could not single you out for adverse treatment without showing that its classification was narrowly tailored to achieve a compelling state interest.<sup>96</sup> Being placed outside this label meant that the state could use your characteristics to classify, even if it meant imposing upon you a unique burden or denying you some benefit that others received, so long as some rational basis existed for the classification.<sup>97</sup>

By what criteria would the Court judge whether a minority was discrete and insular? To arrive at its stated criteria, the Court attempted to decipher the characteristics that counseled in favor of judicial intervention in the political process when a law classified in such a way as to burden racial minorities.<sup>98</sup> It settled roughly upon three: history of discrimination, political powerlessness, and immutability of the defining characteristic.<sup>99</sup> I argue that three decades of heightened scrutiny in nonrace equal protection cases expose this reasoning as merely a hollow cover for another agenda—placing a liberal egalitarian gloss on our Constitution through judicial fiat. When this proved impossible under the regime of categorical balancing, the Court abandoned rigid adherence to the categorical system in favor of a system of ad hoc balancing. We see this manifest in the cases in two ways: (a) by the Court's classification of women and aliens as suspect or quasi-suspect classes although they lack one or more of the characteristics necessary, according to the Court's criteria, for inclusion in the group of discrete and insular minorities, and (b) the exclusion of certain other groups, i.e., the mentally retarded, who much more clearly possess the requisite characteristics.

First, neither women nor aliens fit neatly into the category of discrete or quasi-discrete and insular minorities by the criteria established by the

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96. *See id.* at 642-43.

97. *See, e.g.,* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313-14 (1976).

98. *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

99. *See, e.g.,* *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENT. 375, 376 (1986); Simon, *supra* note 28, at 133-39 (providing a history of the characteristics used to identify suspect classes—including the Rodriguez characteristics—and analyzing whether various groups often thought of as suspect actually meet the characteristics); *see also* *Toll v. Moreno*, 458 U.S. 1, 23 (1982) (Blackmun, J., concurring) (political powerlessness); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (plurality opinion) (immutability of the defining characteristic); *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) (history of discrimination).

Court. While it is true that one's sex is immutable<sup>100</sup> and that for much of this country's history women have lived and labored under a myriad of legal and cultural barriers, it is difficult to argue that women, who comprise a majority of the population, are so politically powerless as to require the judiciary's protection.<sup>101</sup> Classifying aliens generically as discrete and insular is even more suspect. Aliens can become United States citizens in three to five years after receiving permanent residency,<sup>102</sup> thus rendering this characteristic mutable in time. Aliens are also not a discrete homogenous class that has a history of suffering at the hands of the majority population. Certainly some aliens—Chinese, Irish, Italians, and Mexicans for example—have experienced a history of discriminatory treatment.<sup>103</sup> But, other aliens—British, other immigrants from northern Europe, and Cubans fleeing Castro in the 1960s—have experienced a much more welcoming posture upon arrival in the United States.<sup>104</sup> And, although aliens lack the franchise, some groups of aliens have citizen surrogates who vote or advocate their interests.<sup>105</sup>

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100. *But see* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 99 (1995) (“[S]exual equality jurisprudence must abandon its reliance upon biology in favor of an underlying fundamental right to determine gender independent of biological sex.”).

101. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 575 (1996) (Scalia, J., dissenting) (“It is hard to consider women a ‘discrete and insular minorit[y]’ unable to employ the ‘political processes ordinarily to be relied upon,’ when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.” (alteration in original)); ELY, *supra* note 77, at 164-67; Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education: United States v. Virginia and Virginia Military Institute*, 6 SETON HALL CONST. L.J. 999, 1009-12 (1996). *But see* *Frontiero v. Richardson* 411 U.S. 677, 685-87 (1973) (plurality opinion) (recounting a history of formal legal discrimination against women, acknowledging “that the position of women in America has improved markedly in recent decades, [and concluding that] women still face pervasive, although at times more subtle, discrimination” (footnotes omitted)).

102. 8 U.S.C. § 1430(c) (2000), *amended by* 8 U.S.C.A. § 1430(a) (West Supp. 2005) (explaining that aliens can become United States citizens in five years or three years if the alien is married to a United States citizen).

103. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893) (upholding a congressional act mandating that a Chinese alien can only use a White witness to prove his residency); *see also* PHILIP PERLMUTTER, *DIVIDED WE FALL* 124-26, 187-90, 195-96, 222 (1992) (discussing the historical treatment of the Chinese, Italians, and Mexicans).

104. PERLMUTTER, *supra* note 103, at 247, 281 (discussing northern European and Cuban immigrants); Tracy Fujimoto, Comment, *Elian Doesn't Live Here Anymore: One Little Boy in the Maze of U.S. Immigration & Family Law*, 23 HAW. L. REV. 249, 253-54 (2000).

105. *See, e.g.*, Mexican American Legal Defense and Education Fund, About Us, <http://maldef.org/about/index.htm> (last visited Sept. 20, 2005) (defining its mission to “foster sound public policies, laws and programs to safeguard the civil rights of the 40 million Latinos living in the United States”); The Asian Pacific American Legal Center, <http://apalac.org> (last visited Sept. 20, 2005) (seeking “[t]o advocate for civil rights, provide



Second, the Court has refused to provide special judicial protection to members of other groups who more clearly fit the Court's criteria of a discrete and insular minority.<sup>106</sup> And, the Court's reasoning of who is in and who is out has been faulty and incoherent at best. *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>107</sup> a case in which the Court refused to treat the mentally retarded as a suspect or quasi-suspect class,<sup>108</sup> illustrates my arguments. Justice Marshall, dissenting in relevant part, uses the Court's stated criteria to make a convincing case for applying intermediate scrutiny in cases where the government has used mental retardation as the basis for classification.<sup>109</sup>

Immutability of the characteristic? Yes! Political powerlessness? Check! The mentally retarded are no less politically powerless, and in many ways more so, than racial minorities and women.<sup>110</sup> History of discrimination? Check! "[T]he mentally retarded have been subject to a 'lengthy and tragic history' of segregation and discrimination that can only be called grotesque."<sup>111</sup> Marshall continued:

Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded . . . Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded

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legal services and education, and build coalitions to positively influence and impact Asian Pacific Americans and to create a more equitable and harmonious society").

106. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985).

107. 473 U.S. 432 (1985).

108. *Id.* at 435.

109. See *id.* at 469-70 (Marshall, J., concurring in the judgment in part and dissenting in part).

110. See *id.* at 464 ("As of 1979, most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials."). Additionally, even with the franchise it seems almost too obvious to state that the ability to fundraise and organize will never be on par with those with full mental capacity in their ability to fundraise and organize.

111. *Id.* at 461 (citation omitted) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978) (plurality opinion)).

children from them. State laws deemed the retarded “unfit for citizenship.”<sup>112</sup>

Given the fact that mental retardation might be a relevant defining characteristic for some governmental action—the government needs some flexibility in dealing with the mentally retarded—Marshall would have applied intermediate scrutiny, not strict scrutiny.<sup>113</sup> “The fact that retardation may be deemed a constitutional irrelevancy in *some* circumstances is enough, given the history of discrimination the retarded have suffered, to require careful judicial review of classifications singling out the retarded for special burdens.”<sup>114</sup> Marshall argued that “careful review is required to separate the permissible from the invalid in classifications relying on retardation.”<sup>115</sup>

Despite its own criteria and Marshall’s compelling argument using that criteria, the Court refused to classify the mentally retarded as a suspect or quasi-suspect class for equal protection purposes.<sup>116</sup> Therefore, legislation and other governmental action that classifies based on mental retardation are subject merely to rational basis review.<sup>117</sup> In declining the invitation to apply heightened scrutiny, the Court focused on the undeniably relevant distinctions between the mentally retarded and others. “They are thus different, immutably so, in relevant respects . . . .”<sup>118</sup> Ignoring the dark history and refusing to use heightened scrutiny to test and probe individual cases of mental retardation classification, the Court reached the unsubstantiated conclusion “that governmental consideration of those differences in the vast majority of

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112. *Id.* at 461-63 (first alteration in original) (footnotes omitted); see also Marie Appleby, Note, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 3 B.C. THIRD WORLD L.J. 109, 112-17 (1987) (chronicling discrimination against the mentally retarded). The Court itself was not immune from the anthropological assumptions of Social Darwinian theory, adopting those assumptions in its substantive due process jurisprudence in *Lochner*. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”); see also *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393, 407 (1857) (stating that Blacks, whether free or slave, were “regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect”). If the Court succumbs in one era to the temptation to read into the Constitution the then currently fashionable theories about the nature of humanity, it would be foolish to think that the current Court is above such temptation.

