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# The Right to Equal Protection

## 14th Amendment

# Racial discrimination by states

- Separate-but-equal doctrine prevailed for > 50 years
  - Government could enforce racial segregation of public accommodations, such as hotels and railroads
- Legal challenges to "separate but equal" emerged in 1930s
  - The National Association of Colored People (NAACP) first challenged racial segregation in graduate schools (e.g., law schools) on the grounds that the they were not *actually* equal
    - States could either end racial segregation *OR* spend resources to upgrade institutions of higher education for Black students
      - The NAACP won four cases in higher education from 1938 to 1950
        - » They then decided to challenge racial segregation in primary and secondary schools

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# SCHOOL SEGREGATION

# *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

- Facts
  - Black children were denied admission to White schools in Kansas, South Carolina, Virginia, and Delaware
    - Each state had racial segregation in its public school system
  - On behalf of these children (including Brown), the NAACP sued these states
    - They argued that "segregated public schools are not 'equal' and cannot be made 'equal' and that hence they are deprived of the equal protection of the laws"
- Issue
  - Does the racial segregation of public education violate the Equal Protection clause of the 14th Amendment?

# *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

- Holding (9-0)
  - Yes, racial segregation of public schools is unconstitutional
- Reasoning
  - The unanimous majority (Justice Warren) held that "separate educational facilities are inherently unequal" and that "such segregation is a denial of the equal protection of the laws"
    - First, the Court reasoned that the history of the 14th Amendment was unclear, so the case could not be resolved by original meaning alone
      - "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. … We must look instead to the effect of segregation itself on public education"
        - » "Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."
    - Second, the Court reasoned that public education "is a right which must be made available to all on equal terms"
      - "Today, education is perhaps the most important function of state and local governments."
    - Third, the Court reasoned that segregation had a negative impact on Black children
      - "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community"
        - » The Court stopped short of explicitly overruling *Plessy v. Ferguson by* limiting its holding to the context of public education

# *Bolling v. Sharpe*, 347 U.S. 497 (1954)

- Facts
  - A group of parents in Washington, D.C. petitioned permission to racially integrate John Phillip Sousa Junior High School
    - The D.C. Board of Education denied their petition
  - In 1950, one year later, the parents sought admission to the all-White school for 11 Black children
    - When the request was again denied by the Board, the parents sued
      - Since D.C. is not a state, the 14th Amendment--and the "equal protection" clause—does not apply to D.C. residents
        - » The lawsuit alleged a violation of due process under the 5th Amendment
      - The claim was dismissed by the trial court

- Issue
  - Did the segregation of the public schools of Washington D.C. violate the the right to due process under the Fifth Amendment?

# *Bolling v. Sharpe*, 347 U.S. 497 (1954)

- Holding (9-0)
  - Yes, racial segregation violates due process and is unconstitutional
- Reasoning
  - The unanimous Court (Justice Warren) held that "discrimination may be so unjustifiable as to be violative of due process"
    - "Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective"
      - "Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes … a burden that constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause"
        - » "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government"

# Southern resistance to *Brown*

- No public schools in the eight Southern states under federal order from *Brown II* actually desegrated in 1955
  - In 1956, 19 Senators and 77 House Representatives signed the "Southern Manifesto"
    - The manifesto "commend[ed] the motives of those States which have declared the intention to resist forced integration by any lawful means"
- Based on a state amendment opposing desegregation, an Arkansas state court ordered an injunction against integrating Central High School in Little Rock
  - A federal district court blocked the state court injunction
    - In response, governor ordered Arkansas National Guard to prohibit black students from entering Central High School
      - President Eisenhower ordered federal troops to escort the students—called the "Little Rock Nine"—into the school
        - » For rest of the year, eight members of the Little Rock Nine continued to attend under the supervision of federal troops

# *Cooper v. Aaron*, 358 U.S. 1 (1958)

- Facts
  - After the 1957–1958 school year, a federal district court granted a 30-month extension for desegregation
    - This would allow the school more time to deal with the "chaos, bedlam and turmoil" of school desegregation
  - On August 18, 1958, the 8th Circuit Court of Appeals reversed the order
    - Court held that "there was not a sufficient basis to suspend the school integration plans."
- Issue
  - Did the strong—and possibly violent—resistance to desegregation of Little Rock public schools provide a sufficient basis for extending the SCOTUS order to desegregate?

