(BACK TO?) THE FUTURE OF EQUAL PROTECTION DOCTRINE: MODERN CLASSIFICATION ANALYSIS AND CONVERSE-*WASHINGTON V. DAVIS* QUANDARIES

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*Equal protection doctrine is in considerable flux with more change likely to come before long. Recent cases raise basic questions about whether the modern Supreme Court has a coherent approach to determining when governmental classifications trigger heightened judicial scrutiny and about the theoretical basis for the standards of review the Court applies in different circumstances. This Symposium Article explores these questions and associated problems in equal protection doctrine, and then trains its attention on two emerging issues that illustrate the complexities of the law: first, the standard of review that should apply to the slavery reparations programs some states and localities have recently adopted or are considering; and second, the proper approach to what we refer to as converse-*Washington v. Davis *scenarios, in which race or sex is a motivating factor for government action that, while neutral on its face, has the subjective goal of promoting more representation of historically marginalized racial or ethnic groups.*

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I. INTRODUCTION

In this Symposium Article, we explore what we believe are some of the most important cutting edges of equal protection doctrine as the Roberts Court enters its third decade. In particular, using examples of litigation or legislation that have recently been considered, are currently being considered, or are likely soon to be considered by the Court, we explore four often inter-related topics. First, using the recently decided *United States v. Skrmetti*,[1] we explore whether the current Court has a coherent and principled analytic approach to deciding when a legislative[2] classification is "based" on a criterion such as sex (or race) that might trigger judicial vigilance. Second, again using *Skrmetti* and other recent cases involving trans-athletes, we interrogate what the current Court's theoretical basis seems to be for determining whether a particular kind of classification is suspicious or not. Third, in light of the slavery reparations issue percolating legislatively in California, Illinois, and elsewhere, we explore how the Court will—and should—assess laws that make use of a person's having been descended from American slaves. Finally, moving away from facially problematic governmental classifications, we analyze, using some educational and voting rights examples, the question of what we call converse-*Washington v. Davis*[3] situations: that is, situations in which race (or sex) is a motivating factor for regulations that are facially neutral, where the government's objective is to diminish or blunt disparate impacts against historically excluded groups, rather than to perpetuate such under-representation.

1. 605 U.S. 495, 495 (2025).

2. We think the same issues arise when classifications are housed in an Executive Order as when they are embodied in statutory enactments.

3. 426 U.S. 229, 230 (1976).

II. HOW *SKRMETTI* COMPLICATES THE SEEMINGLY STRAIGHTFORWARD QUESTION OF WHAT IT MEANS, FOR EQUAL PROTECTION DOCTRINE, FOR A LAW TO BE "BASED" ON SEX

Certainly since the 1960s (and in reality going all the way back to *Korematsu v. United States*[4] in 1944), equal protection analysis by the Supreme Court has employed differential tiers, or standards, of judicial scrutiny, based on the facial criteria that a law or regulation employs to sort and place some persons in different categories from others. Court doctrine has honed in on the way a law is written on it face (the grounds on which the law facially sorts people) as a basis for deciding how suspicious of a given enactment judges should be (the invocation of strict scrutiny reflecting the highest level of suspicion, deployment of intermediate scrutiny connoting meaningful but less suspicion, and the application of rationality review when there is very little suspicion).[5] Importantly, whether that law ultimately survives judicial review is determined by the *application* of the indicated level of scrutiny, not the level itself.

This means, then, that not all classifications that might rightly trigger "heightened scrutiny" (a term used to combine strict and intermediate scrutiny) are invalid. For example, even though sex-based laws warrant and trigger heightened "intermediate" scrutiny, not all sex-based classifications are unconstitutional.[6] This is because not all laws that make the sex of individuals legally relevant demean or exalt on the basis of sex, and only such differential respect by government is the constitutional evil to be avoided. For example, state laws that treat some K-12 student athletes differently from others because of sex (laws, for example, that provide for separate boys' and girls' basketball teams) are indisputably subject to intermediate scrutiny because these laws undeniably sort on the basis of sex, but should have little trouble surviving that scrutiny. Putting aside the more recent conflicts about transgender athletes, a law that prohibits high school students who are born male and who identify as male from playing on girls' basketball teams does not demean or exalt any boy or any girl on account of their sex; indeed, such a law promotes meaningful opportunities for athletic competition for students of both sexes in a way that acknowledges and respects biological differences between teenage boys and girls.

All of this underscores that the "standards of review," or "tiers of scrutiny," that courts employ in equal protection settings are *tools*, not ends in themselves. They are heuristic devices used to help expose (or "flush out," as famous constitutional scholar John Hart Ely put it)[7] improper governmental objectives, motivations, attitudes, or messages. Application of heightened scrutiny helps us

4. 323 U.S. 214, 216 (1944).

5. *See id.* at 216.

6. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 70 (2001) (upholding different requirements for acquisition of citizenship by a child born to one United States citizen parent and one noncitizen parent when the parents are unmarried ad the child is born outside of the United States, depending upon whether the citizen parent is the mother or the father); Michael M. v. Superior Ct., 450 U.S. 464, 476 (1981) (upholding California statutory rape law that only applied to men).

7. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980).

determine what the true—as opposed to hypothesized or sanitized—motivations of the government likely were, so that we can then decide whether the government has or has not been up to no good.

The doctrinal centrality of "classifications" has been a relatively stable feature of equal protection jurisprudence in the modern era. To be sure, recent decades have seen some changes in the *reasons* the Court offers for why particular kinds of classifications should be viewed suspiciously (a topic we take up in Part III, below). In the last quarter of the twentieth century, the conventional answer had focused on particular characteristics of the group that a classification discriminated against. Building on footnote four of the *Carolene Products* case,[8] the Court frequently justified skepticism of particular classifications by reference to the political powerlessness (and corresponding need for judicial protection from animus-based discrimination) of the group that a classification targeted. But, beginning in the 1990s, at least as to racial classifications in affirmative action cases, the Court began to focus not on the powerlessness of the racial majority burdened by racial classifications conferring benefits on historically discriminated-against racial minorities, but instead on the adverse sociopolitical consequences of *all* racial classifications, in order to explain and justify a "color-blind" approach to the Fourteenth Amendment.[9] This move away from focusing on classes of persons created by classifications to emphasizing inherent problems with the classifications themselves might be limited to race (and sex?). But even against the backdrop of a color-blind prohibition on all (or nearly all) racial classifications, the Court continues to apply strict scrutiny as a tool to ferret out problematic features or consequences of the law in question. For example, in the *SFFA* cases involving Harvard and the University of North Carolina ("UNC") in 2023,[10] the Court found that the affirmative action programs by Harvard and UNC failed strict scrutiny because that scrutiny unearthed the schools' illegitimate embrace of racial stereotypes and the invidious imposition of racial harm on non-minorities.[11] In other words, the universities'[12] use of race didn't automatically dictate judicial invalidation; instead, it led to the application of strict scrutiny that exposed particular flaws.[13]

Whether because of the powerlessness of the classes or persons burdened by a law, or because of the inherent wrongness of certain kinds of classifications themselves (e.g., race), the choice by the Court to employ heightened scrutiny, while not absolutely for-ordaining a case's outcome, remains very important. For

8. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

9. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 210 (2023).

10. *Id.* at 181; Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181, 181 (2023) (companion case).

11. *Students for Fair Admissions, Inc.*, 600 U.S. at 190–91, 214–18.

12. The UNC policy was directly subject to equal protection limits since UNC is a state actor, and the Court held Harvard to the same limits by virtue of federal statutes that the Court has construed as incorporating constitutional limits. *Id.* at 198 n.2.

13. *Id.* at 208.

that reason, determining when a classification triggers heightened scrutiny is something the Court needs to do in a coherent and principled way.

And yet recent developments, in particular *Skrmetti*, call into question the very foundations of a doctrinal framework built on the identification of particular classifications that warrant judicial skepticism. While we are mindful of the perils of overreading a single case (and perhaps *Skrmetti* is jerry-rigged to reach a particular outcome regarding transgender minors in particular), *Skrmetti*'s analysis, while purporting to be thorough and careful, confounds the Court's established framework and renders the Court's doctrinal edifice considerably less coherent and stable.[14] Prior to *Skrmetti*, it could generally be said that if a law makes use of a criterion defined by a person's sex (or race)—that is, if the sex (or race) of an individual was, by operation of the law as facially written, legally relevant to the way government treated the individual—then that law is sex- (or race-) based.[15] So, for example, if a person's sex were relevant to whether she could buy alcohol, be drafted, serve as an executor of an estate, attend a particular university, or receive a tax credit (to name just a few prominent settings), the law in question was sex-based and warrants heightened, intermediate, scrutiny.[16] After *Skrmetti*, things are much less clear.

Let's begin by making clear what the Tennessee law at issue in *Skrmetti* said: As the Court explained, Tennessee Senate Bill 1 ("SB1") prohibits doctors from providing to minors surgical or hormonal treatments sought for the purpose of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's [biological] sex," or "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity."[17] The *Skrmetti* majority concluded that this law on its face did not classify on the basis of sex or any other ground that would implicate "heightened" scrutiny under the Equal Protection Clause, and instead classified on the constitutionally unproblematic bases of age (minor status) and medical condition.[18]

But was this conclusion analytically plausible? To answer that, we need to disassemble the Court's opinion penned by Chief Justice John Roberts. The Court began its analysis innocuously enough, reaffirming the centrality in equal protection doctrine of identifying and focusing on the classification a particular law employs: unless the legislative classification burdens a fundamental right or involves something "suspect," "we will uphold [it] so long as it bears a rational

14. Moreover, *Skrmetti* isn't the *only* case in which the Court undertakes classification analysis in a conceptually untenable manner; indeed, *Skrmetti* itself relies on at least one other prominent case, *Geduldig v. Aiello*, 417 U.S. 484, 503 (1974), in which the Court botched the question of whether a law ought to have been considered sex-based. Yet whereas *Geduldig*'s flawed analysis was breezy, literally relegated to a footnote that responded to none of the compelling available counterarguments, *Skrmetti* purports to confront the errors countless commentators have noted about *Geduldig*, and yet responds, again and again, with non sequiturs or other specious assertions. In this regard, *Skrmetti* marks a new and potentially destabilizing low for the modern Court concerning the integrity of equal protection doctrine.

15. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996).

16. *See, e.g.*, *id.* at 533.

17. *See* United States v. Skrmetti, 605 U.S. 495, 508 (2025).

18. *Id.* at 510.

relation to some legitimate end."[19] So far, so banal. But even at this early point in the analysis, the Court stumbled. In making clear that legislatures are given "wide latitude"[20] under the "rational basis review" that applies in the absence of something "susp[icious],"[21] the Court cited and quoted from an inapt case, *City of Cleburne v. Cleburne Living Center, Inc.*[22] It is true that *City of Cleburne* did say, as the *Skrmetti* Court echoed, that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes,"[23] but it is also true that the *City of Cleburne* Court *struck down*, under rational basis review, the law in question there (one that discriminated against persons seeking to operate group homes for the developmentally challenged), in a way that is doctrinally anomalous and generally considered by analysts to have been analytically unconvincing or dishonest.[24] Not a good case to illustrate deference to the legislature that it ordinarily obtains.

From there, the *Skrmetti* Court went on to acknowledge, as it had to, that "laws that classify people on the basis of race . . . trigger strict scrutiny [and] similarly . . . 'sex-based classifications warrant heightened scrutiny."[25] This teed up *Skrmetti*'s $64,000 question: Does SB1 make use of a "sex-based" classification? To the untutored eye, the answer would certainly seem to be "yes." SB1 expressly pivoted on whether a person was born male or female but wanted to appear otherwise. A person born male was eligible for a certain hormonal treatment to change musculature to appear more masculine, but not a person born female who similarly wanted to appear more masculine. The law itself repeatedly referred to a "minor's sex."[26] The plaintiffs leaned heavily on this straightforward argument, asserting (per the Court) that "SB1 works a sex-based classification because the application of the law turns on sex."[27]

The *Skrmetti* Court rejected this characterization, concluding instead that SB1 classifies only on the ground of age (the law is limited to minors) and medical condition (people seeking treatment for the distinctive medical condition of gender dysphoria are prohibited from access to hormones and surgery; people seeking treatment for other medical conditions are not).[28] It is here where the *Skrmetti*'s Court's analysis itself simply doesn't withstand meaningful scrutiny.

First, the Court misrepresented the relevance of "generality" in determining whether a law classifies on some problematic basis. The Court emphasized that "[u]nder SB1, *no* minor may be administered puberty blockers or hormones to treat gender dysphoria, gender identity disorder or gender incongruence; minors

19. *Id.*
20. *Id.*
21. *Id.* at 509–11.
22. *Id.* at 510 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).
23. *City of Cleburne*, 473 U.S. at 440; *id.* at 510.
24. *See* Vikram David Amar & Samuel Estreicher, *Conduct Unbecoming a Coordinate Branch: The Supreme Court in* Garrett, 4 GREEN BAG 351, 353–54 (2001).
25. *Skrmetti*, 605 U.S. at 510.
26. *Id.* at 506 (emphasis added).
27. *Id.* at 512.
28. *Id.* at 511.

of *any* sex may be administered puberty blockers or hormones for other purposes."[29] But surely the Court knows that laws that are, from one formal angle, generally applicable are nonetheless often considered to embody a suspect classification. For example, the Court admits that a law that prohibits *anyone*, of *any* race, from being able to marry a person of a different race (a slight variant on *Loving v. Virginia*)[30] embodies a racial classification and is subject to strict scrutiny. Nor would that change if such an anti-miscegenation law were legislatively crafted to track SB1's wording: "No person may have access to marriage in the state if the purpose of marriage is a person's desire to promote intimate association with a race other than his own." Such a law might be said to prohibit people of every race (that is, *all* persons) from obtaining access to certain marriages, not on account of their respective races, but on account of their *purpose* in seeking to marry. Oh, but you say, the *purpose* in this hypothetical law is itself statutorily defined in terms of racial identity. Ah, but so is the statutorily defined purpose of the prohibited treatments in SB1.

The *Skrmetti* Court's answer to this problem was to say that anti-miscegenation laws like the one posited would still run afoul of *Loving* because it "would still 'proscribe 'generally accepted conduct' if engaged in by members of different races."[31] To get a better sense of the weakness of this punchline, consider, for example, a law that *mandated*, rather than prohibited, interracial marriages: the *only* marriages the state recognizes are ones that are between persons of different races. It goes without saying that such a law would also be considered a racial classification, so that *Skrmetti*'s formulation of the *Loving* principle would have to be broadened to make clear that a state also cannot, presumptively at least, proscribe generally accepted conduct *unless* engaged in by members of different races.

But if this is true—and it must be—Chief Justice Roberts in particular has a personal consistency problem. In his dissent in *Obergefell*, he declined to apply heightened scrutiny even though the law in question "proscribed [generally accepted] marital conduct *unless* engaged in by members of different sexes."[32] In doing so, Roberts denied that "marriage" was a generally accepted conduct,

29. *Id.* at 514 (emphasis in original). The Court's reasoning here is, of course, inconsistent with the doctrinal treatment of many other laws that are "generally applicable" yet sex-based. Take bathroom laws: neither men nor women can pee in a bathroom other than that designated for them. The laws at issue in *United States v. Virginia*, 518 U.S. 515 (1996) likewise restricted both sexes insofar as no men or women could attend a military institution other than that assigned to them (VMI for men and VWIL for women). *Id.* at 557. So have a great many sex-based laws that have properly been judicially analyzed as sex-based laws. Some have passed muster, some have not. The marriage law in *Obergefell v. Hodges*, 576 U.S. 644 (2015) was rightly invalidated on inequality grounds, even though the law obviously limited both men and women—that is, both gay men and lesbian women. *Id.* at 675–76. Formally, of course, each group was allowed to marry—as long as they married someone of the opposite sex! But *Obergefell* rightly rejected this ultra-formalist "catch-22." Alas, *Skrmetti* failed to honor the spirit of *Obergefell*.

30. 388 U.S. 1, 2 (1967). We say "variant" because, in *Loving* itself, Virginia's law did not ban interracial marriage for *everyone*; its prohibition on interracial marriage was limited to marriages involving Whites. *Id.* at 11.