113. *Cleburne Living Ctr.*, 473 U.S. at 469 (Marshall, J., concurring in the judgment in part and dissenting in part).

114. *Id.* at 470.

115. *Id.* at 469.

116. *Id.* at 435 (majority opinion).

117. See *id.* at 446.

118. *Id.* at 442.

situations is not only legitimate but also desirable.”<sup>119</sup> And, “merely requiring the legislature to justify its efforts [under heightened scrutiny] may lead it to refrain from acting at all” to the detriment of the mentally retarded.<sup>120</sup> “Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of *flexibility* and *freedom* from judicial oversight in shaping and limiting their remedial efforts.”<sup>121</sup>

In a move that conflicted with one of the reasons for using heightened scrutiny in gender cases, the Court also said that heightened scrutiny was not needed because “the legislative response, which [the Court assumed was positive,] could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”<sup>122</sup> In contrast, the plurality in *Frontiero v. Richardson*,<sup>123</sup> reasoned that heightened scrutiny was appropriate in gender cases partly because “over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. . . . Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”<sup>124</sup> Marshall’s dissent in *Cleburne* exposes this inconsistency: “It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.”<sup>125</sup> Referring to *Frontiero*, Marshall continued: “In an analysis the Court today ignores, the Court reached this very conclusion when it extended heightened

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119. *Id.* at 444. The Court knows that the legislation is legitimate and desirable because “a civilized and decent society expects and approves such legislation.” *Id.* Are we to conclude from this that while the society of the mid-1980s was civilized and decent, earlier generations that institutionalized and lobotomized the mentally retarded were not civilized and decent? By what criteria have they determined that society is civilized and decent? If society is now civilized and decent then why does the Court continue to use strict scrutiny to strike down laws that classify based on race, gender, sexual conduct?

120. *Id.*

121. *Id.* at 445 (emphasis added).

122. *Id.*

123. 411 U.S. 677 (1973).

124. *Id.* at 687-88 (plurality opinion) (footnotes omitted). *But see id.* at 692 (Powell, J., concurring) (“It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.”); RONALD DWORKIN, *FREEDOM’S LAW* 26-31 (1996).

125. *Cleburne Living Ctr.*, 473 U.S. at 466 (Marshall, J., concurring in the judgment in part and dissenting in part).

scrutiny to gender classifications and drew on parallel legislative developments to support that extension . . . .”<sup>126</sup>

In *Cleburne*, the Court also squarely faced the legislative and judicial nightmare that would be created if it took its own criteria (immutability, history of discrimination, and political powerlessness) for discreteness and insularity seriously.

[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . , it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.<sup>127</sup>

In the end, the need to provide the governing authorities room to maneuver in setting policy with respect to the mentally retarded and other potential discrete or quasi-discrete and insular minorities, led the Court to abandon any attempt to expand the list of suspect and quasi-suspect classes even if the individual litigant belonged to a class that had immutable characteristics, was politically powerless, and had a history of suffering discrimination at the hands of the majority. The need for government flexibility, not the recognized potential for invidious discrimination, has guided the Court’s categorization for equal protection purposes. Of course, this is not the totality of the *Cleburne* story or the end of the Court’s analysis. Part III will tell the rest of the story.

### *B. Fundamental Rights and Substantive Due Process*

A two-tiered system of categorical balancing also developed in the Court’s fundamental rights jurisprudence under the Equal Protection and Due Process Clauses.<sup>128</sup> Here, the tiered system seemed to serve the cause of legitimacy: did the Court have authority to protect unwritten rights and, if so, by what criteria would such rights be identified? Part of the concern here was the chastisement the Court had received over its

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126. *Id.* “[E]ven when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject.” *Id.* at 467.

127. *Id.* at 445-46 (majority opinion). Are the classes of aliens, women, or African-Americans any less large or amorphous?

128. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting).

substantive due process cases of the *Lochner* era.<sup>129</sup> In *Griswold v. Connecticut*,<sup>130</sup> the Court attempted to distance itself from this discredited period: “Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”<sup>131</sup> Elsewhere, the Court has said:

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.<sup>132</sup>

By categorizing a certain few liberties as fundamental and therefore worthy of heightened judicial protection, the Court could appear constrained by external and impersonal markers, limiting the possibility that the Justices would succumb to the temptation to usurp legislative authority.<sup>133</sup> According to the Court, “[o]ur Nation’s history, legal

129. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 132-37 (1993); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1436-38 (2001).

130. 381 U.S. 479 (1965).

131. *Id.* at 481-82 (citations omitted).

132. *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977); see also *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (“The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[W]e ‘ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.’ By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore ‘exercise the utmost care whenever we are asked to break new ground in this field,’ lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” (second alteration in original) (citations omitted) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

133. This temptation was foreseen by the founders. See *Essays of Brutus No. 11*, in *THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS* 81, 85 (David Wootton ed., 2003) (“[J]udges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favor it; and that they will do it, appears probable.”); Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 276, 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903) (“Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their

traditions, and practices thus provide[d] the crucial ‘guideposts for responsible decisionmaking,’” providing the Court with criteria for determining what liberties were fundamental.<sup>134</sup> The right to privacy “relating to marriage, procreation, contraception, family relationships, and child rearing and education” made up the bulk of these fundamental rights,<sup>135</sup> with their roots supposedly in the *Lochner* era cases of *Pierce v. Society of Sisters*<sup>136</sup> and *Meyer v. Nebraska*.<sup>137</sup>

Under this formula, when the Court determined that a governmental entity had attempted to restrict a fundamental right, it applied strict scrutiny, requiring the state to prove that the restriction was necessary to achieve a compelling state interest.<sup>138</sup> In other words, it bracketed the right deemed fundamental, limiting the right to self-governance, by placing the fundamental right beyond the reach of legislative action and democratic correction.<sup>139</sup> Where no fundamental right is at stake, judicial deference is given to the state, and the challenger is required to prove that the law is not “rationally related to legitimate government interests.”<sup>140</sup>

corps. . . . [T]heir power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control.”).

134. *Glucksberg*, 521 U.S. at 721 (quoting *Collins*, 503 U.S. at 125). The Court elaborated:

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” Second, we have required in substantive-due-process cases a “careful description” of the asserted fundamental liberty interest.

*Id.* at 720-21 (citations omitted).

135. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citations omitted).

136. 268 U.S. 510, 534-35 (1925) (striking down an act requiring parents or guardians to send children of a certain age to public schools because the act “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”).

137. 262 U.S. 390, 403 (1923) (striking down a Nebraska law banning the teaching of languages other than English prior to the eighth grade because the law is “arbitrary and without reasonable relation to any end within the competency of the State”).

138. *E.g.*, *Glucksberg*, 521 U.S. at 721 (stating that the government is forbidden “to infringe . . . ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest” (alteration in original) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))); *Roe*, 410 U.S. at 155 (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn . . . .” (citations omitted))).

139. See generally Michael A. Scaperlanda, *Replies to Professor Chemerinsky: In Defense of Representative Democracy*, 54 OKLA. L. REV. 38 (2001).

140. *Glucksberg*, 521 U.S. at 728.

Requiring that the right be deemed fundamental—that is, “deeply rooted in our legal tradition” as “a threshold . . . before requiring more than a reasonable relation to a legitimate state interest to justify the action . . . avoids the need for complex balancing of competing interests in every case”<sup>141</sup> and “tends to rein in the subjective elements that are necessarily present in due process judicial review.”<sup>142</sup> Much ink has been spilled and trees felled discussing the inconsistencies and incoherencies present in the Supreme Court’s substantive due process jurisprudence; therefore, I will remember, without restating, those arguments.

### III. JUDICIAL FORAYS INTO AD HOC BALANCING

To relieve its sense of claustrophobia brought on by the closedness of its categorical balancing, the Court began experimenting with ad hoc approaches fairly early.<sup>143</sup> Ad hoc balancing has allowed the Court to retain primacy of place for governmental flexibility while giving the Court itself more discretion to overturn state action where the Court saw no need for governmental flexibility in a particular instance but desired to protect what it saw as important liberty and equality interests. This move toward ad hoc balancing maximizes judicial power, allowing judges to make normative decisions about the relationship between the individual and the state on a case-by-case basis.

#### A. Early Forays

Although the Court declined to categorize the mentally retarded as a suspect or quasi-suspect class in *Cleburne*,<sup>144</sup> that was not the end of the story. “Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.”<sup>145</sup> But, the Court’s use of the rational

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141. *Id.* at 722.

142. *Id.*

143. *See* U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 529 (1973) (striking down federal food stamp provisions, which only allowed food stamps in households where all members were related, on the ground that the relatedness requirement was an irrational method for attempting to curb fraud). The Court said: “For if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group [hippies] cannot constitute a *legitimate* governmental interest.” *Id.* at 534.