# *Cooper v. Aaron*, 358 U.S. 1 (1958)

- Holding (9-0)
  - No, the extension was denied
- Reasoning
  - In unanimous opinion, the Court held that constitutional rights "are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature"
    - "The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws"
      - "The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law"
    - "this case … raises questions of the highest importance to the maintenance of our federal system of government"
      - "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system"
        - "No state legislator or executive or judicial officer can war against the Constitution"
  - In a concurring opinion, Justice Frankfurter emphasized that the rule of law requires that states follow the rulings of the Supreme Court
    - "Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution?"
      - "For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society"


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# RACIAL CLASSIFICATIONS

# *Loving v. Virginia*, 388 U.S. 1 (1967)

- Facts
  - In 1958, two residents of Virginia, Mildred Jeter, a black woman, and Richard Loving, a white man, were married in the District of Columbia
    - They returned to Virginia and "established their marital abode"
      - 16 states, including Virginia, prohibited inter-racial marriage
  - Virginia had an anti-miscegenation statute called the "Racial Integrity Act"
    - "If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."
  - The Lovings were found guilty and sentenced to a year in jail
    - The trial judge agreed to suspend their sentence if they would leave Virginia and not return for 25 years
      - At their hearing, the judge stated:
        - "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. …The fact that he separated the races shows that he did not intend for the races to mix."
    - The Lovings moved to D.C. and filed a motion to vacate the judgment
      - They alleged that the Virginia law violated the Equal Protection clause
- Issue
  - Did Virginia's law prohibiting interracial marriage violate the Equal Protection Clause of the 14th Amendment?

# *Loving v. Virginia*, 388 U.S. 1 (1967)

- Holding (9-0)
  - Yes, the law violates the the 14th Amendment
- Reasoning
  - The unanimous Court (Justice Warren) held that the prohibition on interracial marriage violated Equal Protection *and* Due Process
    - First, the Equal Protection clause requires that racial classifications be subject to "the most rigid scrutiny"
      - "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations"
        - » "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates [that they are] designed to maintain White Supremacy"
    - Second, the laws "deprive the Lovings of liberty without due process of law"
      - "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence"
        - » "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes ….is surely to deprive all the State's citizens of liberty without due process"

# *Washington v. Davis*, 426 U.S. 229 (1976)

- Facts
  - Qualifying test for applicants to D.C. police department
    - "an examination that is used generally throughout the federal service … designed to test verbal ability, vocabulary, reading and comprehension"
      - Acceptance into the police department required "a grade of at least 40 out of 80"
  - In 1970, two Black officers' were rejected based on test scores
    - They filed suit alleging that the recruiting procedures discriminated against racial minorities
      - They claimed that the test was unrelated to job performance and excluded a disproportionate number of black applicants
        - » The record indicated that four times as many Black applicants failed the test compared to White applicants
- Issue
  - Did the recruiting procedure which resulted in "disparate impact" violate the Equal Protection clause of the 14th Amendment?