31. *Skrmetti*, 605 U.S. at 514 (quoting *Loving*, 388 U.S. at 11).

32. *See Obergefell*, 576 U.S. at 692–93 (Roberts, C.J., dissenting).

instead arguing that the very *definition* of marriage has historically been "as a union between a man and a woman."[33] But does not that mean, in the interracial marriage context, that a law like the one in *Loving* would not involve a racial classification if (as may have been true) marriage in the state had *always* historically been understood to be between people of the same race? Or consider yet another hypothetical, this one an inverted variant of SB1 itself: imagine the statute forbade the use of hormones for minors to treat precocious puberty or delayed puberty (two medical conditions) and instead permitted the use of hormones in minors *only* for gender dysphoria (another medical condition), that is, when the purpose of the hormones is to permit the minor "to identify with, or live as, a purported identity inconsistent with the minor's [biological] sex."[34] Hard to imagine the Court applying toothless rational basis review to that.

Putting aside the inconsistency within Roberts' own writings, the more fundamental problem with the Chief's purported distinction of anti-miscegenation laws and SB1 is that, without more, it begs the questions of who defines "generally accepted" and how is it to be defined. "Making use of hormones to build muscularity" can be considered a "generally accepted" practice, and yet the *Skrmetti* Court says it is a practice that can be granted to biological boys but denied to biological girls—blatant sex discrimination.

The rejoinder to all of this that the *Skrmetti* Court would probably emphasize is the invocation of and deference to medicine and medical labels as the arbiters of what "generally accepted" medical treatments are.[35] But while medical deference might be able to do some work in the *application* of the relevant level of scrutiny, it is—strictly speaking—logically irrelevant to the question of whether a law is race or gender-based in the first place. That is, it is irrelevant to what level of scrutiny should apply. In other words, the Tennessee law at issue in *Skrmetti* might well be justified, medically or otherwise, and survive judicial review. But that question should be resolved only after applying heightened scrutiny.

In this vein, *Skrmetti*'s invocation of the fact that the FDA "itself recognizes that 'research has shown biological differences between men and women (differences due to sex chromosome[s] or sex hormones) may contribute to variations seen in safety and efficacy of drugs, biologics and medical devices"[36] and the related fact that some treatments and dosages differ between men and women who have the same condition are beside the current point (about whether a law is sex-based or not). The research the FDA credits[37] might explain why sex-

33. *Id.* at 688.

34. TENN. CODE ANN. § 68-33-103(a) (West, Westlaw current through 2025 First Reg. Sess.).

35. This rejoinder is ironic given that SB1 rejects, rather than embraces, the trend in medical treatments.

36. *Skrmetti*, 605 U.S. at 512 (quoting *Sex as a Biological Variable*, FOOD & DRUG ADMIN., https://www.supremecourt.gov/opinions/URLs_Cited/OT2024/23-477/23-477-1.pdf [https://perma.cc/XK2N-5D7R] (third alteration in original) (last visited Mar. 24, 2026)).

37. Amanda Turney, *FDA in Brief: FDA Encourages Inclusion of Male Patients in Breast Cancer Clinical Trials*, SUPREMECOURT.GOV (Aug. 26, 2019), https://www.supremecourt.gov/opinions/URLs_Cited/OT2024/23-477/23-477-2.pdf [https://perma.cc/W5QD-RNCW]; *FDA Approves Second Drug to Prevent HIV Infections as Part of Ongoing Efforts to End the HIV Epidemic*, SUPREMECOURT.GOV (Oct. 3, 2019), https://www.supreme-

differential dosages survive intermediate scrutiny (perhaps so easily that no one bothers to bring legal challenges to them), but no court would or should eschew heightened judicial scrutiny simply because the medical profession uses a particular label.[38] For example, if all patients who visit a gynecologist have to pay a special "gynecology tax," we would never take the government's word for it that such a tax is reasonably calibrated to compensate the government for distinctive costs associated with the drugs and procedures prevalent in women's health treatments, simply because the medical profession has coined and medically defined "gynecology" and because research has demonstrated men's and women's medical needs are sometimes different. So too, if government conferred a special payment on "*all* persons who run the risk of testicular or prostate cancer" on the purported ground that these cancers can be particularly financially devastating, we would not take the government's word for it (as does rational-basis review) simply because government has piggybacked on medical definitions of particular conditions. This is not to suggest that how doctors identify, diagnose, and treat conditions is all just arbitrary. But it does suggest that the law of equal protection should not be thought to blindly track classifications made by medical professionals. Imagine that a drug is developed that treats just two forms of cancer: cervical cancer and prostate cancer. For both type of cancer, the drug is equally effective and has similar (manageable) side effects. If the government were to authorize use of the drug for cervical but not prostate cancer, the law should recognize a sex-based difference in access to cancer treatment, even if the focus of medical professionals is on the two different diseases. The point holds even if the benefits and risks of the drug vary between the two types of cancer. If it turns out that, say, the drug is 90% curative but 10% deadly with respect to patients with cervical cancer and these numbers are reversed for patients with prostate cancer, that information does not alter the law's recognition of a sex-based classification, even though it would be highly relevant in assessing whether the government satisfies the intermediate level of scrutiny that applies.

One final hypothetical in this arena may drive the point home quite clearly. Imagine certain creams and bars that can lighten or darken skin tone are available only by prescription. If the government were to permit these creams and bars for many dermatological conditions, but prohibit their use altogether when a patient seeks them to address what doctors call "Racial Envy Syndrome," that is, a persistent feeling that one's birth skin-color doesn't match one's true racial identity, we would apply strict scrutiny. Selectively preventing access to the ointments only to patients who seek "to identify with, or live as, a purported racial identity inconsistent with the person's biological race" would obviously raise our

court.gov/opinions/URLs_Cited/OT2024/23-477/23-477-3.pdf [https://perma.cc/6F2P-PA97]; *see also Skrmetti*, 605 U.S. at 512 (citing these sources).

38. Indeed, Chief Justice Roberts assumes, but never supports, the notion that differential dosages aren't subject to any meaningful judicial review. *Skrmetti*, 605 U.S. at 512. His FDA discussion arises in his consideration of policies that "refer to" sex, but certainly differential treatment protocols do more than "refer to" sex. Compare Title VII, which prohibits discrimination on the basis of sex but is not itself a law that triggers heightened scrutiny. Instead, differential treatment protocols treat men and women differently and thus embody a sex-based classification.

suspicions and warrant close judicial examination. This is true even though such a policy would technically apply to people of all races and the prohibition would be defined in terms of access to particular treatments for a particular medical condition.

Perhaps this hypothetical ointment-regulating law should pass muster if such creams were judicially and empirically determined to be particularly medically dangerous when patients use them for the forbidden purposes. On the other hand, maybe the government is simply trying to enact racial hierarchy and white supremacy by preventing Blacks from "passing" and Whites from "degrading themselves." That issue must be decided by applying strict scrutiny on the merits, not by withholding it at the threshold. So, too, with gender. Only heightened scrutiny can discern whether the alleged medical justification for SB1 is a sham to exalt the cisgender and demean the transgender. And, again, many sex discriminations are upheld today—not because they are somehow not sex discriminations and thus do not trigger heightened scrutiny, but because these laws survive scrutiny (think single-sex restrooms, which trigger, but would seem to easily survive, heightened scrutiny.).[39]

Nor can medicine claim to be so free from past racist and sexist practices as to justify absolute deference to its labels and prescriptions. As far as race is concerned, recall medically supported eugenics and the grotesque medical mistreatment of Blacks in the Tuskegee syphilis study not so very long ago.[40] And the medical profession has a similarly checkered history of misusing sex. Recall, in this regard, the forced sterilization of women at issue in *Buck v. Bell*.[41] Indeed, laws like SB1 are frequently motivated by the sense shared by some people that the medical profession has become politicized in favor of an LGBT agenda, a concern that itself undermines undue deference to medical professionals.[42]

In the context of SB1, avoiding the intermediate scrutiny that would logically apply to the sex-based classification in the law, on the ground of deference to medical definitions and judgments, would be *particularly* inapt because it is not the medical profession, or even a state analogue to the FDA, that enacted SB1—it was a non-expert legislative body, and one that seems to have rebuffed, rather than followed, at least much of what the medical profession says about the proper way to treat gender dysphoria in teens.[43] At the very least, there is a robust debate within the medical profession. That medical uncertainty might justify granting some latitude to the legislature when heightened scrutiny is applied, but it certainly doesn't warrant blind deference to the legislature without any examination of what was really motivating the lawmakers. Indeed, the recent Colorado conversion therapy case[44] highlights that even in the modern world medical

39. *See supra* note 6.

40. *See* Martin J. Tobin, *Fiftieth Anniversary of Uncovering the Tuskegee Syphilis Study: The Story and Timeless Lessons*, 205 AM. J. RESPIRATORY & CRITICAL CARE MED. 1145, 1146 (2022).

41. 274 U.S. 200, 205 (1927).

42. *See* TENN. CODE ANN. § 68-33-101 (West, Westlaw current through 2025 First Reg, Sess.).

43. United States v. Skrmetti, 605 U.S. 495, 579 (2025) (Sotomayor, J., dissenting).

44. Chiles v. Salazar, 146 S. Ct. 1010, 1023–27 (2026) (holding that, as applied to the plaintiff, a mental-health counselor providing talk therapy, a Colorado law prohibiting licensed counselors from engaging in any

judgments are not necessarily insulated from political pressures, and for that reason even when a legislature is following a clear medical consensus judicial scrutiny may nonetheless be warranted.[45] All the more when no medical consensus exists or when a state is bucking one that does.

So much for pure logic and past cases that cut against what the *Skrmetti* Court did. The best case *supporting* the *Skrmetti* majority's illogical approach, and a case on which the *Skrmetti* Court did place heavy reliance, is the 1974 decision by the Court in *Geduldig v. Aiello*. *Geduldig* held that because not all females are pregnant at any moment, or indeed capable of pregnancy, pregnancy-based laws are not truly sex-based (and thus do not warrant heightened scrutiny).[46]

Could Justice Potter Stewart (or his clerk) really have embraced such specious reasoning? A law that applies to pregnant women applies only to women, and never to men. True, it applies only to a subset of women. But that fact alone should never suffice to avoid heightened scrutiny. A law that gives a benefit (say, an "admissions plus") to only a subset of Blacks (those applying to UNC, say), or only the subset of Blacks over 100 years old is surely a race-based law requiring the strictest of scrutiny. A law barring women from applying to law school (or VMI) applies only to a subset of women—female law school (or VMI) applicants—but here too heightened scrutiny must apply.[47]

A law barring all pregnant persons from voting would obviously violate the core meaning of the Nineteenth Amendment, even though such a law disfranchised only a subset of women (while leaving all men untouched). But to say this is to see clearly that pregnancy laws do indeed discriminate "on account of sex" within the undeniable meaning of the Nineteenth Amendment. (And here we see one huge benefit of holistic constitutional interpretation, bringing the Nineteenth Amendment centrally into view as one of the main pillars of the birth-equality principle.)

Geduldig's analysis (as distinct from its result)[48] was and still remains a conceptual disgrace. The *Skrmetti* dissenters proclaimed it "egregiously

treatment to help a minor client change sexual orientation or gender identity regulated the content of professional speech based on viewpoint, a generally impermissible form of regulation under the First Amendment).

45. *See id.* at 1024 ("The fact that the State's viewpoint regulation targets only licensed healthcare professionals . . . changes nothing. . . . History is littered with examples of official efforts to manipulate and control professional speech—including the content of doctor-patient discourse—in ways designed to increase state power, suppress minorities, and muzzle unpopular ideas.") (quotations omitted).

46. Geduldig v. Aiello, 417 U.S. 484, 498 n.20 (1974) ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.").

47. *See* United States v. Virginia, 518 U.S. 515, 520–23 (1996).

48. The dispute in *Geduldig* involved a California temporary disability insurance program that excluded pregnancy but included similarly disabling conditions among the list of compensable disabilities. Even applying the intermediate scrutiny that should have applied, there may have been legitimate reasons—that have nothing to do with disrespect on account of sex—for the state not to facilitate insurance for the physical disabilities arising from pregnancy. *Geduldig*, 417 U.S. at 492–98.

wrong."[49] Alas, these very same justices offered not a peep about *Geduldig* when it mattered most, back in *Dobbs*,[50] a perfect example of how doctrinal judges on both sides of the ideological spectrum have failed to root themselves in the Constitution itself, with unfortunate long-term consequences all around. If the *Dobbs* majority could properly repudiate *Roe v. Wade*[51] as unrooted in the Constitution itself, surely it would have been fair game for the *Dobbs* dissenters to do the same to *Geduldig*. But they kept mum on this point, alas, and in footnote 4 of his separate opinion in *Skrmetti*, Alito delighted in throwing *Dobbs*' pointed reaffirmation of *Geduldig* in the face of the *Skrmetti* dissenters.[52]

We take no firm position on whether SB1 would, at the end of the day, survive the heightened scrutiny to which it should have been subjected, largely because the lower court discovery and fact-finding process was short-circuited by the Court's action.[53] Indeed, while Justices Sotomayor and Jackson pushed ahead to conclude that intermediate scrutiny was not met, Justice Kagan was surely right to conclude that remand for further development of the record would first be required.[54] As a doctrinal matter, intermediate scrutiny is satisfied only if a law "substantially" furthers an "important" (and genuinely legitimate) government objective.[55] Notably, Tennessee's *stated* (as opposed to hidden) objectives for SB1 themselves raise some constitutional doubts. In SB1's own words, the statute has two objectives. The first is to "encourag[e] minors to appreciate," rather than "become disdainful of," their birth sex.[56] The U.S. Solicitor General ("SG") (and some of the *Skrmetti* dissenters) characterized this objective as itself constitutionally impermissible.[57] There seems much to that argument. As the SG put it, "[a] law aimed at encouraging 'boys and girls to look and live like boys and girls,' rests on [illegitimate 'stereotypic'] notions [about gender]."[58] At oral argument the lawyer for Tennessee suggested that discouraging children from becoming "disdainful" of anything would as a general matter seem good for their mental and psychological health.[59] The Court seemed to embrace this point.[60] Fair enough. But what about the objective of encouraging minors to "appreciate" their birth sex? Isn't expressing that goal another way of saying transgender minors should simply resign themselves to their birth sex? And isn't that governmental attitude disrespectful to people who really are transgender? In response to questioning, Tennessee's lawyer argued that "appreciate" in this context means "have enough time to appreciate their sex before undergoing life-altering

49. United States v. Skrmetti, 605 U.S. 495, 600–01 (Sotomayor, J., dissenting).
50. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268–91 (2022).
51. 410 U.S. 113, 166 (1973).
52. *Skrmetti*, 605 U.S. at 565 n.4 (Alito, J., concurring in part and concurring in the judgment).
53. *Id.* at 510–11 (majority opinion).
54. *Id.* at 607–08 (Kagan, J., dissenting).
55. *Id.* at 510.
56. TENN. CODE ANN. § 68-33-101 (West, Westlaw current through 2025 First Reg. Sess.).
57. Transcript of Oral Argument at 140, United States v. Skrmetti, 605 U.S. 495 (2025) (No. 23-477).
58. *Id.*
59. *Id.* at 141.
60. *Id.* at 142–45.

changes."[61] Discouraging hasty or ill-considered bodily changes would be a legitimate objective, and one not inherently disrespectful of transgender people, but "appreciate" and "have [or take] enough time [to think about]" are simply not the same things.[62] Common synonyms of "appreciate" are "value," "treasure," "cherish," "admire," "be grateful or thankful for," "hold in high esteem," and the like.[63] All of this seems even more linguistically clear when we juxtapose "appreciate" against the statutory desire to avoid "disdain[]." The opposite of "disdain" is "admiration" or "reverence," not "deliberation."[64] In this regard, SB1 is unlike the statutory waiting periods for abortions that were upheld even before *Dobbs*, on the ground that such waiting periods facilitated deliberation.[65]

For these reasons, even putting aside any covert objectives that intermediate scrutiny may help smoke out, SB1's first avowed purpose may very well reflect disrespect towards people who are born transgender.

But what if, on remand, a court were to determine that preservation of the health of minors—SB1's other stated objective—was one sincere and legitimate governmental objective advanced by SB1, and that encouraging people who think they are transgender to simply abandon their identity and accept their birth sex is another, disrespectful goal behind the statute? In such a circumstance, would the permissible justification of the law override the constitutionally improper goal, or vice versa?