144. *See supra* notes 107-11 and accompanying text.

145. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The Court further explained that “[t]his standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full

basis test in *Cleburne* more closely resembled the Court's test in *Lochner*<sup>146</sup> than *Williamson v. Lee Optical of Oklahoma, Inc.*<sup>147</sup> Citing *United States Department of Agriculture v. Moreno*,<sup>148</sup> the Court stated two broad principles for the application of this heightened form of rational basis scrutiny; the first pertaining to the means and the second to the ends of governmental action: (1) "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational";<sup>149</sup> and (2) "some objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests."<sup>150</sup> The Court framed the question: "May the city require the permit for this facility when other care and multiple-dwelling facilities are freely permitted?"<sup>151</sup> raising questions regarding the degree of under- and overinclusivity, factors which are normally not considered rigorously in rational basis review.<sup>152</sup> Placing the burden on the city, the Court said: "[T]he City never justifies

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potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner." *Id.*

146. *Lochner v. New York*, 198 U.S. 45, 57-58 (1905). The values protected by *Cleburne* were very different from the values protected by *Lochner*, but placing the burden on the state to prove rationality or reasonableness was similar. In *Lochner*, the Court could not imagine a maximum hour law being a health or safety regulation, and in *Cleburne*, it could not envision the zoning ordinance as a decision about property values. Cf. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996) (concluding that the city's concern for property values was a "poorly fitting but probably rational justification[>").

147. 348 U.S. 483, 487-88 (1955).

To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma, Inc.*

*Cleburne Living Ctr.*, 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (citations omitted).

148. 413 U.S. 528 (1973).

149. *Cleburne Living Ctr.*, 473 U.S. at 446. What happened to the presumption of constitutionality? Usually the Court doesn't probe and test to determine the degree of attenuation. See *supra* text accompanying notes 37-50.

150. *Cleburne Living Ctr.*, 473 U.S. at 446-47 (alteration in original) (citation omitted) (quoting *Moreno*, 413 U.S. at 534). What evidence is there of the state's mere desire to harm such a group? How does the Court know this? In short, it seems unlikely that the Court is acting in a judicial capacity here in making this determination unless it is implicitly drawing an inference from evidence or taking judicial notice.

151. *Id.* at 448.

152. See *Vance v. Bradley*, 440 U.S. 93, 108 (1979) ("Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this 'perfection is by no means required.'" (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960))).



its apparent view that other people can live under such “crowded” conditions when mentally retarded persons cannot.”<sup>153</sup> In finding the ordinance irrational, the Court concluded that “requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded.”<sup>154</sup>

Justice Marshall responded, observing that

[t]he Court, for example, concludes that legitimate concerns for fire hazards or the serenity of the neighborhood do not justify singling out respondents to bear the burdens of these concerns. . . . Yet under the traditional and most minimal version of the rational-basis test, “reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.”<sup>155</sup>

He continued: “The ‘record’ is said not to support the ordinance’s classifications, but under the traditional standard we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation.”<sup>156</sup> In short, it was clear that the Court was applying more scrutiny to the government’s actions in *Cleburne* than one would expect from a rational basis review.<sup>157</sup>

Marshall was building his argument partly on the back of *Plyler*, and its use of heightened scrutiny to strike down a Texas law that denied illegal

153. *Cleburne Living Ctr.*, 473 U.S. at 450 (quoting *Cleburne Living Ctr., Inc. v. City of Cleburne*, 726 F.2d 191, 202 (5th Cir. 1984)).

154. *Id.* The City offered several justifications for its ordinance, including “avoiding concentration of population and [] lessening congestion of the streets.” *Id.* If the Court had been applying minimum rational basis, it would have upheld the City’s decision. What the Court characterized as “the negative attitude of the majority of property owners . . . as well as . . . the fears of elderly residents of the neighborhood,” *id.* at 448, could have been characterized as permissible concern with property values. Discussing the city’s justifications for the statute, Professor Sunstein opines: “Unquestionably these concerns would satisfy ordinary rationality review as traditionally formulated. For purposes of that standard, it is not decisive—nor even relevant—that there was a poor fit between these ends and the means chosen by *Cleburne*.” Sunstein, *supra* note 146, at 61.

155. *Cleburne Living Ctr.*, 473 U.S. at 458 (Marshall, J., concurring in the judgment in part and dissenting in part) (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)).

156. *Id.* (citation omitted). “Finally, the Court further finds it ‘difficult to believe’ that the retarded present different or special hazards inapplicable to other groups. In normal circumstances, the burden is not on the legislature to convince the Court that the lines it has drawn are sensible; legislation is presumptively constitutional . . .” *Id.* at 459.

157. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 234 (1991) (citing *Cleburne*, Klarman says that “the last two decades of equal protection development are replete with instances in which the Court mouthed rationality language while surreptitiously substituting a heightened review standard, which sometimes was later openly espoused”); Sullivan, *supra* note 80, at 61 n.248 (“[D]e facto intermediate scrutiny occurs whenever the Court escalates nominal rationality review, see, e.g., *City of Cleburne* . . .” (citations omitted)).

alien children a free public education.<sup>158</sup> In *Plyler*, the Court rejected the use of strict scrutiny on the dual grounds that “[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country [is] in violation of federal law” and education is not a fundamental right.<sup>159</sup> But, rather than defer to the legislature’s judgment as would be the norm in the usual case, the Court decided that “[i]n determining the rationality of the law,”<sup>160</sup> it had to weigh the countervailing “costs to the Nation and to the innocent children who are [the law’s] victims.”<sup>161</sup> Given the stigmatic harm caused by this law, which “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status,”<sup>162</sup> the Court concluded that the law “can hardly be considered rational unless it furthers some substantial goal of the State.”<sup>163</sup> Using arguments from *Graham*, a strict scrutiny case,<sup>164</sup> the Court minimized Texas’s interest in reserving scarce educational dollars for those legally in the state by reminding the nation that the federal government, not the states, possesses the power to make alienage classifications.<sup>165</sup> Employing simple ad hoc balancing language, the Court concluded that “[i]t is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”<sup>166</sup>

The move away from categorical balancing was not confined solely to the equal protection field. In *Roe v. Wade*,<sup>167</sup> the Court decided that the fundamental right to privacy was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>168</sup> Employing strict scrutiny, the Court said that a state’s interest in

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158. *Cleburne Living Ctr.*, 473 U.S. at 469 (Marshall, J., concurring in the judgment in part and dissenting in part) (using *Plyler* to show that the Court’s “heightened-scrutiny precedents belie the claim that a characteristic must virtually always be irrelevant to warrant heightened scrutiny”).

159. *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

160. *Id.* at 223-24.

161. *Id.* at 224.

162. *Id.* at 223.

163. *Id.* at 224.

164. For a discussion of *Graham*, see *supra* notes 27-30 and accompanying text.

165. *Plyler*, 457 U.S. at 225 (“The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into [the alienage] field. But this traditional caution does not persuade us that unusual deference must be shown the classification embodied in [this law]. The States enjoy no power with respect to the classification of aliens.” (citation omitted)). Citing *Graham*, the Court said that “a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.” *Id.* at 227.

166. *Id.* at 230.

167. 410 U.S. 113 (1973).

168. *Id.* at 153.

maternal health is compelling after the first trimester<sup>169</sup> and that the State's interest in the life of the fetus became compelling at viability.<sup>170</sup> Early in her tenure on the Court, Justice O'Connor concluded that "[t]he *Roe* framework [was] clearly on a collision course with itself."<sup>171</sup> The rigid all or nothing approach inherent in categorical balancing needed to give way in the abortion context for two reasons. First, *Roe* requires "the State [to] continuously and conscientiously study contemporary medical and scientific literature in order to determine" the viability of particular regulations during any given point in the pregnancy.<sup>172</sup> "Assuming that legislative bodies are able to engage in this exacting task, it is difficult to believe that our Constitution *requires* that they do it as a prelude to protecting the health of their citizens."<sup>173</sup> Second, the trimester approach undervalued the state's interest in maternal health and fetal life. According to O'Connor, "the State possesses compelling interests in the protection of potential human life and in maternal health throughout pregnancy."<sup>174</sup> O'Connor proposed that an "'undue burden' [test be applied as a] threshold inquiry that must be conducted before this Court" applies strict scrutiny to an abortion regulation.<sup>175</sup> If no undue burden is present, the Court would apply a rational basis standard of review and defer to the legislative judgment.<sup>176</sup>

O'Connor's opinion in *Akron* did not address how she would resolve a regulation that unduly burdened access to an abortion. In fact, her framework seemed on a collision course with itself: when a woman's constitutional right to an abortion clashes with the state's compelling interest in protecting fetal life throughout pregnancy, who wins? Her answer came in the joint opinion in *Planned Parenthood of Southeastern*

169. *Id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling point' . . . is at approximately the end of the first trimester.").