# *Washington v. Davis*, 426 U.S. 229 (1976)

- Holding (7-2)
  - No, the procedures did not violated the 14th Amendment
- Reasoning
  - Majority (Justice White) held that *neutral* laws with a racially disparate impact do not violate the Equal Protection Clause
    - Only official discrimination on the basis of race violates Equal Protection Clause
      - "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race"
        - » Test 21 is not "a purposeful device to discriminate against … black applicants"
    - Disparate impact does not imply discrimination
      - "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another"
        - » "we have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory … simply because a greater proportion of [black applicants] fail to qualify than members of other racial or ethnic groups"
    - The record also indicated that D.C. police actively recruited Black applicants
      - "Since August 1969, 44% of new police force recruits had been black; that figure also represented the proportion of blacks on the total force and was roughly equivalent to 20- to 29-year-old blacks in the 50-mile radius in which the recruiting efforts of the Police Department had been concentrated."
        - » "It was undisputed that the Department had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty."
  - Concurring opinion by Justice Stevens agreed with the holding but argued that disparate impact can often be strong evidence of discriminatory intent
    - "normally the actor is presumed to have intended the natural consequences of his deeds."
      - "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume"
        - » "I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown"


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Race-conscious policies and Equal Protection

# AFFIRMATIVE ACTION

# Affirmative action

- In 1961, President John F. Kennedy issued Executive Order #10925
  - Federal government ordered government contractors to "take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."
    - This was taken to mean that some *positive* action should be taken to ensure that minority contractors were employed
      - It was not enough to just eliminate discrimination, since this would not address the legacy of slavery and segregation

# *University of California v. Bakke*, 438 U.S. 265 (1978)

- Facts
  - The medical school at UC Davis denied admission to Allan Bakke, who was white
    - Of 100 seats for entering class, 16 were set aside for minority applicants only
      - Since Bakke could not compete for those spots, he argued that the quota system violated Equal Protection
        - » He also argued that the quota system violated the Civil Rights Act of 1964, which prohibited discrimination by schools that accepted federal funding
- Issue
  - Is an affirmative action program that uses a quota system for admitting racial minority applicants a violation of the Equal Protection clause?

# *University of California v. Bakke*, 438 U.S. 265 (1978)

- Holding (5-4)
  - Yes and no
    - Race may be considered as a factor that increases campus diversity, but racial quota systems are unconstitutional
- Reasoning
  - Majority opinion (Justice Powell) reasoned that the only compelling government interest in using race in school admissions was promoting diversity—*not* correcting past discrimination
    - First, the admissions policy is clearly a "racial classification" under Equal Protection precedent
      - "Petitioner prefers to view it as establishing a 'goal' of minority representation … Respondent … labels it a racial quota"
        - "This semantic distinction is beside the point: The special admissions program is undeniably a classification based on race"
    - Second, racial classifications are always suspect and require *strict scrutiny* (i.e., a compelling government interest)
      - "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake"
        - "This the Constitution forbids"
    - Third, "remedying past discrimination" does *not* present a compelling government interest
      - No evidence that the racial imbalance in admissions was directly caused by past discrimination
        - "the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered"
    - Fourth, the goal of achieving diversity *can* justify the limited use of race in considering individual applications
      - "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity."
        - "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."
    - The UC Davis quota system was not narrowly tailored to promoting diversity and so violates Equal Protection
      - "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment"

# *Adarand Constructors v. Pena*, 515 U.S. 200 (1995)

- Facts
  - Mountain Gravel was awarded the prime contract for a highway project funded by the United States Department of Transportation
    - Mountain Gravel then solicited bids for subcontract work
  - Adarand submitted the lowest bid as a subcontractor for guardrail construction
    - Federal contract stated that the prime contractor would receive additional compensation if it hired small businesses owned by "socially and economically disadvantaged individuals"
      - The clause declared that "the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities...."
    - Gonzales Construction Company was awarded the guardrail work
      - It was certified as a "minority business"
  - Adarand filed suit, alleging that the federal contract violated Equal Protection
      - Mountain Gravel said it would have accepted Adarand's lower bid had it not been for the additional payment for hiring a minority contractor

- Issue
  - Is the allocation of favored treatment in federal contracts based on race a discriminatory practice that violates the Equal Protection clause?
    - Should strict scrutiny be applied for "benign" racial classifications?