The majority in *Skrmetti* seemed to suggest unless a law is facially sex-based (and the *Skrmetti* Court wrongly found SB1 not to be), we ought not care about possibly impermissible gender motives unless they are supported by factual findings of invidious, subjective discriminatory purpose, which was not the case as to SB1:

> [A] law that classifies on the basis of sex may fail heightened scrutiny if the classifications rest on impermissible stereotypes. . . But where a law's classifications are [not] based on sex. . . we do not subject the law to heightened review unless it was motivated by an invidious discriminatory purpose.[66]

61. *Id.* at 140.

62. *See id.*

63. *Appreciate*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/appreciate [https://perma.cc/Z58D-WMRK] (last visited Mar. 24, 2026).

64. *Disdain*, MERRIAM-WEBSTER THESAURUS, https://www.merriam-webster.com/thesaurus/disdain [https://perma.cc/37S9-FZSS] (last visited Mar. 24, 2026).

65. There is another facially troubling aspect of SB1: the statute "seems to override the wishes not just of minors, but of their parents"—the people "who, in consultation with doctors[,] . . . would ordinarily be trusted to make appropriate medical judgments for their children." Akhil Amar & Vikram Amar, Skrmetti *and Birth Equality (Part V): How the Case Should Have Been Analyzed*, SCOTUSBLOG (Dec. 29, 2025), https://www.scotusblog.com/2025/12/skrmetti-and-birth-equality-part-v-how-the-case-should-have-been-analyzed [https://perma.cc/BUS8-L3T8]. So, the proper question may not be whether the state is entitled to deference, but why the parents are not. "The *Skrmetti* [C]ourt declined to take review over challenges to SB1 brought by parents who asserted the law interfered with their rights to direct the medical treatments of their children," but "the unusual parental-override aspect of SB1 [is nevertheless] relevant to what the Tennessee legislature was genuinely and legitimately trying to accomplish." *Id.*

66. United States v. Skrmetti, 605 U.S. 495, 496–516 (2025).

This passage makes little sense to us, for two reasons. First, improper motive can be deduced by direct evidence *or* the face of the law, but either way, once found it should be problematic. Second, once direct evidence of subjectively problematic motive by the legislators is found, we do not apply heightened scrutiny at all. Rather, we ask whether the law would have been enacted absent the impermissible intentions.

As cursory as the Court's analysis here was, it does draw some indirect support from another poorly reasoned passage in a sex discrimination case, *Michael M. v. Superior Court*.[67] There, the Court (per then-Justice William Rehnquist) suggested that, so long as there is one sincere governmental objective that would, on its own, survive intermediate scrutiny, the presence of other constitutionally impermissible government objectives on the face of the law is beside the point.[68] We disagree. In the racial discrimination setting, as Justice Rehnquist's majority opinion in *Hunter v. Underwood*[69] recognized just a few years later, if a government law is motivated by two purposes—one constitutionally permissible and the other constitutionally illicit—the law is invalid unless the government can show that the law would have been enacted even absent the illicit motive.[70] That is, the government must demonstrate that the impermissible purpose was, to use a common criminal procedure term, "harmless error." We think that is the right approach, and, so, if SB1 were motivated by both disrespectful and legitimate governmental motivations, the law should be struck down unless we are confident that the legitimate reasons would have driven enactment even in the absence of the impermissible, demeaning, purposes.

Nor should the fact that SB1 involves sex rather than race alter the analysis. As we noted earlier, the different tiers of scrutiny (intermediate scrutiny for gender, strict scrutiny for race) reflect different levels of suspicion based on the facial classifications a law employs, so that courts can exert the appropriate level of energy to "smoke out" actual and potentially problematic governmental motivations.[71] But once improper motivations are known (either because they have been smoked out or because, as in SB1 under the scenario posited above, the legislature acknowledges them), then the only question becomes whether those motivations were harmless error or not. To put the point another way, sex classifications warrant less searching judicial review than racial classifications, not because sex-based disrespect is any less constitutionally problematic than race-based disrespect, but because sex classifications may portend and correlate with sexual disrespect less than racial classifications portend or correlate with racial disrespect.[72] But once we have clear evidence of disrespect on either ground, we should ensure such disrespect doesn't account for the law's enactment, because both kinds of birth-based disrespect violate that the fundamental constitutional

67. 450 U.S. 464, 472–73 (1981).
68. *Id.*
69. 471 U.S. 222, 222 (1985).
70. *Id.* at 228, 231–32.
71. *See supra* notes 4–10 and accompanying text.
72. *See supra* notes 4–10 and accompanying text.

command that individuals not be demeaned, disregarded, or degraded because of the accidents of birth.[73]

III. HOW *SKRMETTI* AND TRANSGENDER CASES ARE (RE-)IMPLICATING BASIC ISSUES OF WHICH CLASSIFICATIONS SHOULD BE VIEWED SKEPTICALLY BY COURTS AND WHY

Skrmetti interjects uncertainty not just as to what it means for a law to be *based on* a particular criterion but also the question of what is a classification.[74] *Skrmetti* also revives the question—thought to have been dampened if not extinguished during decades when equal protection focused on symmetrical protection of non-minorities in the affirmative action realm—of why should a particular classification be considered problematic in the first place.

Because he concluded that the Tennessee law at issue in *Skrmetti* did not classify on the basis of gender or transgender status, Chief Justice Roberts, in his majority opinion, did not address whether such classifications would trigger a level of review higher than rationality scrutiny.[75] However, in separate concurring opinions, Justice Barrett (joined by Justice Thomas) and Justice Alito wrote that in their views transgender status is not a suspect or quasi-suspect classification[76]. Therefore, laws and executive actions that classify on the basis of transgender status are subject to mere rational-basis scrutiny. In reaching that conclusion, both wrote extensively about their views of when and why classifications should be understood as suspect.[77] Unfortunately, both opinions present incomplete, and at times misleading, accounts of the origins of suspect

73. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973). In highlighting some of the ways *Skrmetti* botches classification analysis and improperly fails to apply heightened scrutiny to a law that, when examined and considered carefully and deeply, embodies a facial sex classification, we do not mean to suggest that classification characterizations are always neat and tidy. For example, when government is speaking rather than regulating, and makes use of racial or gender categories, equal protection principles can surely be implicated. *See, e.g.*, Anderson v. Martin, 375 U.S. 399, 403 (1964). But whether heightened scrutiny applies in such situations can be vexing. *See* Vikram David Amar & Jason Mazzone, *When Is It Constitutionally Problematic for Government to Ask Questions About the Race of Individuals? A Dialogue Between Two Constitutional Scholars*, JUSTIA (Oct. 4, 2019), https://verdict.justia.com/2019/10/04/when-is-it-constitutionally-problematic-for-government-to-ask-questions-about-the-race-of-individuals [https://perma.cc/6TFD-QFSK]. On the other hand, merely collecting racial or sexual information, for example, via the census or similar instrument, perhaps for research or historical recording purposes, wouldn't seem to trigger judicial suspicion. *See id.* This may be an example of the *Skrmetti* Court's correct assertion that mere *reference* to race or sex by government isn't inherently problematic. United States v. Skrmetti, 605 U.S. 495, 512 (2025).

74. *Skrmetti*, 605 U.S. at 597 (Sotomayor, J., dissenting).

75. *Id.* at 517 ("This Court has not previously held that transgender individuals are a suspect or quasi-suspect class. And this case, in any event, does not raise that question because SB1 does not classify on the basis of transgender status.").

76. *See id.* at 550 (Barrett, J., concurring); *id.* at 566 (Alito, J., concurring in part and concurring in the judgment). A note on terminology—all of the opinions in *Skrmetti* refer to suspect classes, as do many cases before it. *See id.* at 550 (Barrett, J., concurring); *id.* at 566 (Alito, J., concurring in part and concurring in the judgment). The better term, we think, is suspect *classification* because it is not the group of individuals—the class—that arouses suspicion, but rather the line the government has drawn. Where possible, therefore, we refer to suspect classifications, rather than classes.

77. *See id.* at 554 (Barrett, J., concurring); *id.* at 567 (Alito, J., concurring in part and concurring in the judgment).

classification analysis and the Court's own caselaw developing it. Worse, neither opinion serves well as a useful guide for litigants seeking to expand the classifications that are understood to be suspect or for courts seeking to assess such claims.

In assessing why a classification might be problematic, it is useful to know which classifications the Court has identified as suspect in the past. Here, the trouble begins. Neither Justice Barrett nor Justice Alito provides an accurate tally. In her opinion, Justice Barrett begins by stating that the baseline standard for assessing government classifications is rationality review and that "[t]here are only a few exceptions to this rule: classifications based on race, sex, and alienage."[78] That is not quite right. Even with the addition, in Barrett's very next sentence, of ethnicity ("Racial and ethnic classifications receive strict scrutiny")[79], a category that might or might not correspond to race, her set is incomplete. As Justice Alito in his concurring opinion recognizes, the Court has also treated classifications based on national origin and ancestry as subject to strict scrutiny and has at least suggested that classifications based on religion would trigger the same standard (an issue not definitively resolved because claims of religious discrimination are generally litigated and decided on First Amendment grounds).[80] While Alito identifies classifications Barrett omits, neither Barrett nor Alito reports that the Court has applied intermediate scrutiny to laws that impose burdens on what were once called "illegitimate children," that is, on children born out of wedlock,[81] and neither mentions the fundamental rights line of equal protection cases in which strict scrutiny applies.[82] Barrett and Alito also offer (each in a footnote) somewhat different accounts of classifications based on alienage,[83] a classification that implicates federalism perhaps more so than it does equal protection. In any event, it is not a good start if two members of the Supreme Court have different lists of which classifications the Court has deemed suspect.

Most early accounts of suspect classifications and the accompanying need for stronger-than-normal judicial review trace to footnote four of *United States v. Carolene Products Co*.[84] It says that "more exacting judicial scrutiny" than

78. *Id.* at 548 (Barrett, J., concurring).

79. *Id.*

80. *Id.* at 569 (Alito, J., concurring in part and concurring in the judgment).

81. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

82. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

83. *Skrmetti*, 605 U.S. at 548 n.1 (Barrett, J., concurring) (reporting in a footnote that only alienage classifications by the states are suspect, writing that "we have grounded our scrutiny of state laws as much in the Supremacy Clause [given Congress's power over immigration] as in the Equal Protection Clause" and drawing no distinction between lawfully and unlawfully present non-citizens); *id.* at 569 n.7 (Alito, J., concurring in part and concurring in the judgment) (writing that the Court has "sometimes referred to 'alienage' as a suspect class[ificaton]," observing that alienage is "quite unlike" other classifications in that "[t]he Court applies such scrutiny [to state laws] not because state laws classifying based on alienage are inherently problematic, but rather because the Federal Government has primary responsibility in the field of immigration and naturalization" and so "identification of alienage as a suspect class is . . . less a result of historical discrimination based on immutable characteristics and more a result of the Supremacy Clause," and explaining that "constitutional scrutiny . . . applies to only those state laws that discriminate against aliens who are lawfully admitted") (quotations omitted).

84. 304 U.S. 144, 152 n.4 (1938).

mere rational review might be appropriate with respect to "statutes directed at particular religious . . . or national . . . or racial minorities" and that "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 . . . may call for a correspondingly more searching judicial inquiry."[85] Both Barrett and Alito begin their analysis with footnote four.[86] Both also invoke *Lyng v. Castillo*, in which the Court (with no mention of *Carolene Products*) applied rational review to a federal statute that drew distinctions between different familial arrangements for purposes of foods stamp eligibility and benefit levels, explaining, "[a]s a historical matter, . . . [members of the class] have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority, or politically powerless."[87] Although Barrett and Alito both conclude transgender classifications are not suspect, and they each claim consistency with the other,[88] they offer, in some key respects, different accounts of what *Carolene Products*, *Lyng*, and other cases stand for and different visions of equal protection and judicial scrutiny.[89]

In Barrett's account, footnote four and *Lyng* require stinginess. She writes that there is a "high bar"[90] to recognition of suspect classification: "[t]he test is strict, as evidenced by the failure of even vulnerable groups [such as the mentally disabled, the elderly, and the poor] to satisfy it;"[91] and "the set [of categories] has remained virtually closed" with no recognition of "any new constitutionally protected classes in over four decades."[92] In her view, judicial "restraint" in equal protection rightly reflects the "wide latitude" government has in lawmaking and the power of the "democratic processes" to "eventually . . . rectif[y]" government's "improvident decisions."[93] According to Barrett, transgender individuals do not satisfy any criteria the Court has recognized in the suspect classification analysis.[94] Although she flags *Carolene Products*, the criteria Barrett invokes sound more in *Lyng.* She writes first that transgender individuals lack "obvious, immutable, or distinguishing characteristics" that exist with respect to race or sex,[95] because transgenderism is not "definitively ascertainable at the moment of

85. *Id.*

86. *See Skrmetti*, 605 U.S. at 548 (Barrett, J., concurring); *id.* at 567 (Alito, J., concurring in part and concurring in the judgment).

87. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

88. *See Skrmetti*, 605 U.S. at 550 n.3 (Barrett, J., concurring) ("Though . . . [Justice Alito's] analysis differs in emphasis . . . I understand it to be consistent with mine."); *id.* at 566 n.6 (Alito, J., concurring in part and concurring in the judgment) ("Justice Barrett sets forth a different analysis of the question whether transgender persons qualify as a suspect or 'quasi-suspect' class . . . . Although our approaches to that question emphasize different points, I do not see them as incompatible.").

89. *Id.* at 549–51 (Barrett, J., concurring); *id.* at 566–69 (Alito, J., concurring).

90. *Id.* at 549 (Barrett, J., concurring).

91. *Id.* at 550.

92. *Id.* at 549.

93. *Id.* at 550 (quotation omitted).

94. *Id.*

95. *Id.* (quotation omitted).

birth,"[96] transgender individuals experience dysphoria at different ages, and some transgender individuals ultimately detransition.[97] Relatedly, Barrett explains that transgender individuals do not qualify as a discrete group because there is too much variation in gender identity, expression, and experience, among them.[98] "The boundaries of the group," Barrett reports, "are not defined by an easily ascertainable characteristic that is fixed and constant across the group."[99]

Barrett next takes a detour, giving three paragraphs (ostensibly connected to the point about ascertainability and discreteness) on her concern that recognition of a suspect classification with respect to transgenderism "would require courts to oversee all manner of policy choices normally committed to legislative discretion."[100] Here, Barrett invokes *City of Cleburne*, in which the Court, declining to recognize mental retardation or other types of disability as a suspect classification, observed that government frequently has good reasons to treat individuals with a mental disability differently than it treats other individuals[101] and that heightened scrutiny would impede or deter legislative efforts to help individuals with disabilities.[102] The Court in *City of Cleburne* wrote that, "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement," courts should be "reluctant . . . to closely scrutinize legislative choices."[103] Barrett identifies two policy areas in which the need for comparable legislative leeway weighs too against recognizing transgender status as a suspect classification. First, she writes, transgender status "implicates physical and mental health" and "[t]he question of how to regulate a medical condition such as gender dysphoria involves a host of policy judgments that legislatures, not courts, are best equipped to make."[104] This seems to us at best poorly worded. It is certainly true that government regulates medical care. But we wouldn't normally think of the government as regulating a medical condition—even as its regulation of care might well impact how the condition is (or is not) treated. Further, it is striking that Barrett views medical conditions as subject to policy judgments but makes no mention of the professional judgment of physicians and other providers of healthcare, matters discussed above in Part II. The second policy concern Barrett identifies is more murky: Barrett refers to this concern as involving "several other areas of legitimate regulatory policy—ranging from access to restrooms to eligibility for boys'

96. *Id.*

97. *Id.* at 550–51.

98. *See id.* at 551.

99. *Id.*

100. *Id.*

101. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 444 (1985). As noted earlier, *Cleburne*'s doctrinal analysis (and any invocation of it) must be viewed with some skepticism, given that the *Cleburne* Court ultimately struck down, rather than upheld, the classification at issue, even though the kinds of under- and over-inclusiveness of the legislative scheme that the Court used to invalidate the law are routinely—indeed, almost inexorably—permitted under rational-basis review. This aspect of *Cleburne* has led many commentators to view the case as either doctrinally incoherent or dishonest. *See supra* note 24 and accompanying text.