170. *Id.*

171. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883 (1992).

172. *Id.* at 456.

173. *Id.* (footnote omitted). Justice O'Connor continued:

It is even more difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.

*Id.*

174. *Id.* at 461.

175. *Id.* at 463.

176. *Id.* at 453.

*Pennsylvania v. Casey*.<sup>177</sup> Reaffirming *Roe*'s holding that a woman has a constitutionally protected right to have an abortion,<sup>178</sup> the Court rejected *Roe*'s "rigid trimester framework"<sup>179</sup> and concluded that it "misconceive[d] the nature of the pregnant woman's interest[] [and] undervalue[d] the State's interest in potential life."<sup>180</sup> To reconcile these competing interests, the Court reaffirmed that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."<sup>181</sup> To grant greater flexibility for the state in regulating abortion, the Court adopted the undue burden rubric: "To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis . . . ."<sup>182</sup>

In *Casey*, the Court had determined that its rigid categorical balancing had taken too much maneuvering room away from the state. The undue burden test became a type of ad hoc balancing in the abortion context, protecting a woman's right to an abortion and providing a small measure of flexibility to the state to promote its interest in fetal life and maternal health, while continuing to locate ultimate power in the Court.<sup>183</sup>

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177. 505 U.S. 833 (1992).

178. *Id.* at 846 ("Roe's essential holding [includes] a recognition of the right of the woman to choose to have an abortion before viability . . .").

179. *Id.* at 873 (plurality opinion).

180. *Id.* at 875. "The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn . . ." *Id.* at 869.

181. *Id.* at 846 (majority opinion). Viability provided the critical line for two reasons. First, *Roe*'s holding on viability "was a reasoned statement, elaborated with great care." *Id.* at 870 (plurality opinion). Second, "viability . . . is the time at which there is a realistic possibility of maintaining . . . life outside the womb." *Id.* The Court acknowledged that it "must justify the lines [it] draw[s]. And there is no line other than viability which is more workable." *Id.* But see *Akron Ctr. for Reprod. Health*, 462 U.S. at 461 (O'Connor, J., dissenting) ("The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.").

182. *Casey*, 505 U.S. at 878 (plurality opinion).

183. See *Stenberg v. Carhart*, 530 U.S. 914, 920-22, 929-30 (2000) (exercising the Court's power to strike down a state statute prohibiting even late term partial-birth abortions on the grounds that the statute did not contain a health exception). Referring to its role in governing, the *Casey* Court said: "Their [the People] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals." *Casey*, 505 U.S. at 868; see also Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 674-75 (1995).

The *Casey* Court also articulated a new basis for finding and defining constitutionally protected liberty interests. Basing its understanding of liberty in philosophical notions of liberal autonomy, the Court opined: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>184</sup> “[I]ntimate and personal choices [based on these beliefs,] choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>185</sup> In 1992, one was left to wonder whether the move away from the rigid two-tier categorical balancing might provide the Court the necessary flexibility to protect a broader scope of autonomy based liberty interests utilizing the mystery of life passage’s expansive possibilities. This possibility seemed unlikely after the Court returned to its two-tier analysis in *Glucksberg*,<sup>186</sup> rejecting Judge Reinhardt’s use of the mystery passage to support a constitutional right to assisted suicide.<sup>187</sup> But, as we will see below, *Lawrence v. Texas*<sup>188</sup> reopens the door to these uncharted waters.<sup>189</sup>

### B. Grutter

With respect to affirmative action, it is well known that the Court spent seventeen years attempting to settle on a standard for reviewing the constitutionality of affirmative action programs.<sup>190</sup> In *City of Richmond v. J. A. Croson Co.*,<sup>191</sup> the Court finally decided that strict scrutiny was the appropriate level for reviewing state affirmative action programs under the Fourteenth Amendment.<sup>192</sup> A year later, the Court

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184. *Casey*, 505 U.S. at 851.

185. *Id.*

186. *See* *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997).

187. *Id.* at 726. Judge Reinhardt had concluded “[l]ike the decision of whether or not to have an abortion, the decision how and when to die is one of ‘the most intimate and personal choices a person may make in a lifetime,’ a choice ‘central to personal dignity and autonomy.’” *Compassion in Dying v. Washington*, 79 F.3d 790, 813 (9th Cir. 1996), *rev’d sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997). Judge Reinhardt continued: “Following the approach of the Court in *Casey*, we note that there is also an extensive body of legal, medical, and sociological literature, lending support to the conclusion that a prohibition on physician assistance imposes an onerous burden on terminally ill, competent adults who wish to hasten their deaths.” *Id.* at 835 (citation omitted) (footnotes omitted).

188. 539 U.S. 558 (2003).

189. *See infra* Part III.C.

190. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218-27 (1995).

191. 488 U.S. 469 (1989).

192. *Id.* at 494 (plurality opinion). The Court emphasized that although Congress was given constitutional authority to remedy past discrimination, states and their subdivisions were not given the same authority. *Id.* at 490. Thus, strict scrutiny was the appropriate standard of review for state actions because “strict scrutiny [would] ‘smoke out’

applied intermediate scrutiny in upholding the FCC's policy that gave minorities a station ownership preference.<sup>193</sup> Repudiating *Metro Broadcasting*, the Court in *Adarand Constructors* stated:

[T]he Court's cases through *Croson* had established three general propositions with respect to governmental racial classifications. First, skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination." Second, consistency: "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" . . . . And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.<sup>194</sup>

Enter Barbara Grutter, "a white Michigan resident" who was denied admission to the University of Michigan School of Law.<sup>195</sup> She filed suit, demanding that the University of Michigan justify the use of race as a criterion in its selection process pursuant to the tests set out in *Croson* and *Adarand Constructors*.<sup>196</sup> In response, the Court applied the veneer

illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* at 493.

193. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

194. *Adarand Constructors*, 515 U.S. at 223-24 (second alteration in original) (citation omitted). *But see Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) ("Although both Amendments require the same type of analysis . . . the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." (citation omitted) (footnote omitted)); Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 604-05 (1994) ("Section Five of the Fourteenth Amendment . . . may grant Congress an overriding interest in 'enforcing' the Fourteenth Amendment through affirmative action programs. Congressionally sponsored affirmative action is, therefore, subject to a lower level of scrutiny than similar action undertaken by a state or a political subdivision thereof." (footnote omitted)); Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 560 (1977) ("In a fifth amendment equal protection case, the basic rule of congruence with the fourteenth amendment does not require strict scrutiny of a federal statute when the interest at stake is one that derives from federalistic limits on the states.").

195. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

196. *Id.* at 316-17.

of its precedent: “We have held that all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’ This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”<sup>197</sup> The Court explained that it “appl[ies] strict scrutiny to all racial classifications to “smoke out” illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool”<sup>198</sup> because “[a]bsent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what ‘classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simply racial politics.”<sup>199</sup>

The veneer was transparent, however, revealing a “reflexive deference”<sup>200</sup> “antithetical to strict scrutiny.”<sup>201</sup> The Court first focused on the end or goal sought by the University of Michigan Law School, concluding that the school “has a compelling interest in attaining a diverse student body.”<sup>202</sup> My purpose is not to contest the validity of the Court’s conclusion, but to expose the methodology used in arriving at this conclusion:

- “Our scrutiny [of the law school’s ends] is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”<sup>203</sup>

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197. *Id.* at 326 (quoting *Adarand Constructors*, 515 U.S. at 227).

198. *Id.* (second alteration in original) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

199. *Id.* (quoting *Croson*, 488 U.S. at 493 (plurality opinion)).

200. *Id.* at 367 (Thomas, J., concurring in part and dissenting in part).

201. *Id.* at 362. “The Court bases its unprecedented deference to the Law School—a deference antithetical to strict scrutiny—on an idea of ‘educational autonomy’ grounded in the First Amendment.” *Id.* (quoting *id.* at 329 (majority opinion)). “The majority grants deference to the Law School’s ‘assessment that diversity will, in fact, yield educational benefits.’” *Id.* at 365 (quoting *id.* at 328 (majority opinion)). “Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.” *Id.* at 380; *see also id.* at 387 (Rehnquist, C.J., dissenting) (explaining that the Court used an “unprecedented display of deference under our strict scrutiny analysis”). “The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents.” *Id.* at 387 (Kennedy, J., dissenting). The Court’s “[d]eference is antithetical to strict scrutiny.” *Id.* at 394; *see also* Joel K. Goldstein, *Beyond Bakke: Grutter-Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 924 (2004) (“That judgment might be correct and appropriate. Yet it seems something of an oxymoron to claim to be using strict scrutiny even while confessing deference to the party being scrutinized. Indeed, the predicate of strict scrutiny is that the classification being used renders deference inappropriate.” (footnote omitted)).