# *Adarand Constructors v. Pena*, 515 U.S. 200 (1995)

- Holding (5-4)
  - Yes, the racial preference in federal law must be subject to strict scrutiny
- Reasoning
  - Majority opinion (Justice O'Connor) reasoned that racial classifications in the law are subject to strict scrutiny
    - "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection"
      - The 14th Amendment protects "persons, not groups"
  - A concurring opinion by Justice Scalia argued that the the government can never have a compelling interesting in "discriminating on the basis of race in order to 'make up' for past racial discrimination"
    - "under our Constitution there can be no such thing as either a creditor or a debtor race"
      - The "concept of racial entitlement" reinforces "for future mischief the way of thinking that produced race slavery, race privilege and race hatred"
        - » "In the eyes of government, we are just one race here. It is American."
  - A concurring opinion by Justice Thomas argued that "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice"
    - "In each instance, it is racial discrimination, plain and simple."
      - "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."
  - Dissenting opinion (Justice Stevens) argued that remedial race-based preferences are not the same as racial discrimination
    - "There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination"
      - "Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."
        - » This is the difference between a "no trespassing" sign and a welcome mat

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

- Facts
  - The University of Michigan Law School considered applicant in its admissions
    - The law school accepted around 350 students out of ~3,500 applications
      - The law school reviews each file individually and holistically, focusing on "academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them'"
        - "the Law School seeks 'a mix of students with varying backgrounds and experiences who will respect and learn from each other'"
  - Barbara Grutter, a white Michigan resident, was denied admission
    - She had a 3.8 GPA and a 161 LSAT score
      - She filed suit, alleging that minority applicants were admitted with inferior credentials
        - She argued that "her application was rejected because the Law School uses race as a 'predominant' factor, giving applicants who belong to certain minority groups a strong preference"
- Issue
  - Does the law school's use of racial preferences in its admissions policy a violation of the Equal Protection clause?

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

- Holding (5-4)
  - No, the affirmative action policy does not violate Equal Protection
- Reasoning
  - Majority opinion (Justice O'Connor) held that the use of racial preferences was narrowly tailored to further the goal of diversity by admitting a "critical mass" of minority students
    - Racial preferences are acceptable for the *limited purpose of educational diversity*
      - "Today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions"
        - "To be narrowly tailored, a race-conscious admissions program cannot use a quota system"
    - The law school did not use a racial quota system
      - "The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.'
        - That would amount to outright racial balancing, which is patently unconstitutional."
      - "critical mass is defined by reference to the educational benefits that diversity is designed to produce"
    - But the use of racial preferences *must not become permanent*
      - "Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point."
        - "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.…"

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

- Reasoning
  - Dissent (Justice Thomas) argued that *any* use of racial preferences by the government violates Equal Protection
    - Cites Frederick Douglass' famous speech against special treatment of former slaves
      - Douglas argued that the "American people have always been anxious to know what they shall do with us.…I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us!"
        - "Like Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators"
    - "Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy"
      - "what lies beneath the Court's decision today are the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination is necessary to remedy general societal ills."
    - Moreover, use of racial preferences creates racial stigma in society
      - "The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving…. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement"
        - "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination"

# *Gratz v. Bollinger*, 539 U.S. 244 (2003)

- Facts
  - The University of Michigan undergraduate admissions used a selection index
    - The maximum score was 150
      - A score of 100 guaranteed admissions
        - » 90–99 indicated "admit or postpone" while 75–89 indicated "delay or postpone"
      - The score was based on factors such as high school GPA, standardized test scores, alumni relationships, and personal achievement
        - » An applicant received 20 points for being a member of an "under-represented racial or ethnic minority group"
  - Two white students were denied admission despite being qualified and having high scores (but less than 100)
    - They filed a class action lawsuit against the University
- Issue
  - Is the undergraduate school's use of racial preferences in its admissions policy a violation of the Equal Protection clause?