102. *Id.* at 444–45.

103. *Id.* at 441.

104. *Skrmetti*, 605 U.S. at 551–52 (Barrett J., concurring).

and girls' sports teams."[105] She writes further that if a suspect classification were recognized for transgender status, courts will have to "closely scrutinize[e] legislative choices in all these domains," even though "legislatures have many valid reasons to make policy" in them and "so long as a statute is a rational means of pursuing a legitimate end, the Equal Protection Clause is satisfied."[106] It isn't at all clear which concerns besides restrooms and sports teams Barrett has in mind here—what falls in the "range" between these two. But there is a more obvious problem. When the government mandates separate restrooms and sports teams for men and women, that sex-based classification is already subject to intermediate scrutiny; a rational relationship to a legitimate end does not suffice to sustain the classification. Indeed, *City of Cleburne* itself identified sex-based classifications as triggering heightened scrutiny precisely because sex "generally provides no sensible ground for differential treatment" and such classifications instead "very likely reflect outmoded notions of the relative capabilities of men and women."[107] By contrast, classifications that trigger only rational review—such as age and (as in *City of Cleburne*) disability—involve instances "where individuals in the group affected by a law have distinguishing characteristics relevant to interests the State has the authority to implement."[108] (We note further that, invoking the work of John Hart Ely, *City of Cleburne* ends up discounting the relevance of immutability to suspect classification analysis.)[109] Perhaps Barrett means to make a different point: that separate restrooms and sports teams would survive intermediate review[110] but not strict scrutiny, if that were the standard for classifications based on transgender status (and restroom and sports laws were challenged as classifying on that basis). As it stands, though, Barrett's announced concern with the need for legislative discretion strikes us as muddled.

Back to *Lyng*. Barrett concludes that under *Lyng*, the fact that transgender individuals do not constitute a discrete group with an obvious, immutable, or distinguishing characteristic, "enough to demonstrate that transgender status does not define a suspect class."[111] In light of *Carolene Products*' reference to "discrete and insular minorities," that might be a fair implication to draw from *Lyng*. But *Lyng* doesn't actually specify that all of the factors it identifies must be met; in *Lyng* itself, none of them were.[112] In any event, Barrett goes on to explain why, in her view, *Lyng*'s additional factor, whether a class historically been subjected to discrimination, also "poses a problem"[113] for the plaintiffs' argument that transgender status is a suspect classification. Here, Barrett explains

105. *Id.* at 553.

106. *Id.* (internal quotations omitted).

107. *City of Cleburne*, 473 U.S. at 440–41 ("[W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.") (quoting Frontiero v. Richardson, 411 U. S. 677, 686 (1973) (plurality opinion)).

108. *Id.* at 441.

109. *Id.* at 442 n.10 ("'[T]here's not much left of the immutability theory, is there?'") (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980)).

110. *See supra* Part II.

111. United States v. Skrmetti, 605 U.S. 495, 553 (2025) (Barrett J., concurring).

112. *See id.* at 549; Lyng v. Castillo, 477 U.S. 635, 638 (1986).

113. *Skrmetti*, 605 U.S. at 553 (Barrett J., concurring).

that the only relevant discrimination is by the government in its laws—*de jure* discrimination, she says—so that evidence of private discrimination (advanced by the plaintiffs and deemed relevant by the district court) is of no significance.[114] Whatever the experience of transgender individuals in the domains of private employment, housing, healthcare, and so on, because "the Fourteenth Amendment constrains state action, not private conduct" and because evidence of private discrimination "does not provide a basis for inferring that state actors are also likely to discriminate" under *Lyng*, a group must have "suffered a history of *de jure* discrimination."[115] That focus, Barrett writes, "is also judicially manageable" because, while "[c]ourts are ill suited to conduct an open-ended inquiry into whether the volume of discrimination exceeds some indeterminate threshold," they can readily "analyze whether there is a history of legislation that has discriminated against the group in question."[116]

Barrett's approach here, involving counting up statutes, is in vogue. In recent cases, including *Dobbs*, that specify that, for a right to be protected against state interference under the Due Process Clause of the Fourteenth Amendment—whether a right protected by the Bill of Rights and incorporated against the states or an unenumerated fundamental right—it must be "deeply rooted in our history and tradition and . . . essential to our Nation's scheme of ordered liberty,"[117] the Court has tallied up historical state laws and practices. So, too, in *Bruen*,[118] in which the Court invalidated a New York statute requiring individuals who wished to carry a concealed firearm outside the home to obtain a license based on a showing of "proper cause,"[119] the Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and therefore "to justify its regulation, . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation,"[120] an inquiry that also involves counting historical state laws.

Aggregating historical statutes to determine the meaning and proper application of the Constitution is an uncertain enterprise.[121] In the context of determining whether there is historical governmental discrimination against a group, there would seem multiple questions that Barrett doesn't address. Do we add up the number of states that have had any kind of discriminatory law? Or do we add instead the number of states with the same or similar statutes? If a single state has had many discriminatory statutes, do we count each of those statutes

114. *Id.* at 553–54.

115. *Id.* at 554–57.

116. *Id.* at 555.

117. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022) (first quoting Timbs v. Indiana, 586 U.S. 146, 149 (2019); then quoting McDonald v. City of Chi., 561 U.S. 742, 764, 767 (2010); then quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

118. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70 (2022).

119. *Id.* at 11.

120. *Id.* at 17.

121. *See generally* Jason Mazzone, *History, Tradition and Federalism*, 47 HARV. J.L. & PUB. POL'y 659, 659–97 (2024) (discussing the practice and its risks).

separately or is the same weight given to every state regardless of the intensity and volume of its discrimination? And what temporal period is the relevant focus when the question is not the meaning of a constitutional provision adopted at a particular point in time, but a history of discrimination? And how about states that once had but no longer have discriminatory statutes?

We are also not confident that the lines Barrett herself draws are as clear as she suggests. Barrett is, of course, correct that the Fourteenth Amendment constrains only government and has no application to the acts of private individuals. Equally, it would be foolish to conclude unreflexively that private discrimination is itself evidence of government discrimination. But it doesn't necessarily follow that how private individuals have treated a group has no *relevance* to the question of whether the group has suffered adverse action at the hands of the government.[122] For one thing, evidence of private discrimination can provide context for government action and inaction.[123] If members of a particular group have experienced widespread private discrimination—when seeking employment, say, or finding housing—and the legislature, with knowledge of the discrimination (and perhaps after lobbying efforts to do something about it), remains indifferent, declines to expand existing non-discrimination laws to cover the group, we would likely consider such inaction relevant to the inquiry into government discrimination.

Limiting the evidence to laws that affirmatively discriminate also strikes us as too narrow. Government repeal of laws that once provided protection to a group would also seem relevant. So, too, while Barrett insists on a history of discriminatory legislation—imagining, we suppose, that such laws could be readily identified and tallied—the history of government discrimination against a group might lie not in statutes, but in the ways in which they are applied (or not) by executive officers. There might, for example, be no statute that directs the police to stop, search, question or arrest transgender individuals at higher rates than the rest of the population.[124] But surely such conduct weighs in the assessment of historical government discrimination.[125] Indeed, among the cases Barrett cites as examples that demonstrate "discrimination in the law" is *Yick Wo v. Hopkins*.[126] Barrett describes *Yick Wo* as a case "identifying ordinances that discriminated against Chinese nationals."[127] But *Yick Wo* did not involve discriminatory legislation (the laundry ordinances at issue said nothing about race,

122. *See* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 736–37 (2003) (using evidence of private employer discrimination to uphold the federal Family and Medical Leave Act as a valid enactment by Congress under Section 5 of the Fourteenth Amendment to abrogate state sovereign immunity from damage liability); Vikram David Amar, *The New "New Federalism": The Supreme Court in* Hibbs *(and* Guillen*)*, 6 GREEN BAG 349, 351 (2003).

123. *See Hibbs*, 538 U.S. at 736; Amar, *supra* note 122, at 351.

124. *See* JOSHUA ARRAYALES, CHRISTY MALLORY & JORDAN GRASSO, UCLA SCH. OF L. WILLIAMS INST., LAW ENFORCEMENT AND LGBTQ PEOPLE 2 (2025), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Police-Interactions-LGBTQ-Nov-2025.pdf [https://perma.cc/SFL8-FFS2].

125. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 372–74 (1886).

126. United States v. Skrmetti, 605 U.S. 495, 554–55 (2025) (Barrett, J., concurring) (citing *Yick Wo*, 118 U.S. at 373–74).

127. *Id.* at 554–55.

ethnicity or national origin) but rather discriminatory *application* of the law by city officials.[128] *Yick Wo*'s most important and memorable sentence makes clear that the equal protection problem was not legislative classification but administrative application: "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution."[129] If Barrett means really to count instances such as those in *Yick Wo*, the evidence extends beyond legislation.

More generally, it is fair to ask what even counts as a discriminatory statute. Barrett's analysis suggests that, as a rule, a group must be named specifically in the statute and then subject to adverse treatment. It is not clear, though, why, for purposes of identifying historical discrimination by the government that supports a determination of suspect classification, the inquiry should be so limited. Another of the examples Barrett cites defies the rule. Writing that "in protecting alienage, we underscored the many state laws that discriminated on that ground, typically by targeting individuals of a particular national origin," Barrett refers to Justice Murphy's concurring opinion in *Takahashi v. Fish and Game Commission* as "discussing a state law 'directed in spirit and in effect solely against aliens of Japanese birth.'"[130] *Takahashi* did indeed involve a state law that classified on the basis of alienage (it denied commercial fishing licenses to individuals ineligible for citizenship) and the Court invalidated the classification. But, in contrast to an earlier statute that had applied specifically to "alien Japanese", the challenged law did not single out individuals born in Japan.[131] The whole point of Justice Murphy's concurring opinion was to highlight "one important aspect of this case" that Justice Black's majority opinion had not discussed: that the challenged law was "the direct outgrowth of antagonism toward persons of Japanese ancestry"[132] specifically. Justice Murphy's assessment that the statute involved discrimination *specifically* against individuals of Japanese birth was based on his reading of the legislative history of the statute and (as noted by the trial court) the fact that the only non-citizens practically affected by the law were of Japanese origin.[133] It seems sensible to include in a tally of historical discrimination laws that, "in spirit and in effect," imposed a disadvantage on a specific group.[134] But, as *Takahashi* itself demonstrates, identifying such laws is more complicated than Justice Barrett's own approach suggests even as she invokes the case. There is also considerable irony to Justice Barrett's quotation of Justice Murphy's concurring opinion. For might not the Tennessee law in *Skrmetti* itself

128. *See Yick Wo*, 118 U.S. at 373–74.

129. *Id.*

130. *Skrmetti*, 605 U.S. at 554 (quoting Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 427 (1948) (Murphy, J., concurring)).

131. *See Takahashi*, 334 U.S. at 413–14.

132. *Id.* at 422 (Murphy, J., concurring).

133. *Id.* at 426–27.

134. *Id.* at 427.

be one that "in spirit and effect" is targeted at and imposes unique hardships on transgender individuals such that it should be understood to discriminate against them?

In her focus on discriminatory statutes, Barrett returns, at last, to *Carolene Products*. She writes that "the inquiry on *de jure* state action would also clarify the test for political powerlessness," which she says "is another factor we have used to determine whether a classification is suspect."[135] Referencing the citations in *Carolene Products*, *McCulloch v. Maryland*, and *South Carolina Highway Department v. Barnwell Brothers, Inc.,* Barrett reports that *Carolene Products* "equates political powerlessness with laws burdening those who lacked a vote."[136] She further observes that while "[t]his kind of political powerlessness . . . leaves the affected persons altogether unable to protect themselves in the political process" and "tracks the experience of the *existing* suspect classes" that the Court has "said little . . . about what 'political powerless' means for our recognition of *new* suspect classes."[137] In the absence of "clear guidelines," Barrett continues, the lower courts have turned to "markers" (such as whether a class is supported by interest groups, has equal representation in government, or has secured statutory protection from private discrimination) that wrongly "reflect sociological intuitions about a group's relative political power" rather than, as it should be, "an objective, legally grounded standard that courts can apply consistently."[138] This all leads back to the importance, for Barrett, of focusing (solely) on *de jure* discrimination—discrimination in statutory law—because it "more precisely (and objectively) captures the interests that lie at the heart of the Equal Protection Clause."[139]

There are several odd aspects to this analysis. It is true that *Carolene Products* cites *McCulloch* and *Barnwell*, both cases (though not equal protection cases) in which entities burdened by state laws were not represented in the state legislatures that were regulating them.[140] But *Carolene Products*, which, reminder, refers to the problem of "prejudice . . . which tends seriously to curtail the operation of . . . political processes," doesn't stand for the proposition that a higher level of judicial scrutiny is *only* appropriate where those affected lack (or have at one point lacked) entirely the right to vote.[141] Minors, for example, cannot vote. But laws that treat minors differently from adults are only subject only to rational review.[142] More generally, while Barrett is right that the lack of a right to vote "tracks the experience of the existing suspect classes" that she

135. *Skrmetti*, 605 U.S. at 555 (Barrett, J., concurring).

136. *Id.* at 555–56 (first citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); then citing S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938)).

137. *Id.* at 556 (emphasis added).

138. *Id.*

139. *Id.*

140. *See Carolene Prods. Co.*, 304 U.S. at 151–53.

141. *Id.* at 152 n.4.

142. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part and dissenting in part) ("The political powerlessness of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.").

identifies—in that government in the past denied the right to women and Black citizens (and still does with respect to aliens)—we might well wonder why, if the right to vote is the focus, extension of the right in the Fifteenth and Nineteenth Amendments does not lead to movement of these groups out of the category of suspect classification. *Carolene Products*' answer, of course, is that the right to vote does not alone eliminate the risk of adverse legislative outcomes.[143] Even with full voting rights, some groups might still have less power than other groups and so still routinely lose out in political processes. In another respect, though, Barrett's focus, at the end of her opinion, on past exclusion from voting makes internal sense: it ties back to her incomplete list of suspect classifications (race, sex, alienage) with which her opinion begins.[144] But just as Barrett's list does not capture the full landscape, and just as her identification of evidence of discrimination seems underinclusive, so too her approach to political power lacks completeness under *Carolene Products* and the cases that grow out of it.