202. *Grutter*, 539 U.S. at 328.

203. *Id.*

- “The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we *defer*.”<sup>204</sup>
- “Our holding today is in keeping with our tradition of giving a degree of *deference* to a university’s academic decisions, within constitutionally prescribed limits.”<sup>205</sup>
- “[G]ood faith’ on the part of a university is ‘presumed’ absent ‘a showing to the contrary.’”<sup>206</sup>

The Court’s deferential posture toward the means chosen by the law school to implement its goal of diversity is even more interesting than its deference toward the goal itself. To achieve diversity, the law school desired to have a “critical mass” of minority law students in each law school class.<sup>207</sup> In turn, a “critical mass” serves to (a): “promote[] ‘cross-racial understanding,’ [(b)] help[] to break down racial stereotypes, [(c)] ‘enable[] [students] to better understand persons of different races,’”<sup>208</sup> and (d) “encourage[] underrepresented minority students to participate in the classroom and not feel isolated.”<sup>209</sup> Diminishing racial “stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”<sup>210</sup> Here the Court deferred to the law school’s determination, “based on its experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”<sup>211</sup>

Even if the end—diversity—is compelling and the broad means chosen—achieving a critical mass—is necessary to achieve that end, the law school still retains the burden of establishing that its actual implementation is “‘narrowly framed to accomplish that purpose.’”<sup>212</sup> Narrow tailoring ensures “‘that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’”<sup>213</sup> A quota system fails constitutional muster as not narrowly tailored.<sup>214</sup> A nonquota system that does not evaluate

204. *Id.* (emphasis added).

205. *Id.* (emphasis added).

206. *Id.* at 330 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)).

207. *Id.* at 329.

208. *Id.* at 330 (fifth alteration in original).

209. *Id.* at 318.

210. *Id.* at 333.

211. *Id.*

212. *Id.* (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996), *rev’d sub nom.* *Hunt v. Cromartie*, 526 U.S. 541 (1999)).

213. *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

214. *Id.* at 334.



applicants as individuals will meet a similar fate.<sup>215</sup> In other words, “an applicant’s race or ethnicity [cannot be] the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”<sup>216</sup> Given this framework, the Court should have used strict scrutiny to test and probe the law school’s racially sensitive plus factor to smoke out the possibility that the admission policy was in actuality an illegitimate covert quota system or in some other way failed to be narrowly tailored to the compelling goal of diversity. But, the Court backed away from such a searching inquiry, saying that it needed to calibrate its inquiry for the special context of diversity in higher education.<sup>217</sup>

The dissents powerfully expose the Court’s language of strict scrutiny with its narrow tailoring as mere empty rhetoric. As Chief Justice Rehnquist pointed out, several troubling questions remain unanswered and would require a convincing explanation from the law school before one could rationally conclude that the school’s policy is narrowly tailored to the stated goal of diversity.<sup>218</sup>

- The law school never offered an explanation as to why it needed to admit between ninety-one and 108 African-Americans to achieve a “critical mass” while it only needed to admit between forty-seven and fifty-six Hispanics and thirteen to nineteen Native Americans to achieve critical masses for those two groups.<sup>219</sup>
- The law school never explained why there was such a strong correlation between the percentage of applicants in each minority group and the percentage of each group who were offered admission.<sup>220</sup>

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215. *Id.* at 336-37.

216. *Id.* at 337.

217. *Id.* at 334-35.

218. *See id.* at 386 (Rehnquist, C.J., dissenting) (“The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a ‘critical mass,’ but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool.”).

219. *Id.* at 381-82 (“If the Law School is admitting between 91 and 108 African-Americans in order to achieve ‘critical mass,’ thereby preventing African-American students from feeling ‘isolated or like spokespersons for their race,’ one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans. . . . Respondents have *never* offered any race-specific arguments explaining why significantly more individuals from one underrepresented minority group are needed in order to achieve ‘critical mass’ or further student body diversity.” (citations omitted) (footnote omitted)).

220. *Id.* at 383 (“[T]he correlation between the percentage of the Law School’s pool of applicants who are members of the three minority groups and the percentage of the admitted applicants who are members of these same groups is far too precise to be

- The law school never explained its disparate treatment of individuals among minority groups.<sup>221</sup>
- The law school never explained how it gave individual review to each applicant for the final twenty percent of the offers it made given its desire to obtain a critical mass of minorities.<sup>222</sup>
- In light of its precedent in *United States v. Virginia*,<sup>223</sup> the Court failed to articulate why the State of Michigan has a compelling interest in maintaining an elite law school.<sup>224</sup> In other words, the Court failed to explain why the law school should not be forced to choose between its desire to be elite and its commitment to diversity.<sup>225</sup>

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dismissed as merely the result of the school paying ‘some attention to [the] numbers.’” (second alteration in original); *id.* (“[T]he Law School’s disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of ‘critical mass’ is simply a sham.”).

221. *Id.* at 382 (“For example, in 2000, 12 Hispanics who scored between a 159-160 on the LSAT and earned a GPA of 3.00 or higher applied for admission and only 2 were admitted. Meanwhile, 12 African-Americans in the same range of qualifications applied for admission and all 12 were admitted.”).

222. *Id.* at 389 (Kennedy, J., dissenting). Justice Kennedy explained:

About 80% to 85% of the places in the entering class are given to applicants in the upper range of the Law School Admissions Test scores and grades. An applicant with these credentials likely will be admitted without consideration of race or ethnicity. With respect to the remaining 15% to 20% of the seats, race is likely outcome determinative for many members of minority groups. That is where the competition becomes tight and where any given applicant’s chance of admission is far smaller if he or she lacks minority status. At this point the numerical concept of critical mass has the real potential to compromise individual review.

*Id.*

223. 518 U.S. 515, 545-46 (1996). After noting the District Court’s findings that “‘some aspects of the [school’s] distinctive method would be altered’ if women were admitted [and] [t]hus, ‘sufficient constitutional justification’ had been shown . . . ‘for continuing [VMI’s] single-sex policy,’” *id.* at 524 (first and fifth alterations in original) (citations omitted) (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1412-13 (W.D. Va. 1991)), the Court nonetheless held that the state “‘has fallen far short of establishing the “exceedingly persuasive justification,” that must be the solid base for any gender-defined classification.” *Id.* at 546 (citation omitted) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 731 (1982)).

224. *Grutter*, 539 U.S. at 356 (Thomas, J., concurring in part and dissenting in part). Justice Thomas noted that “[r]acial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.” *Id.* at 350.

225. *Id.* at 361 (“The interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions ‘standards’ that, in turn, create the Law School’s ‘need’ to discriminate on the basis of race.”). Without providing reasons, the Court concluded that “[n]arrow tailoring does [not] require . . . a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.” *Id.* at 339 (majority opinion). Noting the number of states without public law schools (five) and the number of states

- The Court failed to articulate why it took away the University of Michigan's incentive to seek race-neutral alternatives for achieving the desired critical mass of minority students.<sup>226</sup>

The evidence is overwhelming that, despite its protestations to the contrary, the Court did not use traditional strict scrutiny in reviewing the University of Michigan Law School's race-based admissions policy. Feigning strict scrutiny, the Court, by recalibrating contextually, engaged in a form of ad hoc balancing. The Court balanced the individual's constitutionally recognized right to be treated by the state as a person and not merely as a member of a racial group<sup>227</sup> against the state's asserted interest in obtaining a racially diverse class without forfeiting its elite status.<sup>228</sup> "Context matters" says the Court.<sup>229</sup> The context contained three factors that tipped the scales away from race neutrality. First, this case, like *Plyler*<sup>230</sup> and *Brown v. Board of Education*,<sup>231</sup> involved

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without elite public law schools (forty-six) together with the facts that less than a third of the law school's students are from Michigan and less than a fifth will stay in Michigan, Justice Thomas concluded that "there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school." *Id.* at 357-60 (Thomas, J., concurring in part and dissenting in part). According to Thomas, "the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways." *Id.* at 361. Justice Scalia found particularly unanswerable [this] central point: that the allegedly "compelling state interest" at issue here [was] not the incremental "educational benefit" that emanate[d] from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

*Id.* at 347 (Scalia, J., concurring in part and dissenting in part).