# *Gratz v. Bollinger*, 539 U.S. 244 (2003)

- Holding (6–3)
  - Yes, the affirmative action policy violates the Equal Protection Clause
- Reasoning
  - Majority opinion (Justice Rehnquist) held that the policy violated Equal Protection because it did not provide individualized consideration of applicants
    - "We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity"
      - "Even if [a] student's 'extraordinary artistic talent' rivaled that of Monet or Picasso, the applicant would receive, at most, five points.…At the same time, every single underrepresented minority applicant … would automatically receive 20 points for submitting an application"
  - Dissent by Justice Ginsburg reasoned that using racial classifications as a way to deal with "entrenched discrimination and its aftereffects" should not be viewed with strict scrutiny
    - "There is no suggestion that the College adopted its current policy in order to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. Nor has there been any demonstration that the College's program unduly constricts admissions opportunities for students who do not receive special consideration based on race."

# *Fisher v. University of Texas (Fisher II)*, 579 U.S. _ (2016)

- Facts
  - In 1997, Texas enacted Top Ten Percent plan, requiring the University of Texas to admit all high school seniors who ranked in the top 10 percent of high school classes
    - The entering class after the Top Ten Percent Law was "4.5% African American and 16.9% Hispanic"
      - Due to difference from racial/ethnic makeup of state's population, University of Texas decided to modify the race-neutral admissions policy
  - For applicants not admitted under Top Ten Percent plan, race became part of the "Personal Achievement Index" (PAI) score
    - This score included "other special circumstances that give insight into a student's background"
      - This included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family
    - "The University asks students to classify themselves from among five predefined racial categories on the application.
      - "Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.
  - Abigail Fisher, a white female, applied for undergraduate admission to the University of Texas in 2008
    - She competed for admission with other non-top ten percent in-state applicant
      - University of Texas denied her application
    - Fisher filed suit against the university, claiming that the use of race in admission decisions violated Equal Protection
      - The district court decided in favor of the University of Texas, and the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision by summary judgment
  - Fisher appealed the appellate court's decision
    - After having case remanded by SCOTUS for "overly deferential good faith standard" in *Fisher I,* Court of Appeals re-heard the case and applied the legal standard of strict scrutiny
      - The Court of Appeals once again affirmed the summary judgment in favor of the University

- Issue
  - Is the undergraduate school's consideration of race in its admissions policy a violation of the Equal Protection clause?

# *Fisher v. University of Texas (Fisher II)*, 579 U.S. _ (2016)

- Holding (4-3)
  - No, the admissions policy did not violate the Equal Protection clause
- Reasoning
  - The majority opinion (Justice Kennedy) held that the admissions policy was narrowly tailored to the compelling government interest of achieving a "critical mass" of minority students
    - "a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan"
      - "here that assessment appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals"
    - "Petitioner's final suggestion is to uncap the Top Ten Percent Plan, and admit more—if not all—the University's students through a percentage plan"
      - "the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment"
        - » "to compel universities to admit students based on class rank alone is in deep tension with the goal of educational diversity as this Court's cases have defined it"

# *Fisher v. University of Texas (Fisher II)*, 579 U.S. _ (2016)

- Reasoning (cont.)
  - Dissent by Justice Alito argued that the use of race in the Texas admissions plan fails a strict scrutiny examination
    - "Something strange has happened since our prior decision in this case"
      - "we made it clear that UT was obligated (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were in fact satisfied"
    - UT has failed to show why it needs a race-conscious policy or when its goals will be met
      - "UT has claimed that its plan is needed to achieve a 'critical mass' of African-American and Hispanic students, but it has never explained what this term means"
      - "UT has also claimed at times that…the Top Ten Percent Plan admits *the wrong kind* of African-American and Hispanic students, namely, students from poor families"
        - "the argument turns affirmative action on its head. Affirmative-action programs were created to help *disadvantaged* students."
      - Goal of diversity is unclear since "classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic. But the UT plan discriminates against Asian-American students."
        - "What is at stake is whether university administrators may justify systematic racial discrimination simply by asserting that such discrimination is necessary to achieve "the educational benefits of diversity," without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives."
  - Dissent by Justice Thomas reasoned that *Grutter* was wrongly decided
    - Instead, racial classifications *always* violate the Equal Protection Clause