As to whether there is a history of discriminatory legislation *vis a vis* transgender individuals, Barrett, in the end, doesn't definitively say.[145] In her view, the *Skrmetti* plaintiffs, mistaken in their belief that evidence of private discrimination counted, didn't "thoroughly discuss" whether there is a "history of *de jure* discrimination" against transgender individuals; the issue, she says, remains "largely academic" because, in any event, "the group of transgender individuals is an insufficiently discrete and insular minority" and that suffices to foreclose a claim of a suspect classification.[146] In a footnote, Barrett adds that the evidence of such discrimination before the Court is "sparse but suggestive of relatively little *de jure* discrimination," but that, because the issue wasn't briefed, she took no position on whether there is a longstanding history.[147] Therein lies a further important point. On Barrett's account, consistent with the tradition analysis under the Fourteenth Amendment, parties asserting that there is a history of discrimination to support a designation of suspect classification, are responsible for compiling the record of discriminatory statutes.[148]

Before we turn to some more general observations, we take up Alito's analysis of suspect classifications. He begins his account by observing that the Court has "never set out a hard-and-fast test" to identify suspect classifications but notes that its decisions "have identified certain key factors that transgender individuals do not share with members" of groups recognized as classes that trigger heightened review.[149] Alito sticks closer to *Carolene Products* than does Barrett. In so doing, he offers a very specific understanding of *Carolene Products* and the concerns of footnote four. Alito describes the core focus of footnote four and cases that followed *Carolene Products* as remedying racial discrimination and particularly "discrimination against blacks," who he says "undoubtedly

143. *See* 304 U.S. at 152 n.4.
144. United States v. Skrmetti, 605 U.S. 495, 556–57 (2025) (Barrett, J., concurring).
145. *Id.*
146. *Id.*
147. *Id.* at 557 n.5.
148. *Id.* at 554.
149. *Id.* at 566 (Alito, J., concurring in part and concurring in the judgment).

constituted a discrete and insular minority that was denied equal participation in the political process."[150] We note two things at the outset. First, that Alito's framing does not quite align with footnote four. It refers not to discrete and insular minorities who have been denied equal political participation, but to the problem of prejudice against discrete and insular minorities that "curtails the operation of . . . political processes" that would "ordinarily" protect minorities. Indeed, equal participation is a quite different concept. Members of a racial minority might individually participate equally in a political process as members of the racial majority but still lose out within the meaning of footnote four. The second thing to note is that within footnote four, before getting to discrete and insular minorities, *Carolene Products* already identifies "statutes directed at particular . . . racial minorities" as potentially triggering more intensive judicial review.[151] In light of that feature of the footnote, it isn't clear why the quintessential example of discrete and insular minorities in the final part of footnote four would be racial minorities, as Alito claims. Without significant elaboration, Alito also writes that the Court has "treated national origin and ancestry as suspect classes, largely because of their proximal relationship to race."[152] He further observes that the Court has suggested that religion is a suspect classification.[153] Notice here the shift in framing (one that we will return to again): with respect to race, Alito's focus is on racial minorities and more particularly on Blacks.[154] In describing national origin and ancestry, however, his description is not about particular groups within these two categories, but about the very classification itself.[155]

As to race, Alito recounts instances of various kinds of historical discrimination against Black Americans, including with respect to voting and other forms of political participation, that the Court has sought to remedy.[156] He writes that in light of that historical experience, "the circumstances that led to the identification of race and national origin as suspect classes were truly extraordinary."[157] Again, though, Alito is less concerned with the classification—race—than with particular classes of race. In the next sentences, he adds, "the designation of a suspect class is reserved for those classes saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" and is "largely reserved" for "those groups whose members tend to carry an obvious badge of their membership in the suspect class, which in part explains the severity or pervasiveness of the historic legal and political discrimination" they have experienced.[158] By contrast,

150. *Id.* at 568 (quotation omitted).
151. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).
152. *See Skrmetti*, 605 U.S. at 569 (Alito, J., concurring in part and concurring in the judgment).
153. *Id.*
154. *Id.* at 570.
155. *Id.*
156. *See id.* at 568.
157. *Id.* at 570.
158. *Id.* (quotations omitted).

"suspect class status," Alito writes, is "inappropriate" for "large, diverse, and amorphous groups that do not share obvious, immutable, or distinguishing characteristic that define them as a discrete group."[159] "[R]ace," Alito next writes, "satisfies all of these criteria."[160] But it isn't race, as a general category, that matters. The next two sentences read: "Racial minorities experienced a long history of invidious discrimination and lack of political power. Race . . . is an immutable characteristic that often coincides with a visible and distinguishable 'badge' of membership in the group."[161] Similarly, when Alito turns to sex and intermediate scrutiny, he refers to "sex-based classifications,"[162] but his focus is not the classification in general, but women as a class.[163] He writes that "sex discrimination shares many characteristics with racial discrimination: it was historically entrenched and pervasive; it was based on identifiable and immutable characteristics; and it included barriers to full participation in the political process."[164] That is to say, discrimination against, and full participation by, women.

Alito's focus on classes rather than classifications, with slippage between the two, results in a conceptually incoherent opinion. In particular, in depicting suspect classification analysis as originating in and primarily about remedying discrimination against Black Americans, Alito's approach is in tension with recent opinions of the Court—joined by Alito himself—that insist the Equal Protection Clause requires colorblindness and so prohibits (with just narrow exceptions) *all* government consideration and use of race. For example, in *Students for Fair Admissions* ("*SFFA*"), which invalidated consideration of race in university admissions, Chief Justice Roberts wrote (in an opinion Justice Alito joined):

> Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies without regard to any differences of race, of color, or of nationality—it is universal in its application. For the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[165]

Perhaps there is a persuasive explanation that comports with Justice Alito's account in *Skrmetti* on the particular origins and focus of footnote four, for why strict scrutiny applies to government programs that discriminate in favor of (rather than against) Black Americans. Although Alito cites *Students for Fair Admissions*,[166] he does not in his *Skrmetti* opinion provide one.

Summarizing the Court's trajectory, Alito finds two lessons in the Court's recognition of certain "classifications" as requiring a higher level of scrutiny, and

159. *Id.*
160. *Id.*
161. *Id.* (quotation omitted).
162. *Id.* at 571.
163. *See id.*
164. *Id.* at 572–73.
165. Students for Fair Admissions, Inc. v. President of Fellows Harvard Coll., 600 U.S. 181, 206 (2023) (quotations and alterations omitted).
166. *Skrmetti*, 605 U.S. at 571 (Alito, J., concurring in part and concurring in the judgment).

its refusal to apply the same scrutiny to "other classifications" even when those classifications "share some characteristics with race, national origin, and sex."[167] First—and now, again, Alito switches from classifications to classes—he writes that suspect or quasi-suspect status is "exceedingly rare[ly]" and has been denied even to "class[es]" that have "suffered from harmful historical discrimination or a lack of political power."[168] Second, Alito writes, "no single characteristic is independently sufficient to qualify a proposed class," but instead the Court has required "a strong showing of multiple relevant criteria: a history of widespread and conspicuous discrimination, *de facto* or *de jure* exclusion from equal participation in the political process, and an immutable characteristic that tends to serve as an obvious badge of membership in a clearly defined and readily identifiable group."[169]

In Alito's view, transgender status cannot be the basis for elevated judicial review because none of the criteria he identifies are met.[170] He reports that although transgender individuals have suffered discrimination, he reports that there was no showing in the case of "a history of widespread and conspicuous discrimination . . . similar to that experienced by racial minorities or women."[171] Further, in Alito's view, no evidence exists of an exclusion of transgender individuals from participation in the political process; indeed, Alito writes, in spite of the small size of the group, it has had "notable success in convincing many lawmakers to address their problems."[172] According to Alito, transgender status is also not immutable and is not accompanied by "visibly identifiable characteristics."[173] Finally, Alito notes, the "class" is amorphous.[174]

The analysis by Justices Barrett and Alito leaves considerable confusion about why, under the Equal Protection Clause, certain kinds of government classifications trigger a higher level of judicial scrutiny. Read together, the opinions of these two justices offer different explanations for and emphasize different considerations in suspect classification analysis.[175] Especially unhelpful are the all-or-nothing assessments in both opinions. Justice Sotomayor's dissent is similarly all or nothing in concluding that transgender status is a suspect classification.[176]

167. *Id.* at 573.

168. *Id.* at 574–75.

169. *Id.* at 575.

170. *See id.* at 575–76.

171. *Id.* at 575.

172. *Id.* at 576.

173. *Id.* (quotation omitted).

174. *Id.* at 577 (quotation omitted); *see also id.* at 566 (writing that transgender status is not immutable and persons "can and do move into and out of the class;" and "members of the class differ widely among themselves, and it is often difficult for others to determine whether a person is a member of the class;" and transgender individuals "have not been subjected to a history of discrimination that is comparable to past discrimination against the groups" previously recognized as a basis for heightened review).

175. *See id.* at 547–78.

176. Justice Sotomayor concludes that transgender status is a quasi-suspect classification that, like sex, should trigger intermediate scrutiny. *Id.* at 600–01 (Sotomayor, J., dissenting). She points to: (1) a history of discrimination, writing that transgender individuals have "long been subject to discrimination in healthcare, employment, and housing, and to rampant harassment and physical violence," that "[i]ndividuals whose gender identity diverges from their sex identified at birth (whether labeled as 'transgender' at the time or not) . . . have

Both Justices Barrett and Alito conclude that transgender status doesn't satisfy any of the criteria they analyze and that there is no evidence in the record in support of historical discrimination.[177] But neither Justice recognizes—let alone grapples with—the problem that, under most multi-factor tests, some elements will be met and some won't be, and neither acknowledges that the classifications that are recognized as suspect do not satisfy all of the criteria invoked.[178] Religion, for example, is not an immutable characteristic: it does not carry any "badge" of identification, and Americans regularly change their religious affiliations.[179] Alienage is not immutable either. A person born an alien might become a U.S. citizen. While there are official markers of alienage (such as birth certificates and passports) and there might be signs that members of the public rely upon (a foreign accent, for example), these are far from consistent or inevitable. Sex classifications obviously encompass an enormous number and diversity of individuals. Racial classifications, themselves the product of political and social decisions, can also lack rigidity. Our point is not that there is nothing to the idea of a discrete and insular minority under footnote four. But it isn't helpful—and it is quite misleading—to write with certainty about the category (transgender status) at issue in *Skrmetti* while downplaying the uncertainties that exist with categories previously recognized to trigger higher judicial review.

Perhaps, like John Hart Ely,[180] Barrett and Alito ultimately think the best account of footnote four lies in political processes. Unfortunately, both Barrett (with her focus on an outright denial of voting rights and her imprecise account of historical discriminatory laws) and Alito (with his off-handed claim that transgender individuals have had some notable legislative successes) never articulate an account of equal protection that, from a political perspective, explains the role courts have played in the past, much less the role they might play in the future, consistent with the vision of footnote four.[181] Indeed, the accounts both provide suggest that the categories that have been recognized to constitute suspect classifications are forever fixed, with no movement in and out. Yet a virtue of footnote four itself is its lack of rigidity. It recognizes that because political

been subject to a lengthy history of *de jure* discrimination in the form of cross-dressing bans, police brutality, and anti-sodomy laws," and that today "[t]he Federal Government . . . has started expelling transgender servicemembers from the military and threatening to withdraw funding from schools and nonprofits that espouse support for transgender individuals," *id.* at 601–02; (2) a defining characteristic ("incongruence between sex and gender identity") that has "no relation" to the "ability to perform or contribute to society," *id.* at 602 (quotation omitted); (3) coherence of the class, *id.* ("As a group, the class is no more . . . amorphous than most races or ethnic groups.") (quotation omitted); and (4) political power, *id.* at 602–03 ("the class lacks the political power to vindicate its interests before the very legislatures and executive agents actively singling them out for discriminatory treatment.") (quotation omitted).

177. *See id.* at 547–57 (Barrett, J., concurring); *id.* at 557–78 (Alito, J., concurring in part and concurring in the judgment).

178. *See id.* at 547–57 (2025) (Barrett, J., concurring); *id.* at 557–78 (Alito, J., concurring in part and concurring in the judgment).

179. *See id.* at 569 (Alito, J., concurring in part and concurring in the judgment).

180. *See generally* ELY, *supra* note 7 (arguing that the Supreme Court's role is to ensure that the democratic process works, not to enforce substantive rights).

181. *See Skrmetti*, 605 U.S. at 547–57 (Barrett, J., concurring); *id.* at 557–78 (Alito, J., concurring in part and concurring in the judgment).

processes change over time, so too will the circumstances in which the Court will have fair occasion to intervene.[182] Moreover, both Barrett and Alito fail to square the particular version of equal protection and suspect classification they describe in *Skrmetti* with the Court's own rigorous insistence in recent years on symmetrical protections for every class within the classifications that it has identified as warranting increased scrutiny.[183] Footnote four's asymmetrical approach has virtues but seems to have been eclipsed by color-blindness. Barrett's and Alito's failure to engage the tension between their old-fashioned emphasis on classes, rather than classifications, might well be the biggest element of doctrinal uncertainty their writings interject going forward.

IV. ANOTHER EMERGING CLASSIFICATION CONTROVERSY—HOW TO TREAT LAWS THAT SINGLE OUT ANCESTORS OF AMERICAN SLAVES?

Recently, state and local governments have considered, and some have adopted, measures to provide "reparations" for slavery, government and private discrimination, and other historic racial injustices.[184] A common theme to these recent reparations initiatives is provision of monetary compensation and other forms of compensation to the descendants of victims of the past.[185] There appear two motivating reasons. One grows out of the historical and philosophical belief that, while the direct victims of slavery are long dead, descendants, the theory runs, continue to be worse off than they would be had the harm to their ancestors not occurred.[186] A second is more pragmatic, and reflects an evident effort to frame the reparative program as not based on race so as to avoid strict scrutiny.[187] Some prominent commentators have taken the position that ancestry-based reparations, even when the beneficiaries come from a single race, do not involve a racial classification by the government and therefore are only subject to rational review. Dean Erwin Chemerinsky, for example, takes the position that "race-neutral" reparations based on "lineage" are likely constitutionally valid.[188]

There are two related problems with framing reparations for race-based injuries in terms of ancestry and lineage. One is that, as the recent reparations

182. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

183. *See Skrmetti*, 605 U.S. at 553 (Barrett, J., concurring); *id.* at 577–78 (Alito, J., concurring in part and concurring in the judgment).

184. *See, e.g.*, CAL. TASK FORCE TO STUDY & DEV. REPARATION PROPOSALS FOR AFR. AMS., FINAL REPORT 4 (2023) [hereinafter CAL. TASK FORCE], https://oag.ca.gov/system/files/media/full-ca-reparations.pdf [https://perma.cc/7USE-4Y42]; S.F. HUM. RTS. COMM'N, SAN FRANCISCO REPARATIONS PLAN 2023: A SUBMISSION FROM THE SAN FRANCISCO AFRICAN AMERICAN REPARATIONS ADVISORY COMMITTEE 8 (2023), https://media.api.sf.gov/documents/AARAC_Reparations_Final_Report_July_7_2023.pdf [https://perma.cc/EY3U-Z3KS]; CITY OF EVAN-STON, LOCAL REPARATIONS: RESTORATIVE HOUSING PROGRAM 3 (2021), https://www.cityofevanston.org/home/showpublisheddocument/66184/637677439011570000 [https://perma.cc/9265-K7GF].

185. *See supra* note 184 and accompanying text.

186. *See* CAL. TASK FORCE, *supra* note 184, at 3.

187. *See, e.g.*, CALIFORNIA DEPARTMENT OF JUSTICE, *February 23, 2022 Reparations Task Force - Witness Testimony - Erwin Chemerinsky*, at 00:13 (YouTube, Mar. 15, 2022), https://www.youtube.com/watch?v=scLFf-HDj38M [https://perma.cc/Z2UB-7WU3].

188. *See id.*

initiatives themselves show, race and lineage are often very difficult to disentangle.[189] The second problem is broader: government classifications based on "lineage" are themselves constitutionally problematic, for many of the same reasons as racial classifications.[190]

We explore these issues in light of recent reparations initiatives in two cities, Evanston (Illinois) and San Francisco, and in one state, California. In 2019, the Evanston City Council voted to fund—using taxes on cannabis dispensary sales—"local reparations for African American residents of the city,"[191] and in 2021 it launched a "Restorative Housing Program." According to the program guidelines, in adopting the program, the city "recognizes the government allowed and perpetuated racial disparities through the use of many regulatory and policy-oriented tools" and "acknowledges the harm caused to Black/African-American Evanston residents due to discriminatory housing policies and practices and inaction on the City's part."[192] The stated purpose of the program is therefore to take a "step towards" four outcomes: "[r]evitaliz[ing], preserv[ing], and stabiliz[ing] Black/African-American owner-occupied homes in Evanston;" "[i]ncreas[ing] homeownership and build[ing] the wealth of Black/African-American residents;" [b]uild[ing] intergenerational equity amongst Black/African-American residents; and "[i]Improv[ing] the retention rate of Black/African-American homeowners in the City of Evanston.[193] The program makes available cash grants of $25,000 to three classes of current residents of Evanston who are of "Black/African-American ancestry"[194] (defined as "a person having origins in any of Africa's black racial and ethnic groups"),[195] with applications reviewed and funded in a designated order: (1) those who lived in Evanston as adults anytime between 1919 and 1969 (the program calls these individuals "ancestors"); (2) "direct descendants" of the designated "ancestors," defined as "a blood relative in the direct line of descent;" and (3) other individuals who "experienced housing discrimination due to the City's policies/practices after 1969."[196]

Evanston's "Restorative Housing Program" involves racial classifications through and through and, therefore, is subject to strict scrutiny under the Equal Protection Clause. The program is poorly designed to survive that standard. Local government can have a compelling interest in remedying its own discriminatory laws and practices and can do so by uses of racial classifications, so long as they are narrowly tailored to the remedial goal.[197] Evanston's program, though, hardly even pretends to meet these stringent requirements. Its first—and highest priority—class of beneficiaries are Black residents of Evanston any time during

189. *See* CAL. TASK FORCE, *supra* note 184, at 606.

190. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 4 n.4, 12 (1967).

191. City of Evanston, Ill., Mun. Resol. 126-R-19 (Sep. 9, 2019) (codified as EVANSTON, ILL., CITY CODE §§ 2-17-1 to -6, 3-2-20-3 (2020)).

192. CITY OF EVANSTON, *supra* note 184, at 3.

193. *Id.*

194. *Id.* at 7.

195. *Id.* at 3.

196. *Id.* at 3–4, 6.

197. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 486 (1989).

a defined fifty-year period.[198] This is very unlikely to be a narrowly tailored approach for the simple reason that there is no way to know which of the individuals deemed eligible for compensation were victims of housing-related racial discrimination by the city or as a result of city policies during the period in question. Under strict scrutiny, the fact that some Black residents were victims does not permit the government to assume all Black residents were victims and direct remedies to an undifferentiated group. The second Evanston class—the descendants of the former Black residents—fares worse. We will take up problems with descendancy below. For now, it suffices to flag that nobody in that class was a victim of the harm purportedly being remedied.

Turn now to California. In San Francisco, in 2023, the city's African American Reparations Advisory Committee recommended in its final report[199] reparations to individuals who are (1) descendants of an enslaved person, (2) descendants of a free Black person prior to the end of the nineteenth century, or (3) have identified as Black/African American on public documents for at least 10 years. Three additional requirements apply: these individuals must have been born in or migrated to San Francisco before 2006, lived in San Francisco for 10 years,[200] and prove they experienced one of a list of identified harms. The list of harms includes being "[a]n individual (or surviving direct descendant) who experienced documented physical injury, psychological trauma, or loss of life at the hands of law enforcement;" being "[a]n individual relocated by the San Francisco child welfare/foster system;" and being "[a]n individual, or direct descendant of someone, who was arrested, prosecuted, convicted, and/or sentenced in San Francisco for a drug-related crime."[201] For individuals who meet the requirements, the report recommends a lengthy and imaginative roster of financial and other "reparations." These include "a one-time, lump sum payment of $5 million;"[202] a "debt forgiveness program that clears all educational, personal, credit card, payday loans, etc.;"[203] "[t]ax abatement on sales taxes for 250 years;"[204] "grants for home maintenance and repair costs;"[205] exemption from city property taxes;[206] preferences in city employment;[207] and full college tuition.[208] Given the prohibitive costs, the city has not implemented the report's recommendations.[209] However, at the end of 2025, the city did approve creation of a reparations

198. *See supra* note 196 and accompanying text.
199. S.F. HUM. RTS. COMM'N., *supra* note 184, at 4.
200. *Id.* at 32.
201. *Id.*
202. *Id.* at 9.
203. *Id.* at 10.
204. *Id.* at 11.
205. *Id.* at 12.
206. *Id.* at 13.
207. *Id.* at 16.
208. *Id.* at 19.
209. *See San Francisco Proposes Reparations, Includes $5 Million for Eligible Black People*, PBS NEWS (Mar. 14, 2023, at 11:32 ET), https://www.pbs.org/newshour/nation/san-francisco-proposes-reparations-includes-5-million-for-eligible-black-people [https://perma.cc/BV57-SSXS].

"fund," albeit without any city dollars; the fund therefore exists, for now, as a repository for private donations and any future city allocations made.[210]

Meanwhile, in 2025, following two reports by a state-created "Reparations Task Force,"[211] the California state legislature passed a series of reparations measures. Three bills, all vetoed by Governor Gavin Newsom on October 13, 2025,[212] are of particular interest. One bill, AB 7, stated that public and private colleges and universities "may consider providing a preference in admissions to an applicant who is a descendant of slavery,"[213] as defined in the bill.[214] A second bill, AB 62, designed to "compensate victims of racially motivated eminent domain, which deprived persons of just compensation for their property due to racially discriminatory motives," allowed "dispossessed owners and their descendants" to obtain from the state, through a process in its Civil Rights Division, "the return of the taken property, other property of equal value, or financial compensation."[215] A third bill, AB 57, required reserving at least 10% of funding under the state's Dream for All Program (a program administered by the California Housing Finance Agency ("CalHFA") that provides downpayment assistance to eligible first-time buyers) for "descendants of formerly enslaved people."[216]

Newsom offered some different reasons for vetoing all three bills. He explained that AB 7, involving admissions preference, was not necessary because colleges could already consider whether to grant the identified preference;[217] that AB 62, involving past exercises of eminent domain, was fiscally untenable and

210. *See* Monica Madden, *San Francisco Lawmakers Vote to Create Reparations Fund for Black Residents Without Initial Funding*, ABC7NEWS (Dec. 17, 2025), https://abc7news.com/post/san-francisco-lawmakers-vote-create-reparations-fund-black-residents-initial-funding/18293649/ [https://perma.cc/DNP4-RRJK].

211. *See* CAL. TASK FORCE, *supra* note 184; CAL. TASK FORCE TO STUDY AND DEV. REPARATION PROPOSALS FOR AFR. AMS., INTERIM REPORT (2022), https://oag.ca.gov/system/files/media/ab3121-reparations-interim-report-2022.pdf [https://perma.cc/7LUG-SSA3].

212. *See infra* notes 213–16 and accompanying text.

213. Assemb. B. 7, 2025 Gen. Assemb., 2025–2026 Reg. Sess. § 1(a) (Cal. 2025).

214. *See id.* at § 1(b). The bill defines descendants as:

> an individual who can establish direct lineage to a person who, before 1900, was subjected to American chattel slavery and meets at least one of the following criteria:
>
> (1) Was emancipated through legal or extralegal means, including self-purchase, manumission, legislative action, military service, or judicial ruling.
>
> (2) Obtained freedom through gradual abolition statutes or constitutional amendments.
>
> (3) Was classified as a fugitive from bondage under federal or state law.
>
> (4) Was deemed contraband by military authorities.
>
> (5) Rendered military or civic service while subject to legal restrictions based on ancestry historically associated with slavery.

Id.

215. Assemb. B. 62, 2025 Gen. Assemb., 2025–2026 Reg. Sess. (Cal. 2025).

216. Assemb. B. 57, 2025 Gen. Assemb., 2025–2026 Reg. Sess. (Cal. 2025).

217. In his veto message, Newsom stated: "This bill clarifies, to the extent permitted by federal law, that California public and private postsecondary educational institutions may consider providing a preference in admissions to an applicant who is a descendant of slavery. . . . These institutions already have the authority to determine whether to provide admissions preferences like this one, and accordingly, this bill is unnecessary. I encourage the institutions referenced in this bill to review and determine how, when, and if this type of preference can be adopted." *AB-7, Postsecondary Education: Admissions Preference: Descendants of Slavery: Governor's Message*, CAL. LEGIS. INFO. (Oct. 13, 2025), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202520260AB7 [https://perma.cc/P37L-LZ6U].

practically un-administrable;[218] and that AB 57, involving preferential access to downpayments, by "creating an ancestry-based set-aside[,] presents legal risks and could jeopardize CalHFA's access to federal mortgage markets."[219] Newsom has, however, signed into law certain other measures, not involving reparations, that emerged from the task force's recommendations.[220]

Governor Newsom's expressed concern about an "ancestry-based set-aside" is apt. Government classifications based on ancestry and related concepts of lineage and descendancy, whether for allocation of government benefits or imposition of penalties, should—and we think would—trigger strict scrutiny analysis in the same was as do racial classifications. Courts would be very likely to invalidate reparations programs, such as the San Francisco committee's recommendations and the three bills Newsom vetoed, that make descendancy from slavery or other ancestry-based criteria the basis for eligibility.[221]

Ancestry classifications bear a close relationship to racial classifications. Because the two categories are very difficult to disentangle, each rightly generates suspicion. Racial classifications themselves operate by ancestry and lineage. Racial groups are, from one angle, large clans defined by familial, ancestral relationships.[222] Historically, implementation of laws that drew distinctions among racial groups—to keep races apart and elevate the status of Whites—depended upon determining who belonged to which race.[223] Governments thus created and instituted lineage-based criteria by which an individual was deemed to be White, Black, or a member of another racial group. *Loving v. Virginia*[224] is known for invalidating state bans on interracial marriage. But the case was more specific. Virginia had made it "unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian."[225] That required racial definitions. Virginia law thus further specified that "the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-

218. *AB-62 Civil Rights Department: Racially Motivated Eminent Domain: Governor's Message*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202520260AB62 [https://perma.cc/SQ53-Q5L4] (last visited Mar. 24, 2026).

219. Governor Gavin Newsom, Governor of California, to Members of the California State Assembly (Oct. 13, 2025), https://www.gov.ca.gov/wp-content/uploads/2025/10/AB-57-Veto.pdf [https://perma.cc/RV3E-684A] (discussing fiscal concerns and the lack of capacity of the Civil Rights Division to administer the envisaged program).

220. Newsom signed into law a bill providing for the creation of a state "Bureau for Descendants of American Slavery," charged, among duties, with providing genealogical tools to verify the status of individuals as descendants of former slaves for purposes of eligibility any future state-allocated benefits and conducting various outreach and policy activities. S.B. 518, 2025–2026 Reg. Sess. § 1 (Cal. 2025). He also signed another bill appropriating $6 million for the California State University System to "explore options to determine how to confirm an individual's status as a descendant of an enslaved person." S.B. 437, 2025–2026 Reg. Sess. § 1 (Cal. 2025).

221. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 201 (1995) (holding that all governmental racial classifications are subject to strict scrutiny).

222. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 40 (1994).

223. *See infra* notes 224–27.

224. 388 U.S. 1, 12 (1967).

225. *Id.* at 5 n.4.

sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons."[226] The law further specified the following:

> Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one fourth or more of Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.[227]

There is, of course, no such thing as "white blood," "Negro blood," or "Indian blood," much less any possibility of measuring the fraction of each type of blood an individual has.[228] These are, instead, all lineage rules: determining race in Virginia (and elsewhere) required going back through a family tree to identify the racial classification previously given to the individual's ancestors.[229] More generally, slavery itself was an ancestral (as well as racial) system: the children of enslaved persons themselves were property at the moment of birth because of the status of their parents. Indeed, the entire system of American slavery following the prohibition (beginning in 1808) on the Atlantic slave trade depended on its hereditary aspect.[230]

This is not to say that all legal classifications based on ancestry are necessarily classifications based on race. A law that says, for example, that in the absent of a will or a surviving spouse, the children will inherit the decedent's estate is based on lineage and descendancy and not on race. But the example is a world apart from the San Francisco proposal and the vetoed California laws described above, all of which start and end with compensation for race-based injustices.[231]

Moreover, even if race and ancestry are not absolute equivalencies, the same (or similar) reasons for being skeptical of racial classifications apply to most if not all ancestry classifications. The Constitution, beginning with the original 1789 document, contains a series of mutually supporting measures disfavoring ancestry, lineage, and descendancy as the bases for government action, allocation of public benefits, or membership and participation in the political community.[232] The treason clause of Article III ("no Attainder of Treason shall work Corruption of Blood") and the Article I prohibitions on "bills of attainder" prevent government from imposing punishments (particularly an inability to inherit property) on a perpetrator's offspring. Government cannot taint a punished individual's bloodline[233] by, as James Madison put it, "extending the

226. *Id.*

227. *Id.*; *see* Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

228. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987).

229. *Loving*, 388 U.S. at 6–7.

230. *See id.* at 11.

231. *See supra* notes 217–20 and accompanying text.

232. U.S. CONST. art. III, § 3; U.S. CONST. art. I, §§ 9–10.

233. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 771 (1999) (noting the "special historical link between attainders and 'corruption of the blood' in which legislatures tried to taint or stain a person's bloodline").

consequences of guilt beyond the person of its author." [234] The Constitution's anti-ancestry theme appears also in the bar on the United States granting "Title[s] of Nobility"[235] that could be passed onto offspring and thereby serve to create a noble class by ancestry. The Republican Guarantee Clause is also an anti-lineage provision: republican government is the antithesis of monarchy and aristocracy.[236] Alexander Hamilton wrote in *The Federalist* of the tight connection between the ban on titles of nobility and the requirements of republican government.[237] More generally, under the Constitution, eligibility to hold public office or to vote is not limited to descendants of prior office-holders or voters or to those with land holdings or other signals of proper lineage.[238]

The Reconstruction amendments built on and extended these anti-ancestry provisions. Besides the Thirteenth Amendment, which forever bars slavery (a lineage-based institution), the Fourteenth Amendment is strongly anti-ancestry (and pro-republican)[239] in its requirements and protections. Section One opens majestically with these words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[240] A crowning achievement of Reconstruction and a self-conscious repudiation of the Supreme Court's egregiously wrong ruling in *Dred Scott* (holding that Black persons, whether free or enslaved, could not be citizens of America),[241] this clause constitutionally guarantees citizenship for "all persons" who are "born . . . in the United States" and who are "subject to [its] jurisdiction."[242] Birthright citizenship is a rejection of lineage. All persons who are born on U.S. soil and who are "subject to" "jurisdiction" of the United States (that is, are persons over whom the United States does assert the lawful power to govern but not persons, such as foreign dignitaries and some Indians, over whom the U.S. disclaims any such power) are automatically citizens.[243] This is true, regardless of the citizenship or other characteristics of parents. Under section one, ancestry is of no importance to acquisition of citizenship.[244] President Trump's executive order on January 20, 2025, purporting to limit section's

234. JAMES MADISON, THE FEDERALIST NO. 43, at 221 (Ian Shapiro ed., Yale Univ. Press 2009) (1788).

235. U.S. CONST. art. I, § 9, cl. 8.

236. *See, e.g.*, JAMES MADISON, THE FEDERALIST NO. 39, at 193 (Ian Shapiro ed., Yale Univ. Press 2009) (1788) (defining a republic as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior" and distinguishing republican government from monarchies and aristocracies).

237. ALEXANDER HAMILTON, THE FEDERALIST NO. 84, at 432 (Ian Shapiro ed., Yale Univ. Press 2009) (1788) ("Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.").

238. Amar, *supra* note 233, at 770.

239. *See* Jason Mazzone, *The Incorporation of the Republican Guarantee Clause*, 97 NOTRE DAME L. REV. 1435, 1460 (2022) (discussing how "the text of Section 1 itself, when read as a whole, sounds in republican themes").

240. U.S. CONST. amend. XIV, § 1.

241. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 406–23 (1857).

242. *See id.*

243. *See id.*

244. *See id.*

birthright citizenship provision has occasioned reminder of the provision's sweep.[245] Instead, the words of the Citizenship Clause speak directly to and about the persons who are born—rather than to or about the parents of the persons who are born (and in that way was radical in rejecting more traditional blood-based notions of citizenship)—on U.S. soil.[246] The Citizenship Clause is explicitly about the place of birth rather than, as was traditional in other societies, the parentage of birth.[247] Indeed, the Clause's very words will sometimes operate to distinguish sharply parent from child: A mother unlawfully present may be removed from the country or otherwise punished, even though her newborn enjoys the benefits of citizenship.[248] As Akhil Amar has noted of section one of the Fourteenth Amendment, "[t]his language was emphatically Lincolnian. All persons born under the American flag are born citizens. *All are born equal citizens. All are created equal citizens*."[249]

The third of the Reconstruction amendments, the Fifteenth, reinforces the equality and anti-ancestry mandate of the Fourteenth and underscores the relationship between race and lineage. The Supreme Court's 2000 decision in *Rice v. Cayetano*[250] is instructive. There, the Court held that a provision of the Hawaii state constitution limiting the right to vote for the trustees of the state Office of Hawaiian Affairs to "Hawaiians," defined as "descendants of the peoples inhabiting the Hawaiian Islands in 1778,"[251] violated the Fifteenth Amendment. Hawaii argued that the challenged provision did not involve a racial category at all, but instead a classification "limited to those whose ancestors were in Hawaii at a particular time, regardless of their race."[252] The Court concluded that there was no difference (at least in the case) between ancestry-based and racial classifications for purposes of the Fifteenth Amendment.[253] The Court's analysis would seem to cast serious doubt on reparations initiatives, including the San Francisco committee proposals and the bills approved by the California legislature but vetoed by the governor, that provide compensation to the descendants of slavery or other injustices.