226. *Id.* at 362 (Thomas, J., concurring in part and dissenting in part) ("[T]he Court ignores the fact that other top law schools have succeeded in meeting their aesthetic demands without racial discrimination."). "The sky has not fallen at Boalt Hall at the University of California, Berkeley, for example," where race-based admissions factors are prohibited. *Id.* at 367. "Apparently the Law School cannot be counted on to be as resourceful." *Id.* The Court acknowledges that "[u]niversities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop." *Id.* at 342 (majority opinion). But, the Court provides them no incentive to do so, at least for the next twenty-five years. *See id.* at 343.

227. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298-99 (1978) (plurality opinion); *De Funis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) ("A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions.").

228. *Grutter*, 539 U.S. at 328.

229. *Id.* at 327.

230. 457 U.S. 202, 205 (1982). *But see Rodriguez v. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4-5 (1973).

education; university education to be specific. And, the Court finds in the First Amendment a measure of “educational autonomy,” concluding that “universities occupy a special niche in our constitutional tradition.”<sup>232</sup> Second, the benefits of a diverse class “are not theoretical but real [because the] global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”<sup>233</sup> And third, “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>234</sup> Balancing these interests against the harm visited upon a person deemed unworthy of admission based largely on a racial criterion, the Court deferred to the law school and concluded that this “dangerous” tool of racial classification would be allowed for the next twenty-five years.<sup>235</sup>

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231. 347 U.S. 483, 493 (1954) (“Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

232. *Grutter*, 539 U.S. at 329. The dissent wondered why the deference given to Michigan Law School because of its standing as an elite educational institution was not extended to the Virginia Military Institute in *United States v. Virginia*, 518 U.S. 515 (1996). See *Grutter*, 539 U.S. at 366 (Thomas, J., concurring in part and dissenting in part) (“[I]n *Virginia*, where the standard of review dictated that greater flexibility be granted to VMI’s educational policies than the Law School deserves here, this Court gave no deference.”).

233. *Id.* at 330 (majority opinion). *But see id.* at 347 (Scalia, J., concurring in part and dissenting in part) (“If properly considered an ‘educational benefit’ at all, it is surely not one that is either uniquely relevant to law school or uniquely ‘teachable’ in a formal educational setting.”). For a discussion/debate regarding ideological and religious diversity in law schools, see Brian Leiter, *The Law School Observer*, 6 GREEN BAG 2D 421, 421-22 (2003) (defending the ideological balance by making an analogy between the lack of alchemists on science faculties and the lack of religious conservatives on law faculties), and John O. McGinnis & Matthew Schwartz, *Conservatives Need Not Apply*, WALL. ST. J., Apr. 1, 2003, at A14 (“America splits evenly between the GOP and Democrats, but 74% of the [law] professors contribute primarily to Democrats. Only 16% do so to Republicans.”).

234. *Grutter*, 539 U.S. at 332. “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.” *Id.*

235. *See id.* at 343. In a further sign of deference, unexpected in the application of strict scrutiny, the Court said: “We take the Law School at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.” *Id.*

### C. *Lawrence v. Texas*

Lower courts had split over whether homosexuals should be classified as a discrete or quasi-discrete and insular minority.<sup>236</sup> Given its reluctance to add additional groups to this preferred status,<sup>237</sup> the Supreme Court dodged the issue, using ad hoc balancing—or heightened rational basis—in the equal protection context to review and strike down a Colorado constitutional amendment that prohibited state entities from granting a privileged protected status to homosexuals.<sup>238</sup>

In *Lawrence v. Texas*,<sup>239</sup> the Court expanded the use of ad hoc balancing to the substantive due process arena. Under the guise of rational basis review, the Court overruled *Bowers v. Hardwick*,<sup>240</sup> concluding that participation in homosexual sodomy is a protected liberty interest.<sup>241</sup> Under the old two-tiered system, liberty interests were divided into two categories: fundamental rights and the infinite number of other claims of liberty.<sup>242</sup> Upon determining that the right at stake was fundamental, the Court would protect the right, insulating it from the political process. The state could only interfere with the protected liberty if it proved that its restriction was necessary to achieve a

236. See, e.g., *Watkins v. U.S. Army*, 875 F.2d 699, 724-28 (9th Cir. 1989) (holding that homosexuals are a suspect class); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 436-40 (S.D. Ohio 1994) (analyzing whether homosexuals are a suspect class and ultimately determining that the group is a quasi-suspect class), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996); *Dean v. District of Columbia*, 653 A.2d 307, 349-51 (D.C. 1995).

237. See *supra* notes 107-27 and accompanying text (discussing *Cleburne*).

238. See *Romer v. Evans*, 517 U.S. 620, 620, 624 (1996); see also Richard F. Duncan, *Wigstock and the Kulturkampf: Supreme Court Storytelling, The Culture War, and Romer v. Evans*, 72 NOTRE DAME L. REV. 345, 355 n.54 (1997) (discussing the effect *Romer* might have on forcing organizations to abandon their conscience to accommodate homosexuals); Lino A. Graglia, *Romer v. Evans: The People Foiled Again by the Constitution*, 68 U. COLO. L. REV. 409, 416 (1997) (“To the extent that the State and its municipalities gave homosexuals special protection, Amendment 2 merely returned the State to a position of neutrality by removing that special protection.”); Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS, May 1998, at 34, 34-38 (examining the motives behind those who supported Colorado’s Amendment 2 in order to determine the true purpose of the Amendment); Steven D. Smith, *Conciliating Hatred*, FIRST THINGS, June/July 2004, at 17, 21 (“Moral disapproval of conduct, such as homosexual acts, is equated with hostility toward and hatred of persons who engage in that conduct, and even of persons with a proclivity to engage in it, whether they actually do so or not.”). *But see* Brief of Laurence H. Tribe et al. as Amici Curiae in Support of Respondents at 1, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), 1995 WL 17008432 (arguing that Colorado’s Amendment 2 is a “per se” constitutional violation). Thus, automatic strict scrutiny would apply.

239. 539 U.S. 558 (2003).

240. 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

241. *Lawrence*, 539 U.S. at 578.

242. See *id.* at 593.

compelling state interest.<sup>243</sup> In all other cases—dealing with the myriad non-protected liberty interests—the Court would defer to the political process, striking down the state’s action only if the challenger proved that the state was not acting in a way that was rationally related to the state’s legitimate ends.<sup>244</sup>

The Court changed its methodology in *Lawrence* in two significant ways. First, it used a heightened form of rational basis review rather than strict scrutiny to strike down Texas’s sodomy prohibition.<sup>245</sup> Viewing the community’s moral foundation as either irrational or an illegitimate basis for state action, the Court summoned *Cleburne*’s rhetorical legacy with phrases such as “born of animosity,”<sup>246</sup> “stigma,”<sup>247</sup> “demeans the lives of homosexual persons,”<sup>248</sup> and “[t]he State cannot demean their existence”<sup>249</sup> to conclude that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>250</sup> Traditional rational basis would have led the Court to defer to the state’s policy choices when exercising its recognized power to regulate for the benefit of the community’s health, safety, and morals.<sup>251</sup> “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable’—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.”<sup>252</sup>

243. *See id.*

244. *See supra* notes 76-80 and accompanying text.

245. *See Lawrence*, 539 U.S. at 578.

246. *Id.* at 574.

247. *Id.* at 575.

248. *Id.*

249. *Id.* at 578.

250. *Id.*

251. *See, e.g., S.C. State Highway Dep’t v. Barnwell Bros., Inc.*, 303 U.S. 177, 190-91 (1938); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (“[T]he liberty safeguarded [by the due process clause] is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.”); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 471 (1888) (“The police powers comprehend all those general powers of internal regulation necessary to secure peace, good order, health, comfort, morals, and quiet of all persons, and the protection of all property in the State.”).

252. *Lawrence*, 539 U.S. at 599 (citation omitted) (Scalia, J., dissenting). “State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. . . . The impossibility of distinguishing homosexuality from other traditional ‘morals’ offenses is precisely why *Bowers* rejected the rational basis challenge.” *Id.* at 590; *see also* 1 WILL DURANT, *THE STORY OF CIVILIZATION: OUR ORIENTAL HERITAGE* 30 (1935); 2 MICHEL FOUCAULT, *THE USE*

But, at least with respect to homosexual conduct, the Court concluded that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>253</sup> It remains to be seen whether this conclusion “effectively decrees the end of all morals legislation,”<sup>254</sup> although its logic tends strongly in that direction. More likely, the Court will not follow its own logic. Instead, it will use its new found freedom of ad hoc balancing to pick and choose the liberty interests that it will protect against government and communal encroachment.