# Harvard and NC cases (2023)

- Facts
  - University of North Carolina and Harvard University both consider applicant race in admission decisions
    - In line with *Grutter*, each school aims to achieve diversity through holistic review of individual applications
  - Students challenged these admissions as unconstitutional
    - UNC policy alleged to violate Equal Protection clause
    - Harvard policy alleged to violate Title VI of Civil Rights Act of 1964
- Legal issue
  - Can universities use race as a factor in admissions process?
    - If not, the Court would overrule Grutter and hold that affirmative action in higher education violates Equal Protection
      - I.e., Justice Thomas' dissent in *Fisher II*!
  - If race *can* still be used, did the UNC and Harvard admissions policies rely too much on applicant race, violating *Grutter*?


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"Other" Discrimination

# NON-RACIAL CLASSIFICATIONS

# Tiers of judicial scrutiny

- Strict scrutiny
  - A law will be upheld if it is *narrowly tailored* to achieve a *compelling* government purpose
    - First, the court must regard the government's purpose as *essential*
    - Second, the law must be shown to be truly *necessary* as means to accomplishing the end
      - This requires proof that the law is the least restrictive or least discriminatory alternative
- Intermediate scrutiny
  - The classification must be *substantially related* to an *important* governmental purpose
    - "[T]he government's objective must be more than just a legitimate goal for government to pursue; the court must regard the purpose as 'important.'
      - "The means chosen must be more than a reasonable way of attaining the end; the court must believe that the law is substantially related to achieving the goal."
- Rational basis scrutiny
  - A law will be upheld if it *reasonably related* to a *legitimate* government purpose
    - "[T]he government's objective only need be a goal that is legitimate for government to pursue."
      - "The means chosen need only be a reasonable way to accomplish the objective. Under the rational basis test, the challenger of a law has the burden of proof."

# Sex discrimination

- Strict scrutiny…or something else?
  - In 1973, SCOTUS held that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."
    - "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility'"
      - "statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." [*Frontiero v. Richardson*, 411 U.S. 67 (1973)]
  - In a concurring opinion, 3 justices held that "strict scrutiny" was not the appropriate standard
    - "It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding"
      - "The Equal Rights Amendment, which if adopted will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.
        - » "democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes."

# *Craig v. Boren*, 429 U.S. 190 (1976)

- Facts
  - An Oklahoma law prohibited the sale of "nonintoxicating" 3.2 percent beer to males under the age of 21
    - For females, however, the law only prohibited sale to those under the age of 18
  - Curtis Craig, a male between the ages of 18 and 21, and Carolyn Whitener, a licensed vendor challenged the law as sex discrimination

- Issue
  - Did the Oklahoma statute violate the Equal Protection Clause by establishing different drinking ages for men and women?