Deeming ancestry an impermissible "proxy" for race, Justice Kennedy in *Rice* wrote for the Court that "'racial discrimination'" is that which singles out 'identifiable classes of persons . . . solely because of their ancestry or ethnic

245. *See* Vikram David Amar & Jason Mazzone, *The Birthright Citizenship Clause Means Exactly What It Says: The Textual and Historical Implausibility of Alternative Interpretations Offered by the Trump Administration and Conservative Commentators Such as Randy Barnett, Ilan Wurman, Chuck Cooper and Pete Patterson*, VERDICT (Mar. 10, 2025), https://verdict.justia.com/2025/03/10/the-birthright-citizenship-clause-means-exactly-what-it-says [https://perma.cc/H4P6-9RBE].

246. Students for Fair Admissions, Inc. v. President of Fellows Harvard Coll., 600 U.S. 181, 236 (2023).

247. U.S. CONST. amend. XIV, § 1.

248. Michelle Lapointe, *In Birthright Citizenship Decision, the Supreme Court Expanded Trump's Power*, AM. IMMIGR. COUNCIL (July 1, 2025), https://www.americanimmigrationcouncil.org/blog/in-birthright-citizenship-decision-the-supreme-court-expanded-trumps-power/ [https://perma.cc/W6FG-2EKK].

249. AKHIL REED AMAR, BORN EQUAL: REMAKING AMERICA'S CONSTITUTION, 1840–1920 517 (2025).

250. 528 U.S. 495 (2000).

251. *Id.* at 499.

252. *Id.* at 514.

253. *Id.* at 514–15.

characteristics.'"[254] That ancestry might be a more specific class than race was not determinative: "simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral."[255] And any claim that an ancestry-based classification is race-neutral can be "undermined" by the "express racial purpose" of a classification "and by its actual effects."[256] If that is true, it is hard to see how reparations measures publicly initiated to benefit Black individuals and plainly having that effect could be characterized as race-neutral. Indeed, *Rice* expresses particular concern with "[m]anipulative devices and practices,"[257] and, citing examples of earlier state efforts to avoid Fourteenth and Fifteenth Amendment requirements, refers to "scheme[s] which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise."[258]

Importantly, *Rice* does not say merely that uses of ancestry are improper *only* when used evasively, to head off a claim of race-based discrimination. Observing that "[e]ven if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification,"[259] Kennedy deemed ancestry-based classifications inherently problematic. On an individual level, he explained, such classifications are inconsistent with principles of individual equality:

> The ancestral inquiry . . . implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[260]

Echoing the anti-ancestry themes of the Constitution we have described, Kennedy also tied skepticism of ancestry-classifications (like those involving race) to principles of republican government:

> The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.

254. *Id.* at 515 (quoting Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987)).

255. *Id.* at 516–17.

256. *Id.* at 517.

257. *Id.* at 513.

258. *Id.* (discussing, among other examples, *Guinn v. United States*, 238 U. S. 347, 363 (1915), which invalidated Oklahoma's literacy requirement for voting that exempted from that requirement the lineal descendants of persons eligible to vote before 1866).

259. *Id.* at 514.

260. *Id.* at 517.

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. . . . Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name.[261]

Rice was decided three years before *Grutter*.[262] Justice Kennedy dissented in that case.[263] *SFFA* effectively overrules *Grutter* and signals a court majority that is hostile to race-based classifications and attuned to efforts to efforts to circumvent the prohibition.[264] That likely dooms reparations programs of the kind we have discussed. Strict scrutiny is not fatal. But remedial programs that compensate individuals for harms to other individuals many generations back would seem the textbook case of lacking a compelling interest and failing to tailor narrowly.

Readers who think otherwise should consider a final hypothetical: the government enacts a law imposing an additional 5% annual tax on the income of descendants of slaves. The stated purpose of the law is to recoup the financial costs of the Civil War. "You benefited," the government explains to the descendants, "from the end of slavery and the liberation of your ancestors. Absent the Civil War, you would likely be enslaved yourself. It is only fair that you pay the costs incurred." Would anybody think strict scrutiny would not apply? Or that the law meets that standard?

V. THE QUESTION OF SYMMETRY AND THE CONVERSE-*WASHINGTON V. DAVIS* PROBLEM

The preceding Parts have focused on how and why equal protection doctrine evaluates particular kinds of classifications present on the face of legislative enactments.[265] But even when a law's facial text embodies no potentially or presumptively problematic sorting device, equal protection law has long taken account of a law's disparate effects across various racial or gender groups, at least when a plaintiff can show that the disparate effect was in fact intended by the enacting government body. So, for example, under *Washington v. Davis*,[266] a law that has the effect of denying a particular benefit, say public employment, to a higher percentage of Blacks than Whites, implicates equal protection concerns only when a plaintiff can establish that the disparate effect that inflicts relatively greater harm on Blacks was in fact an intended consequence of the law's enactment. And that makes sense. If a facial racial classification is subject to strict scrutiny to ensure it does not reflect improper racially discriminatory purpose,

261. *Id.* (quotation omitted).
262. *See id.* at 498; Grutter v. Bollinger, 539 U.S. 306, 306 (2003).
263. *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).
264. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 601 U.S. 181, 227–28 (2023).
265. *See supra* Parts III & IV.
266. 426 U.S. 229 (1976).

direct evidence of such purpose, even in the context of a facially neutral law, should be viewed critically.[267]

But now that certain facial classifications—most prominently all racial classifications, as discussed in the *SFFA* opinions—are to be avoided entirely (or nearly so), regardless of whether such classifications on their face burden minorities or majorities, the question naturally arises as to whether this "symmetry" should or will apply to laws that on their face make no mention of the race of individuals, but that were motivated by a desire to engineer certain racial outcomes that are similar to those outcomes educators sought in *SFFA*. In particular, to what extent can admissions officials, without focusing on the race of individual applicants, select and revise the criteria used for admissions decisions (criteria that formally apply in the same way to all applicants, regardless of their race) with an eye towards making the student body more diverse and representative of racial minorities? If, under *SFFA*, a public university cannot take account of the race of individual applicants to achieve a racially diverse student body, does it make sense to think it can tinker with the criteria of admission for everyone in a facially neutral way (say, de-emphasizing standardized test scores) in order to accomplish that very same racially diverse student body outcome? We call this the converse-*Washington v. Davis* issue. This converse-*Washington v. Davis* question is one the Court has danced around for a few decades and seems to be teed up for a resolution in the coming months or years.[268]

A recent case in point: in 2022 the Court denied an application for emergency relief (part of the so-called "shadow" docket) in a case involving changes in the admissions policy at the Thomas Jefferson High School for Science and Technology ("Thomas Jefferson" or "TJ") in Alexandria, Virginia, a public STEM-focused school that has a selective admissions process and that has traditionally served high-performing students.[269] The Plaintiffs/Applicants argued in the district court (successfully) that the school's recent changes in admissions criteria arose from an impermissible desire to accomplish "racial balancing."[270] The Court of Appeals for the Fourth Circuit, however, stayed the district court's ruling in favor of the Applicants pending appellate review,[271] and the Applicants asked the Supreme Court to undo the Fourth Circuit's stay.

Although the high Court denied the application,[272] three Justices (Thomas, Alito, and Gorsuch) noted, albeit without explanation, that they would have granted the application and lifted the Fourth Circuit's stay of the district court decision.[273] One reasonable inference to be drawn is that these three Justices,

267. The Court has not been consistent across all constitutional doctrine in this regard. *Cf.* United States v. O'Brien, 391 U.S. 367, 383 (1968) (rejecting relevance of direct evidence of impermissible censorial motive as to a facially viewpoint-neutral statute in a free speech case).

268. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

269. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S. Ct. 2672 (2022).

270. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at *10 (E.D. Va. Feb. 25, 2022).

271. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 887–88 (4th Cir. 2023).

272. *Coal. for TJ*, 142 S. Ct. at 2672.

273. *Id.*

provisionally at least, agree with the district court that what school officials had done in changing TJ's admissions criteria to alter the racial makeup of the student body was constitutionally problematic. Later, after the Fourth Circuit reversed the district court on the merits, the Supreme Court denied certiorari, with Justices Alito and Thomas dissenting.[274]

The facts of the case are complex, and for present purposes we shall present a simplified version drawn in part from the lower court rulings, the application to vacate the Fourth Circuit's stay, and from the certiorari petition. Before October 2020, TJ admitted incoming students "based on a competitive, merit-based process that included [middle-school] GPA requirements, teacher recommendations, and a multi-component standardized test."[275] But, in the fall of 2020, TJ's Board undertook an overhaul of the admissions process, eliminating the standardized testing requirement and adopting a "holistic" admissions policy that, among other things, "guaranteed seats at TJ for 1.5% of the eighth-grade class of each public middle school within TJ's reach."[276] This approach (akin to so-called "percentage plans" used throughout the country to guarantee school admission to the top grade-earners of feeder schools without regard to how these top grade-earners fare on standardized tests or other admissions metrics)[277] had the predictable and desired effect of increasing the number of Black students who were granted admission to TJ, presumably because at least some of the feeder middle schools in the region had high percentages of Black students such that admitting 1.5% from each of these schools diversified Thomas Jefferson.

The ethnic group whose representation at TJ fell the most under the new policy was Asian Americans. As the Application put it, "[b]ecause a disproportionate number of Asian-American applicants and accepted students at TJ [had previously] come from a handful of Fairfax County Public middle schools, each of which often sent far more than 1.5% of their eighth graders to TJ, the [new policy had the effect of reducing] Asian-American enrollment."[278] In fact, "offers to Asian-American students dropped 19 percentage points [under the new admissions policy]—from 73% [of the total pool of admittees] to 54% in a single year."[279]

The Applicants built their constitutional challenge on this drop in the number and percentage of Asian American admitted students, which seemed fully expected by TJ administrators, combined with what appears to be a pretty uncontested (if not candid) goal on the part of TJ's Board when it changed admissions policies to have TJ's makeup better "reflect the diversity of Fairfax County

274. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 146 S.Ct. 541, 541 (2024); *id.* at 541–46 (Alito, J., dissenting).

275. Emergency Application to Vacate the Stay Pending Appeal Issued by the United States Court of Appeals for the Fourth Circuit at 3–4, Coal. for TJ v. Fairfax Cnty. Sch. Bd., 142 S.Ct. 2672 (No. 21A590) [hereinafter Application to Vacate Fourth Circuit Stay].

276. *Id.* at 4.

277. For a discussion of such percentage plans, see, for example, Fisher v. Univ. of Tex. at Aus., 579 U.S. 365, 377–80, 386 (2016).

278. Application to Vacate Fourth Circuit Stay, *supra* note 275, at 4.

279. *Id.* at 8.

Public Schools, the community and Northern Virginia."[280] The district court embraced the challenge, finding that the TJ Board's overhaul of its admissions process "was infected with talk of racial balancing from its inception"[281] and enjoining TJ officials from implementing their new admissions process. In reversing, the Fourth Circuit relied on, among other things, the fact that Asian Americans remained over-represented, relative to their community demographic baseline, even after the admissions criteria had been tweaked.[282] When the Supreme Court denied certiorari, Justices Alito and Thomas wrote a dissent suggesting they could "not imagine" the Court upholding the Fourth Circuit's reasoning on this point.[283]

The constitutional issues raised in converse-*Washington v. Davis* cases like the TJ case can be complicated, and we are not able to meaningfully engage all of them here. But a few important analytical and doctrinal points do jump out. First, the Applicants may have been too quick to assert that the TJ's Board's goal to make TJ better reflect the racial makeup of the community in which TJ is located must be understood as a desire to limit Asian-American enrollment in particular. To be sure, increasing the number of students from some underrepresented racial groups (such as Blacks, Latinx and Native American persons) may necessarily mean reducing the representation of other groups (such as Asian Americans) given relatively fixed entering class sizes and the resulting zero-sum nature of school admissions. But the Supreme Court itself, in cases where women or ethnic minority group members have challenged facially neutral criteria on the ground their use is motivated by impermissible gender or racial bias, might be seen to have drawn, rightly or wrongly, a distinction between a government desire to help Group A and a desire to harm Group B, even if assisting Group A would necessarily involve less success for Group B. Consider, for example, *Personnel Administrator of Massachusetts v. Feeney*,[284] which built on the seminal *Washington v. Davis* case, where the Court explained that proof of disparate impact, plus proof of invidious motive, could result in the invalidation of a facially neutral law.[285] In *Feeney*, where women challenged a facially neutral civil service hiring preference for veterans that had the foreseeable effect of helping many more men than women, the Court seemed to require (wrongly in our view) the challengers to prove a government animus towards women, as opposed to simply an affinity towards men, in order to successfully attack the law.[286]

In the TJ case, it may well be that the school's Board foresaw that Asian American enrollment would drop but had no ill will towards Asian Americans,

280. *Id.* at 5.

281. Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at *9 (E.D. Va. Feb. 25, 2022).

282. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F. 4th 864, 881, 887 (4th Cir. 2023).

283. Coal. for TJ v. Fairfax Cnty. Sch. Bd., 146 S.Ct. 541, 545 (2024) (Alito, J., dissenting).

284. 442 U.S. 256, 257–59 (1979).

285. Washington v. Davis, 426 U.S. 229, 238–44 (1976).

286. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 258 (explaining that a plaintiff must prove "the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' *its adverse effects* upon an identifiable group") (emphasis added)).

so much as a desire to increase the number of Blacks and students from other underrepresented groups. Indeed, even if we recast (as we believe is proper) the *Feeney* test away from ill will or animus towards simply *equal government respect* for all racial or gender groups, TJ's motives might be legitimate to the extent TJ would have sought to alter admissions criteria if it were Asian Americans, rather than other ethnic minority groups, who were scarce rather than plentiful at TJ under the old admissions regime. None of this means, of course, that the Court will conclude that race can ever factor into decision making, even if on these "neutral" terms.

Second, it does not help TJ in this regard that White students, along with Blacks, increased their share of admissions offers, leaving Asian Americans as the *only* racial group whose share went down.[287] Perhaps the fact that Asian Americans are the only racial group to experience a drop in its share of admitted students is simply a function of how successful this group had been under the prior admissions regime; it might be that there were no reasonably workable changes to admissions criteria that would have increased the number of Black and Hispanic students that also wouldn't have increased the number of White students somewhat. But the fact that Whites benefitted as Asians suffered is not a feel-good fact, especially because it blurs the line between a traditional and a converse-*Washington v. Davis* situation.

Third, just as the Applicants may have been too quick to infer anti-Asian bias, TJ is almost certainly unpersuasive in arguing that, as an absolute matter, the Applicants' claims are defeated simply by virtue of the fact that Asian Americans remain at least proportionately represented (indeed, still overrepresented) at TJ, compared to their share of the TJ applicant pool or the overall community population, even after the admissions overhaul.[288] Justices Alito and Thomas are correct on this point. If there were demonstrated animus or unequal respect towards Asian Americans in the board's actions, the fact that Asian Americans still outperform their demographic baseline in getting into TJ would not excuse the impermissible effort to reduce their numbers. Imagine, for instance, that the school district board in an overwhelmingly White community voted to eliminate selective admissions and move instead to a lottery at a desirable and popular magnet high school precisely because Nigerian Americans were filling a majority of slots under the selective admissions regime, a fact that irked a majority of school board members. Think board members who frequently and publicly expressed disdain for the "dark-skinned newcomers wrongly eating up seats at *our* school." Could anyone deny that such a decision by the board would be constitutionally problematic even though under the new lottery system Nigerian American applicants would be proportionately represented? This point seems too obvious even to elaborate.