Second, in resurrecting *Casey*'s mystery passage, *Lawrence* jettisoned the methodology of earlier substantive due process cases, which had attempted to ascertain whether the restricted liberty belonged to a small class of fundamental rights deeply rooted in our history and tradition.<sup>255</sup> It is no coincidence that these two moves—toward ad hoc balancing and toward judicial protection of certain liberty interests not labeled fundamental—occur at the same point in history. The use of ad hoc balancing provides the Court some elbow room, allowing it to overturn government action on a case-by-case basis while leaving it free to uphold the government's action when government flexibility is deemed desirable, all without rigidly identifying, categorizing, and separating protected from unprotected liberty interests. With the increased flexibility inherent in ad hoc balancing, the line between protected and unprotected freedom can be much more porous.

The logic of the Court's modern substantive due process cases had been problematic from its inception. In a fit of thinly disguised judicial legerdemain, the Court in *Griswold v. Connecticut*<sup>256</sup> pretended that it was not engaged in substantive due process at all, suggesting, instead,

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OF PLEASURE 15 (Robert Hurley trans., Random House 1985); Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475, 475-76 (2002) (“Across cultures and throughout history, the answer to this question has been yes. Even today, a vast majority of ‘tolerant’ Americans would agree that the state can go beyond regulating or expressing disfavor and legitimately prohibit . . .”).

253. *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)) (holding that “Justice Stevens’ analysis . . . should control here”).

254. *Id.* at 599 (Scalia, J., dissenting).

255. See *supra* note 13; see also *Washington v. Glucksberg*, 521 U.S. 702, 710-16 (1997) (examining the history of assisted suicide); *Bowers*, 478 U.S. at 196-97 (Burger, C.J., concurring) (recounting the history of homosexuality); *Roe v. Wade*, 410 U.S. 113, 129-47 (1973) (describing the history of abortion).

256. 381 U.S. 479 (1965).

that it was teasing penumbras and emanations from the Bill of Rights.<sup>257</sup> In *Eisenstadt v. Baird*,<sup>258</sup> the Court seemed to suggest that freedom to fornicate is deeply rooted in our nation's history.<sup>259</sup> And, in *Roe*, the Court, despite the historical record, concluded that the fundamental right to privacy was broad enough to encompass a mother's right to terminate her pregnancy,<sup>260</sup> leading the late John Hart Ely to describe *Roe* as "a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law."<sup>261</sup> Having weathered a storm of criticism and attempts to overturn or limit *Roe*,<sup>262</sup> the Court has established itself, at least for the time being, as the chief purveyor of not only our constitutional law but also our constitutional ideals.<sup>263</sup>

The Court faced a dilemma, however, in its quest to expand constitutionally protected freedoms because it could not convincingly expand this list using the fairly strict formula of the fundamental rights regime. If it were to attempt to give effect to the desires of "persons in every generation [to] invoke [the Constitution's] principles in their own search for greater freedom,"<sup>264</sup> its criteria could not be the old backward looking criteria, which asked if the freedom was deeply rooted in our history and tradition. Instead, it would need forward looking criterion, using contemporary sources to gage the direction of freedom's future. Rejecting the requirement that a liberty interest be "deeply rooted in our

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257. *Id.* at 484. For a more honest assessment, see *Poe v. Ullman*, 367 U.S. 497, 515-22 (1961) (Douglas, J., dissenting). In *Griswold*, the Court wanted to distance itself from *Lochner*. See *Griswold*, 381 U.S. at 482 ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."). But, by engaging in blatant policy-making untethered to the Constitution itself in *Griswold* and subsequent substantive due process cases, the Court appeared unconcerned that it was stripping the citizenry of its vital liberty in self-governance. See Scaperlanda, *supra* note 139, at 43-44.

258. 405 U.S. 438 (1972).

259. *Id.* at 453 ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.").

260. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

261. John Hart Ely, *Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973) (footnotes omitted).

262. See ABORTION AND THE CONSTITUTION app. 1, at 265-68 (Dennis J. Horan, Edward R. Grant, Paige C. Cunningham eds., 1987) (summarizing Supreme Court decisions on abortion); Ely, *supra* note 261, at 947-49.

263. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) ("Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.>").

264. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).



legal tradition” before it receives heightened judicial protection,<sup>265</sup> the Court concluded “that our laws and traditions in the past half century are of most relevance here.”<sup>266</sup> Referring to decisions of the European Court of Human Rights, various state courts, and scholarly criticism of *Bowers*, the Court found “an emerging awareness” that private sexual contact between adults ought to be among the activities receiving constitutional protection.<sup>267</sup> This double-switch,<sup>268</sup> to use a baseball metaphor, has poised the Court for a new generation of constitutional jurisprudence as the Court begins to work through the implications of “its famed sweet-mystery-of-life passage.”<sup>269</sup>

#### IV. CONCLUSION: JUDICIAL LICENSURE AND THE COURT’S FAIRLY EXPLICIT ANTHROPOLOGY

The shift toward ad hoc balancing would lead, according to Justice Marshall, to an “unaccountab[ility] for [the Court’s] decisions employing, or refusing to employ, particularly searching scrutiny.”<sup>270</sup> More recently, Justice Scalia reached a similar conclusion: “[T]he Court simply describes petitioners’ conduct as ‘an exercise of their liberty’—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”<sup>271</sup>

265. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

266. *Lawrence*, 539 U.S. at 571-72.

267. *Id.* at 571-73.

268. The Court is using a double-switch by moving from categorical to ad hoc balancing and moving from protecting fundamental rights deeply rooted in our nation’s history and tradition to protecting rights birthed from an “emerging awareness” in Europe and among American intellectuals that certain freedoms ought to receive judicial protection.

269. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting). Justice Scalia elaborated: [The mystery passage] “casts some doubt” upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s “right to define” certain concepts; and if the passage calls into question the government’s power to regulate *actions based on* one’s self-defined “concept of existence, etc.,” it is the passage that ate the rule of law.

*Id.*

270. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

271. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting). For initial views from scholarly commentators, see Epstein, *supra* note 80, at 77-78 (“[T]he combined impact of [*Lawrence* and *Grutter*], no matter how construed, shakes the structure of modern constitutional law to its intellectual roots. . . . When the dust settles, the best explanation for what the Court has done is to revive, in the area of social rights, much of the traditional view of the somewhat misnamed laissez-faire constitutionalism.”), Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 67 (2003) (“This approach to interpreting the Constitution promises to achieve

To develop a roadmap, even if only a crude one, of where the Court might be driving its equal protection and substantive due process jurisprudence as it frees itself from the limitations self-imposed by categorical balancing, it is important to delve beneath the surface and explore the anthropological vision fueling its engine. As Professor John Coughlin has said: “[E]very system of law reflects certain assumptions about what it means to be human. The law interacts with these anthropological assumptions, with the result that, over the course of time, the law influences society’s understanding of what a human being is and ought to be.”<sup>272</sup> *Casey*’s mystery passage provides the clearest articulation of this Court’s jurisprudential anthropology. To repeat the now familiar mantra: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>273</sup> For a brief moment the Court minimized this language as a source of constitutional meaning. Judge Reinhardt and the Ninth Circuit had relied on the mystery passage to strike down Washington’s ban on assisted suicide.<sup>274</sup> In overturning the Ninth Circuit and referring to the mystery passage, the Court said: “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . .”<sup>275</sup>

In light of *Glucksberg*, was the mystery passage “merely reckless dicta, [the] rhetorical flourish[] of justices who let their inner poet or inner philosopher out to play from time to time”?<sup>276</sup> One astute commentator thought not, reminding that “dicta have a way of insinuating themselves

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a more universal understanding of liberty and equality and a more comprehensive embodiment of the principles expressed in the Declaration of Independence.”), and Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 4 (2005) (arguing that *Lawrence* and *Grutter* “fortify, rather than aim to dismantle, social hierarchies of race, sexuality, class, and gender”).

272. John J. Coughlin, *Pope John Paul II and the Dignity of the Human Being*, 27 HARV. J.L. & PUB. POL’Y 65, 74-75 (2003) (footnote omitted).

273. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). One observer recently commented that “[t]he ‘sweet mystery’ passage with which Kennedy concludes his privacy discussion is an embarrassing muddle.” Richard D. Mohr, *The Shag-A-Delic Supreme Court: “Anal Sex,” “Mystery,” “Destiny,” and the “Transcendent” in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 365, 379 (2004).

274. *Compassion in Dying v. Washington*, 79 F.3d 790, 813 (9th Cir. 1996), *rev’d sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997).

275. *Glucksberg*, 521 U.S. at 727 (citation omitted).