# *Craig v. Boren*, 429 U.S. 190 (1976)

- Holding (7-2)
  - Yes, the OK statute violated the Equal Protection clause of the 14th Amendment
- Reasoning
  - Majority opinion (Justice Brennan) established that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"
    - "We accept for purposes of discussion the District Court's identification of the [statute's] objective as the enhancement of traffic safety
      - "statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under Reed withstand equal protection challenge."
        - » "the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense"
    - "Oklahoma's 3.2% beer statute invidiously discriminates against males 18-20 years of age…[and] constitutes a denial of the equal protection of the laws.…"
  - Concurring opinion by Justice Powell reasoned that it was not necessary to create a broad category of review for any sex classification in the law
    - "cases involving gender-based classifications make clear that the Court subjects such classifications to a more critical examination than is normally applied when 'fundamental' constitutional rights and 'suspect classes' are not present."
  - Concurring opinion by Justice Stevens reasoned that there should be one standard of review—strict scrutiny—for all cases
    - "There is only one Equal Protection Clause."
      - "It requires every State to govern impartially."
        - » "It does not direct the courts to apply one standard of review in some cases and a different standard in other cases."
  - Dissenting opinion by Justice Rehnquist reasoned that sex classifications should only have to survive "rational basis" review
    - "the Court's application here of an elevated or 'intermediate' level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard."
      - "The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized—the norm of 'rational basis,' and the 'compelling state interest' required where a 'suspect classification' is involved—so as to counsel weightily against the insertion of still another 'standard' between those two."
        - » "the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough"

# *United States v. Virginia*, 518 U.S. 515 (1996)

- Facts
  - The Virginia Military Institute (VMI) was Virginia's only exclusively male public undergraduate higher learning institution
    - The United States brought suit against Virginia and VMI alleging that the school's male-only admissions policy violated the Equal Protection clause
      - On appeal from a District Court ruling favoring VMI, the Fourth Circuit reversed, finding VMI's admissions policy to be unconstitutional
    - Virginia, in response to the reversal, proposed to create the Virginia Women's Institute for Leadership (VWIL) as a parallel program for women
      - On appeal from the District Court's affirmation of the plan, the Fourth Circuit ruled that despite the difference in prestige between the VMI and VWIL, the two programs would offer "substantively comparable" educational benefits
        - » The United States appealed to the Supreme Court, challenging the male-only admissions policy (and female institution) as unconstitutional

- Issue
  - Does Virginia's creation of a women's-only military academy satisfy the Fourteenth Amendment's Equal Protection Clause?

# *United States v. Virginia*, 518 U.S. 515 (1996)

- Holding (7-1)
  - No, the male-only admissions policy violates the Equal Protection Clause
- Reasoning
  - The majority opinion (Justice Ginsburg) reasoned that the "constitutional violation in this case is the categorical exclusion of women from an extraordinary educational opportunity afforded men"
    - First, intermediate scrutiny applies to this classification based on sex
      - "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action. Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."
    - Second, Virginia failed to prove that the male-only admission policy promoted a substantial government interest
      - "Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring.…"Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex."
        - Also, VMI would be inappropriate for most men (as a group) as well
    - Third, the creation of a separate-but-equal female institution fails to correct the discrimination
      - "the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, i.e., it does not provide equal opportunity"
  - Dissenting opinion by Justice Scalia reasoned that "the rationale of today's decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny"
    - "Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half."
      - "The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution."
        - "So to counterbalance the Court's criticism of our ancestors, let me say a word in their praise: they left us free to change. The same cannot be said of this most illiberal Court, which has embarked on a course of inscribing one after another of the current preferences of the society (and in some cases only the counter-majoritarian preferences of the society's law-trained elite) into our Basic Law."
    - "We have no established criterion for 'intermediate scrutiny' either, but essentially apply it when it seems like a good idea to load the dice."
      - "Intermediate scrutiny has never required a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the state interests that it serves."
        - "Only the amorphous 'exceedingly persuasive justification' phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program."
    - "Justice Brandeis said it is 'one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'"
      - "Under the constitutional principles announced and applied today, single-sex public education is unconstitutional."

# Heightened rational basis?

- While equal protection issues usually involve racial or sexual classifications, there are other types of discrimination that are also subject to "heightened" rational basis scrutiny
  - Main examples
    - Intellectual disability
    - Sexual orientation
- Other classifications are only subject to rational basis review, however
  - E.g., age classifications are permissible under this lower standard

# *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)

- Facts
  - In Cleburne, Texas, a municipal ordinance stated that the construction of "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions" required a special use permit
    - In 1980, Cleburne Living Center, Inc. submitted a "special use permit for the operation of a group home for the mentally retarded"
      - The city council of Cleburne voted to deny the special use permit, acting pursuant to a municipal zoning ordinance
- Issue
  - Did the denial of the permit to Cleburne Living Center violate the Equal Protection clause?