That brings us to the fourth point, and it is an important one. In contrast to the hypothetical just presented, the nation lacks doctrinal clarity on whether

287. Application to Vacate Fourth Circuit Stay, *supra* note 275, at 8.

288. *See* Coal. for TJ v. Fairfax Cnty. Sch. Bd., 68 F.4th 864, 876–77, 887 (4th Cir. 2023).

adopting or changing admissions criteria with the overt goal of increasing, rather than decreasing, minority representation is constitutionally problematic as a matter of first principles of equal protection—that is, true converse-*Washington v Davis* scenarios. It is true, of course, that the Court has made it clear in the context of overt, facial racial classifications that affirmative action is just as subject to strict scrutiny as was old-fashioned discrimination.[289] Thus, the affirmative-action set-aside programs in *Adarand Constructors, Inc. v. Pena*[290] and *City of Richmond v. J.A. Croson*,[291] and even the more flexible programs in *Grutter v. Bollinger*[292] and *SFFA*, were subjected to the same test as were the laws that sought to exclude minorities from higher education institutions or from juries, such as those at issue in *Sweatt v. Painter*[293] and *Strauder v. West Virginia*.[294] We live in an equal protection world that seems to embrace symmetry (at least as to the applicability—if not the outcome—of strict scrutiny) in the realm of facial classifications based on race. But we don't yet know the extent for certain to which symmetry applies to the *Washington v. Davis* line of cases. For this reason, we don't know what the fate of so-called percentage plans like those that have been used by the University of California and the University of Texas (by which students graduating in the top X% of their high school classes are admitted, regardless of test scores or other traditional admissions factors) would be if it were to be proven that such plans were consciously intended to increase the number of Black and Latinx and Native American students on public college campuses and would not have been adopted absent such motive. Would these plans then be viewed with the same skepticism we would apply if, say, a university chose to lean heavily on SATs because these scores have the effect of reducing the number of minority students who are admitted? The Court has not directly answered this question, something the Applicants in the TJ case pointed out as a reason the Court should take up its case.[295]

Finally, and also importantly, while the Court as an institution hasn't given definitive indications of its view of the permissibility of percentage plans and the like (that is, of changes in admissions criteria seemingly motivated by a desire to increase the representation of historically underrepresented racial groups in educational institutions),[296] certain Justices do seem to have opined on the permissibility of such actions by educational administrators, and the prior statements of these Justices don't always seem to jibe with the Justices' current or expected future actions.[297]

289. *Id.* at 890 (Heytens, J., concurring).
290. 515 U.S. 200, 205–06, 238–39 (1995).
291. 488 U.S. 469, 477–78, 511 (1989).
292. 539 U.S. 306, 308, 313–15 (2003).
293. 339 U.S. 629, 631 (1950).
294. 100 U.S. 303, 304–05 (1880).
295. Application to Vacate Fourth Circuit Stay, *supra* note 275, at 11.
296. *See id.*
297. Contrast Grutter v. Bollinger, 539 U.S. 306, 355, 361–62 (2003) (Thomas, J., dissenting) (arguing diversity-driven changes are race-neutral rather than discrimination), with Coal. for TJ v. Fairfax Cnty. Sch. Bd., 146 S. Ct. 541, 544 (2024) (Alito, J., dissenting) (arguing changing admissions criteria for racial reasons may be problematic under equal protection principles).

Perhaps the best example is Justice Clarence Thomas, whose dissents from the denial of the application and the denial of certiorari in the TJ case seem to suggest at least some agreement (we emphasize that the dissents were without full explanation) with the district court that changing admissions criteria for racial reasons may be generically problematic under equal protection principles.[298] In the famous *Grutter v. Bollinger* case upholding the consideration of individual applicants' race in admissions at the University of Michigan Law School, in dissent Justice Thomas (joined by Justice Scalia) wrote:

> *One must also consider the Law School's refusal to entertain changes to its current admissions system that might produce the same [diversity-related] educational benefits.* The Law School adamantly disclaims any race-neutral alternative that would reduce academic selectivity . . . [T]he Law School . . . cannot have it both ways. *With the adoption of different admissions methods, such as accepting all students who meet minimum qualifications, the Law School could achieve its vision of the racially aesthetic student body without the use of racial discrimination.*[299]

This passage seems to us to bless changes in admissions criteria that are adopted precisely in order to produce more racial diversity (or racial aesthetics, as Justice Thomas calls it). And Justice Thomas characterizes such explicit diversity-driven changes as something other than racial discrimination. Indeed, he calls those changes, notwithstanding their presumed diversity motivation, "race-neutral."[300] Justice Alito's dissent, joined by Justice Thomas, in *Fisher v. University of Texas* has passages that could be similarly understood.[301]

To be sure, we don't know whether, when the Court does take up this big question in a later case, Justice Thomas (and Justice Alito) will in fact frown on criteria alteration undertaken with an eye towards racial outcomes. It is possible that he would permit some such racially motivated criteria changes so long as they didn't seek to create a world of completely proportionate representation, something the Court in earlier cases has suggested is an inappropriate government goal and may be something he sees at work in the TJ case. In this regard, it bears noting that in the Michigan Law School case, the school's desired "racial aesthetic," as Justice Thomas described it,[302] involved not proportionality but attainment of a "critical mass" of students from different racial groups. More likely, though, is that when the issue is ultimately joined, Justice Thomas—who in *Grutter* repeatedly described the educational benefits of diversity as "marginal"[303]—will deny admissions officers the ability as a general matter to reconsider admissions criteria with an eye towards racial diversity.

The likelihood that a majority of the Court will frown on the consideration of racial outcomes in the selection of admissions criteria themselves raises some

298. Coal. for TJ, 146 S. Ct. at 544.
299. *Grutter*, 539 U.S. at 355, 361–62 (Thomas, J., dissenting) (emphasis added).
300. *Id.* at 355.
301. 579 U.S. 365, 393–94 (2016) (Alito, J., dissenting).
302. *Grutter*, 539 U.S. at 355 (Thomas, J., dissenting).
303. *Id.*

vexing questions, beyond the problems of legitimacy that arise when Justices appear to change their views based on who is suing whom. One important question to be confronted is whether, even if converse-*Washington v. Davis* cases are generally treated similarly to their more traditional analogues, would a judicial aversion to consideration of race need to be absolute? Consider the following hypothetical: a new school is being created that seeks to produce graduates who succeed in passing a licensing exam and getting employment in a given field. There are two standardized tests under consideration. Test A correlates with positive licensing and employment outcomes, the school's stated objectives, ever so slightly better than does Test B. But Test A has a pronounced disparate impact along racial lines and Test B has none. Even under these near tie-breaker circumstances, are the administrators who are setting up the new school forbidden from choosing Test B, or instead might awareness of racial outcomes be considered so long as it doesn't predominate?[304]

If that last phrase—consideration of race that doesn't predominate—seems familiar, that is because it is drawn from another area of constitutional equality law that also involves government taking race into account—not at the retail level of individuals, but at the general level of selection of criteria: so-called racial redistricting. It is true that in the voting districting cases—the so-called *Shaw* doctrine[305]—some of the Court's opinions have characterized race-conscious districting laws as "laws that classify citizens by race" and "racial classifications."[306] But this characterization by the Court is, we think, reflects nothing more than analytical sloppiness. As discussed earlier, in the educational affirmative action cases, we confront what we might term old-fashioned racial classifications—government laws or policies that on their face make the race of particular individuals relevant to receipt of a public benefit or imposition of a public burden. Race-conscious districting, by contrast, does not involve a racial classification in this traditional, and overt, sense. Instead, as a logical matter, it falls into a different doctrinal box—facially-neutral governmental decisions that are allegedly motivated by racial considerations—cases like *Washington v. Davis* and *Arlington Heights*. This is because, at the moment the law applies to an individual (in this setting the moment an individual casts a vote in a particular district), the individual's race is not considered. White people and Black people located in the same district are treated no differently from each other when they vote. Instead, to the extent that race has been considered by government, it is not the race of the individual to whom the law is applied; it the racial identity of residential groups that has informed decisions about where to draw geographical lines in the first place, just like decisions about what criteria that apply to groups of applicants in a college admissions process.

304. Imagine an even more stylized situation where two equally expensive tests are dead equal in identifying the candidate qualities to be sought, but one has a disparate racial impact and the other does not. Could the disparate impact not be taken into account (and avoided) even as a true tie breaker?

305. This line is named for the seminal *Shaw v. Reno* decision. *See* 509 U.S. 630, 649 (1993).

306. *See* Melissa Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Districting*, 109 YALE L.J. 1603, 1608 n.26 (2000).

Importantly, in its more careful passages in the *Shaw* cases, even the Court has acknowledged that, strictly speaking, racial redistricting is not a racial classification in the classic old-fashioned sense. In *Cromartie*,[307] for example, the Court conceded that "districting legislation ordinarily is race-neutral on its face."[308] But, citing to cases in the *Washington v. Davis* line, the *Cromartie* Court characterizes racial redistricting as "racial classifications" of the "covert" variety.[309]

All of this raises the question as to what standard of review the Court has traditionally used when it has dealt with "covert" racial classifications. If these laws are like overt racial classifications, then they would ordinarily be subject to strict scrutiny; if so, the Court's allowance of racial districting except when race "predominates" looks inconsistent. In fact, though, the Court has never, outside the districting cases, applied strict scrutiny to "covert" racial classifications; instead, it has simply invalidated them, provided that the racial considerations were a but-for cause of enactment of the facially race-neutral policy. Once racial motivations are determined to have led to the enactment,[310] the judicial inquiry would be at an end.

Unless, that is, there is a difference between consideration of race in a way that burdens racial minorities (see *Washington v. Davis*) and consideration of race in a way to assists racial minorities, (as it ostensibly does in the TJ dispute and in other converse-*Washington v. Davis* setups. As noted earlier, we simply don't know yet for sure how far doctrinal symmetry, present in the context of facial racial classifications, at least in terms of what doctrinal test applies, extends to the influence of race behind the scenes of a facially race-neutral policy.

We did get some additional information on this question from the Court's recent ruling in *Louisiana v. Callais*,[311] involving the extent to which states can take race into account in order to vindicate the interests that led Congress to enact the Voting Rights Act of 1965. On the one hand, even as the Court sharply cut back on the requirement and ability of states to take race into account to promote voting success for racial minorities, the Court didn't flatly prohibit all group-based use of race to redress past group-based racial discrimination against racial-minority voters. But the Court certainly did express a skepticism of race here that approaches absolute color-blindedness. Moreover, even if some small window remains open for race to play a factor in the drawing of district lines, we must remember that, at least historically, the Court has seemed to confer on government in the voting arena more latitude to take race into account to redress past racial wrongs than in the educational affirmative action realm. The simple fact is that the Court itself, over time and in spite of personnel changes, has treated voting cases differently than school admissions or government contracting cases. In fact, although the Court rarely acknowledges it, the vision of equality

307. Hunt v. Cromartie, 526 U.S. 541, 543 (1999).
308. *Id.* at 547.
309. *Id.* at 558.
310. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 225 (1985).
311. 146 S. Ct. 1131 (2026).

implemented in cases involving political participation has been distinct from equality decisions in other realms. A few examples will illustrate this deep constitutional trend.

Take, for instance, the way the intent requirement of *Washington v. Davis* has played out in the context of discrimination against minorities. In the employment and housing setting, the Supreme Court made it very difficult for a person to challenge a facially neutral government decision that adversely affects minority interests; the bar for proving illicit intent has been set extremely high. But as Daniel Ortiz pointed out, in the voting context in cases such as *Rogers v. Lodge*[312] (involving exclusion of Blacks), the intent requirement has been satisfied by the following:

> [A] showing of disparate impact plus a showing that the jurisdiction [involved] has engaged in other types of discrimination in the past . . .. In voting [unlike school or employment cases], the intent requirement does not demand any showing of actual discriminatory motivation in the decision to adopt or retain the [voting system] at issue.[313]

In the jury venire setting, which one of us elsewhere has argued is historically and analytically similar to the voting setting, the Court has also lowered the intent bar, allowing a minority group to challenge a method of selecting jurors that has the effect of excluding minority group members from the venire, even when there is no clear showing of invidious motivation.[314] Effects, more than intent, seem to drive the jury exclusion cases, as they do another political equality line of cases—the so-called *Hunter v. Erickson*[315] line of decisions, in which the Court manifests a deep concern not just with the formal neutrality of procedural provisions of state legislative processes, but also with their real world consequences on the policy agendas of racial minorities.

Finally, consider how political equality has been treated in the alienage setting. The Supreme Court has repeatedly held that the Equal Protection Clause forbids states from discriminating against noncitizens in the provision of education and other public benefits.[316] But, when it comes to government jobs that have any political dimension to them at all, states are free to exclude aliens.[317] Once again, constitutional equality means something different where political participation is involved than where it is not.

312. 458 U.S. 613 (1982).

313. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1127–28 (1989).

314. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 255–58 (1995) (discussing intent versus effect in political rights cases).

315. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385, 386 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 459 (1982). For a discussion of this interesting and vexing line of cases, see Vikram David Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 HASTINGS CONST. L.Q. 1019, 1020 (1996), and Vikram David Amar & Evan H. Caminker, *The Hunter Doctrine and Proposition 209: A Reply to Thomas Wood*, 24 HASTINGS CONST. L.Q. 1001, 1001–02 (1997).

316. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 646 (1973); Nyquist v. Mauclet, 432 U.S. 1, 21 (1977); *In re* Griffith, 413 U.S. 717, 729 (1973).

317. *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 299 (1978); Ambach v. Norwich, 441 U.S. 68, 81 (1979); Cabell v. Chavez-Salido, 454 U.S. 432, 447 (1982).

This unarticulated, but clear, distinction in the Court's doctrine is not made up of whole cloth. The distinction between political equality and other equality is part of our constitutional tradition. Indeed, it runs much deeper than any single opinion by a Justice, no matter how famous. As one of us (Amar), among other people, has recounted elsewhere, the framers of the Reconstruction Amendments drew a sharp distinction between so-called civil rights (e.g., the right to own property, ply a trade, inherit, make contracts, etc.) and political rights (e.g., the right to vote, hold office, serve on juries, etc.).[318] In fact, the Fourteenth Amendment was intended to cover only the former, leaving the latter to be taken care of by the Fifteenth Amendment.[319]

Given that political rights are protected by different provisions of the Constitution than are civil rights, it is not necessarily surprising that the concept of equality embodied in the political rights provisions may be different as well. Thus, any seeming inconsistencies we see in the cases between political equality and civil rights equality may simply reflect different kinds of equality for different kinds of cases. In this vein, legislative attempts to accomplish racial or gender balance in political processes—affirmative action in the political rights realm, if you will—might be a constitutionally different matter than affirmative action in the civil rights context.[320] Real world access—rather than formal governmental barriers to it—on the part of minorities to democratic institutions has until recently been accepted as the touchstone of political rights doctrine by the Court. Whether any of this differential flexibility will remain going forward is quite unclear. *Callais* certainly marks a significant change in course, but because the case involves not just race and voting but also federalism (insofar as states were being required, not just permitted, to take race into account), its implications for the other topics we address in this Article might, at least, be somewhat more complicated.

VI. CONCLUSION

In his solitary dissent in *Plessy v. Ferguson*, Justice John Marshall Harlan famously proclaimed that with its Equal Protection Clause, the Constitution "neither knows nor tolerates classes among citizens."[321] Harlan's focus in *Plessy* was, of course, race, as to which he insisted: "Our [C]onstitution is color-blind."[322] But thirteen decades on there remain significant puzzles about what color-

318. *See* Amar & Caminker, *Equal Protection*, *supra* note 315, at 1050–51.

319. *See* Amar, *supra* note 314, at 258. One plausible counterargument to this line of asymmetrical tolerance of governmental race consciousness in political rights cases focuses tightly on constitutional text; the text of the Fifteenth Amendment, unlike that of the Fourteenth, singles out race, and thus might—or textualists—be read to speak flatly in terms of color blindness.

320. If the Court adopts a fully symmetrical racial prohibition in educational or political settings, the bar for proving impermissible consideration of race to choose criteria to help minorities should, of course, be set just as high as it is in cases like *Washington v. Davis*, where challengers claim that criteria have been selected to disfavor minorities. 426 U.S. 229, 232 (1976). As noted earlier, that bar (at least in employment and housing cases at the Court) has been very hard to clear. *Id.*

321. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

322. *Id.*

blindness—invoked now regularly—requires and, more generally, about what counts as impermissible government action on the basis of class. The Court's recent efforts, including the *Skrmetti*, *SFFA*, and *Callais*, articulate and ground the parameters of equal protection law leave in play some core questions including about when and why governmental classifications trigger heightened judicial scrutiny, when such classifications are invalid, and whether facially neutral policies and programs designed to produce the same results as those based on suspect criteria trigger anything more than rational review. The boldness in the Court's own analysis in recent equal protection cases should not obscure the puzzles that remains and the challenges that lie ahead.