276. Richard J. Neuhaus, *Rebuilding the Civil Public Square*, 44 LOY. L. REV. 119, 125 (1998).

into later jurisprudence. . . . I believe such dicta deserve the closest attention, for they reveal the underlying assumptions of the Court—or at least of some on the Court—about the relationship between law and moral judgment.<sup>277</sup> Close attention was deserved because in *Lawrence*, the mystery passage, with its anthropological assumptions, took center stage in the Court’s reasoning.<sup>278</sup>

What are these anthropological assumptions? The mystery passage provides us with our new national creed,<sup>279</sup> our constitutionally mandated public “creation story”—or, more accurately, “existence story”—in which each individual is an autonomous self-creator. In this story, there is no objectively knowable origin of humanity, no objectively knowable purpose to life, no objectively knowable personal and communal goods, and no objectively knowable destination toward which those goods should tend. In creating and recreating, defining and redefining the self,<sup>280</sup> the individual is free to adopt or reject the received wisdom from history, culture, family, and community. This new creed serves, for the time being, the cause of the secularist liberal state.<sup>281</sup>

277. *Id.*

278. *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003). The “deeply entrenched” *Casey* anthropology serves as the foundation for, and does much of the important work in, our communities’ public arguments about moral questions. We—or, at least, many of us—think about the person, and about her rights and duties, and about her very nature, in *Casey*’s terms, and the fact that *Casey*’s anthropology provides the scaffolding for our arguments cannot help but affect the conclusions we reach and solutions we offer.

Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 541, 555 (2003).

279. Our old national creed was reflected in The Declaration of Independence: “We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

280. Some question whether this process of authentic self-creation is even possible. See, e.g., John Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 6 (1998) (“*Casey* assumes that there are no givens in life—that our persons are our own creations, and always open to recreation. . . . It is not at all clear, though, that we have this capacity or that it can do the work its proponents assign to it. . . . In fact, some say, it is [our preferences, desires, and appetites] that drive us, not we them.” (footnotes omitted)); RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 87 (1989) (“[N]onintellectuals would . . . be commonsensically nominalist and historicist. So they would see themselves as contingent through and through, without feeling any particular doubts about the contingencies they happened to be. . . . They would feel no more need to answer the question[] ‘Why are you liberal?’ . . . than the average sixteenth-century Christian felt to answer the question ‘Why are you a Christian?’”).

281. I use the term “secularist” as opposed to “secular” to describe the liberal project espoused by *Casey* and other recent Supreme Court decisions because the “secularist” state marginalizes the potential public significance of peoples’ religious beliefs. A “secular” state, by contrast, does not adopt and impose a particular religious orthodoxy, but it provides room in the public square for a robust pluralism in which people of any or

Paradoxically, the mystery passage's anthropological assumptions destroy the intellectual and moral foundations of the liberal project itself. In a world of self-definers and self-creators, there is no accessible "criterion for wrongness."<sup>282</sup> As Rorty persuasively argues, insisting "on contingency, and our consequent opposition to ideas like 'essence,' 'nature,' and 'foundation,' makes it impossible for us to retain the notion that some actions and attitudes are naturally 'inhuman.'"<sup>283</sup> In this world, where the public concept of the human being is very thin, we must abandon "the idea that liberalism could be justified, and Nazi or Marxist enemies of liberalism refuted, by . . . argument[]." <sup>284</sup> Liberalism itself, as Maritain noted a half century ago, is susceptible to its own form of illiberal totalitarianism.<sup>285</sup> Today we witness the death of freedom for some in the name of freedom for others. Nurses have to resign their positions because they are not free to follow their consciences when it comes to refusing to dispense the morning-after pill abortifacient.<sup>286</sup> Doctors and lawyers are forced against conscience to engage in activities deemed morally objectionable in the name of the patient/client's

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no faith can bring their whole selves, including their core, to bear in their participation in the public life of the nation. The "liberal" project can be defined as

a world in which the right to "be oneself," to choose oneself, is placed in a special and privileged position; in which expression is favored over self-control; in which achievement is valued over inborn or inherited traits and in which achievement is defined in subjective, personal terms, rather than in objective, social terms.

LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE* 3 (1990) (emphasis omitted). Neuhaus explains the ramifications of the secularist state built upon *Casey's* anthropology and logic:

In its own intellectually stumbling way, the notorious mystery passage of *Casey* and the accompanying opinion pose the radical proposition that our polity has but two players. On the one hand is the autonomous, unencumbered individual, and on the other is the Court, the sole source of governmental legitimacy and ultimate authority.

Neuhaus, *supra* note 276, at 131.

282. RORTY, *supra* note 280, at 20, 75.

283. *Id.* at 189.

284. *Id.* at 53.

285. JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 91-93 (John J. Fitzgerald trans., 1947). The specter of illiberality rears its ugly head in Bruce Ackerman's early work. See ACKERMAN, *supra* note 51, at 79-81 ("The rights of the talking ape are more secure than those of the human vegetable."). For my critique of Ackerman, see Michael A. Scaperlanda, *Immigration Justice: A Catholic Christian Perspective*, 1 J. OF CATHOLIC SOC. THOUGHT 535, 543 (2004). Professor James Dwyer advocates stripping parents of their right to raise their children, placing ultimate parental responsibility in Big Brother. See JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* (1998); JAMES G. DWYER, *VOUCHERS WITHIN REASON* (2001). For my review of *Vouchers Within Reason*, see Michael A. Scaperlanda, *Producing Trousered Apes in Dwyer's Totalitarian State*, 7 TEX. REV. L. & POL. 175 (2002).

286. See Jannell McGrew, *Contraception Policy Criticized*, MONTGOMERY ADVERTISER, June 26, 2004, at 1A.

freedom.<sup>287</sup> Catholic Charities is forced, against conscience and religious freedom, to include contraceptive coverage in its health care package for employees.<sup>288</sup>

Without a foundation—without a thick conception of the human person—the judiciary will “feel”<sup>289</sup> its way through substantive due process and equal protection cases.<sup>290</sup> And, by moving toward a system of ad hoc balancing, the Court has maximized its ability to govern on the great cultural questions of our generation from its liberal egalitarian anthropology. “[L]iberal egalitarians care about human freedoms. People should be free to pursue their own projects . . . . In addition, liberal egalitarians are committed to equal opportunity [and] keep[ing] actual economic, social and political inequalities as small as possible . . . .”<sup>291</sup> *Lawrence* depicts the Court’s liberal tack while *Grutter* depicts its egalitarian tack.

Even if it is able to sustain an aura of legitimacy for its self-proclaimed role as cultural architect, the Court’s *Casey* jurisprudence is not viable in the long term. History teaches that without an adequate anthropology,

287. Eleanor W. Myers, “Simple Truths” About Moral Education, 45 AM. U. L. REV. 823, 825-26 (1996) (“The bar’s approach implies an ethic of obedience rather than personal responsibility. It discourages students from understanding that they have significant power to choose and create a legal identity that is congenial with their personal orientation and their values.” (footnote omitted)). See generally Judith F. Daar, *A Clash at the Bedside: Patient Autonomy v. A Physician’s Professional Conscience*, 44 HASTINGS L.J. 1241 (1993).

288. See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 73 (Cal.), cert. denied, 125 S. Ct. 53 (2004).

289. “Feel” as opposed to “think critically and analytically.” See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

290. The Court’s starting point, as seen through the prism of the Court’s plenary power doctrine in the alienage jurisprudence, seems to be Walzerian particularist rather than universalist liberalism. See Bosniak, *supra* note 32, at 1068 (“Walzer’s analysis of the political community’s ‘membership sphere’ has become the paradigm organizing concept for virtually all normative treatments of immigration law and policy, whether or not the substance of his views is actually embraced.”). Employing a Walzerian particularist position, the Court grants rights only to those who are members and partial members. Walzer’s theories contrast those of the universalist or cosmopolitanist who believe in a global view of rights. Thus, rights are not based on membership, but rather on status as a rights bearing human being. See, e.g., ACKERMAN, *supra* note 51, at 4-5, 100.

291. Joseph H. Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in FREE MOVEMENT 25, 26 (Brian Barry & Robert E. Goodin eds., 1992) (footnote omitted).

grounded in something beyond our own self-creation, our quest for liberty will give way to darker impulses embedded in human nature.<sup>292</sup>

What is the alternative to the Court's current anthropology? My answer is that we should take a fresh look at our founding document and its implications for the future of liberty and equality in America. Its anthropology is summed up in words that every school child learns: "We hold these truths to be self-evident; that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."<sup>293</sup> The great challenge for the next generation will be to bring the Declaration's anthropology to life in a truly pluralistic liberal state that recognizes and privileges the Declaration's thick conception of the human person.

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292. This certainly is the lesson of the twentieth century with Stalinist Soviet Union and Nazi Germany.

293. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