# *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)

- Holding (9-0)
  - Yes, the denial of the permit violates Equal Protection

- Reasoning
  - Majority opinion (Justice White) held that requiring a special permit for such group homes "appears to us to rest on an irrational prejudice against the mentally retarded."
    - Intermediate scrutiny is not appropriate for all non-racial classifications
      - "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement, the courts have been very reluctant … to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."
        - "In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end."
    - The Court applied "heightened rational basis" review instead of intermediate scrutiny
      - "if the large and amorphous class of the mentally retarded were deemed quasi-suspect…, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others."
        - "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."
    - But the permitting policy fails under rational basis review
      - The City Council stated that the special permit was denied based on the possible negative attitudes of neighbors, the proximity of the group home to a school, its location on a flood plain, the legal responsibility for the mentally retarded residents, and the size of the home and number of occupants
        - "Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case."
  - Concurring opinion by Justice Stevens reasoned that the tiers of scrutiny approach was confusing and unnecessary
    - "our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."
      - "I have never been persuaded that these so-called 'standards' adequately explain the decisional process."
  - Concurring opinion by Justice Marshall reasoned that intermediate scrutiny should be applied to the class of mentally retarded because the city ordinance would usually survive rational basis review
    - "discriminatory classifications exist only where some constitutional basis can be found for presuming that equal rights are required"
      - "Discrimination, in the Fourteenth Amendment sense, connotes a substantive constitutional judgment that two individuals or groups are entitled to be treated equally with respect to something."
        - "As the history of discrimination against the retarded and its continuing legacy amply attest, the mentally retarded have been, and in some areas may still be, the targets of action the Equal Protection Clause condemns."
    - "Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny."
      - "Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation."
        - "The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent for this Court and lower courts to subject economic and commercial classifications to similar and searching 'ordinary' rational-basis review."

# *Romer v. Evans*, 517 U.S. 620 (1996)

- Facts
  - Colorado voters adopted Amendment 2 to their State Constitution
    - This Amendment denied "special class" status based on sexual orientation
      - "No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."
    - Following a legal challenge by homosexual and other aggrieved parties, the state trial court entered a permanent injunction enjoining Amendment 2's enforcement
      - The Colorado Supreme Court affirmed on appeal
- Issue
  - Does the CO Amendment violate the Equal Protection Clause?

# *Romer v. Evans*, 517 U.S. 620 (1996)

- Holding (6-3)
  - Yes, the CO Amendment violated the Equal Protection clause

- Reasoning
  - The majority opinion (Justice Kennedy) reasoned that the Amendment fails a rational basis review
    - First, the Amendment is subject to rational basis review
      - "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."
        - "We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."
    - Second, the Amendment "lacks a rational relationship to legitimate state interests."
      - "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."
        - "It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."
    - Third, "we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights."
      - "To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint."
        - "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do."
  - Dissenting opinion by Justice Scalia argued that "Today's opinion has no foundation in American constitutional law, and barely pretends to."
    - Opposition to homosexuality is not the same as racial or sexual bigotry
      - States have the police power to legislate for the common morality, such as laws against polygamy and sodomy
        - "Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions."
    - "The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution."
      - "That is to say, the principle underlying the Court's opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws."
        - "If merely stating this alleged 'equal protection' violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness."
    - "I think it no business of the courts (as opposed to the political branches) to take sides in this culture war."
      - "When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."
        - "Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even 'animus' toward such conduct. Surely that is the only sort of 'animus' at issue here: moral disapproval of homosexual conduct."