5-25-2017

The Failures of Equal Protection: an Examination of the Supreme Court's Three-Tiered Test in Equal Protection Claims

Jazmyn A. Ortiz
Portland State University

Follow this and additional works at: <https://pdxscholar.library.pdx.edu/honorstheses>

Let us know how access to this document benefits you.

Recommended Citation

Ortiz, Jazmyn A., "The Failures of Equal Protection: an Examination of the Supreme Court's Three-Tiered Test in Equal Protection Claims" (2017). *University Honors Theses*. Paper 381.
<https://doi.org/10.15760/honors.324>

This Thesis is brought to you for free and open access. It has been accepted for inclusion in University Honors Theses by an authorized administrator of PDXScholar. Please contact us if we can make this document more accessible: pdxscholar@pdx.edu.

**The Failures of Equal Protection: An Examination of the Supreme Court's Three-Tiered
Test in Equal Protection Claims**

Jazmyn Ortiz

Portland State University

Abstract

Identity is incredibly complex when we recognize the spectrums of race, gender, and sexuality. While these identities have always been complex, it has been only recently that those diverse people are gaining recognition and acceptance within society. Recognition and acceptance is propelled forward when we establish law that is meant to protect diverse identities. The Equal Protection Clause is meant to protect those who have historically been marginalized or even failed to be recognized by the law. When states violate the Fourteenth Amendment's Equal Protection Clause, the case may reach the Supreme Court of the United States. The Supreme Court will determine if the state law in question is permissible under the Equal Protection Clause through the three-tiered test; in doing so, the Supreme Court sets the standard for all lower courts to follow. The tiers of this test define the levels of scrutiny used by the Court, and are dependent upon who is being discriminated against by the state. The highest level of scrutiny is strict scrutiny; following strict scrutiny is intermediate scrutiny; and lastly there is the rational basis test, the lowest level of scrutiny the Court can apply. The thesis argues that there are an abundance of flaws with this existing model; specifically, the model leaves out a number of diverse groups because the Court views it through a lens that only sees race, gender, and sexuality as binary. Because of this, it fails to protect all citizens equally under the law. By examining past cases of Equal Protection claims, this thesis demonstrates the need for a removal of the three-tiered test if the federal and state governments are to protect all Americans equally.

INTRODUCTION

In the year 2017, self-identity has become far more complicated and diverse than it was in years past. The melting pot of the United States consists of mixed races, non-binary genders, and fluid sexualities. Yet as society advances, the laws that govern it progress at a rather depressing pace. Restrictive legislation often clashes with the will of the people, and when that legislation violates the Equal Protection Clause of the Fourteenth Amendment, it is then that the opposing parties present their cases to the courts. In order to determine how to approach a case of discrimination, the Court assesses who was being discriminated against and for what cause. Did the law discriminate against race, gender, or sexuality? If so, is it within the reasonable interest of the government? Over time, the Court has developed a three-tiered test with varying levels of scrutiny: rational basis, intermediate scrutiny, and strict scrutiny. With this method, the Court has managed to rule on issues involving white people and people of color, men and women, and heterosexuality and homosexuality as those are the binaries which the Court recognizes. But modern society has evolved to the point that the majority of Americans no longer fit neatly into any of the Court's hypothetical boxes. How will the Court address affirmative action cases brought by multiracial students? How will the Court address laws banning trans women from using public restrooms? How will the Court address class action suits for pansexual individuals, and why does the Court insist that the queer community is not entitled to being reviewed under a higher level of scrutiny? With the existing methods of examination used by the Court, these questions are impossible to answer, and not all will be protected equally by the Court.

In this article, I argue that the existing three-tiered test the Court implements in discrimination cases is not sufficient in addressing all cases of discrimination, and in fact, does

not treat them equally, despite the language of the Equal Protection Clause. The three-tiered test allows much room for failure because it lacks the ability to protect individuals who cannot be neatly packed into the Court's boxes of classifications. In order to gain a deeper understanding of just how inadequate the current system is in addressing modern issues, there has to be an understanding of how the Court has assessed race, gender, and sexuality in past cases.

The Equal Protection Clause

The Reconstruction Era after the Civil War witnessed a shift in constitutional law. By way of preparing for the social chaos that would ensue after the freeing of former slaves, the federal government added the Fourteenth Amendment. In his article *The Strange Career of the Reconstruction Amendments*, Eric Foner (1999) notes, "The Reconstruction amendments transformed the Constitution from a document primarily concerned with federal-state relations and the rights of property into a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government." Just as the federal government follows the Fifth Amendment of the Constitution, so the states must follow the Fourteenth Amendment. The first section of the Fourteenth Amendment states the following:

"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. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The states must treat all similarly situated citizens equally under the law. This clause is vital to the civil rights of all citizens of a given state and has been used by civil rights activists in order to advance the rights of people of color, women, and the queer community. When the Court is presented with legislation that is accused of violating the Equal Protection Clause, the Court uses the three-tiered test, with varying levels of scrutiny.

Footnote 4

The Court has also used the term “discrete and insular minority” in its famous Footnote 4, a passage from its ruling on *United States v. Carolene Products Company* (1938).¹ What began as a dispute over filled milk in the 1930’s turned into the origins for the line of reasoning the Court would use to evaluate appropriate federal interference in state government. The Court recognized the need to intervene in matters specific to the Equal Protection Clause, but had to do so while maintaining a balance in dual federalism. This began as the Court was leaving the *Lochner* era, as mentioned in *The Lochner Era and Comparative Constitutionalism* by Sujit Choudhry (2004). Justice Stone, author of Footnote 4, wrote, “‘a more searching judicial inquiry’ is warranted when prejudice against ‘discrete and insular minorities’ undercuts the ‘operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.’”

¹ 304 U.S. 144 (1938).

The idea of the “discrete and insular” minority would be applied later in a more relevant case to minorities, *Graham v. Richardson* (1971).² Gerstmann covers this rationale of the Court’s opinion in *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (1999). “Without acknowledging that it had never before used the political-process rationale in an equal protection case, the Court held, “Aliens as a class are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate,” Gerstmann writes in addressing Footnote 4. Footnote 4, he continues, has been used in order to both expand and deplete the list of “acceptable” minorities, proving further the inconsistencies of the Court in addressing marginalized groups and their qualifications.

Rational Basis Test

A state law passes the rational basis test, the lowest level of scrutiny, when the challenger of said law proves that the law is not a reasonable measure to achieve a legitimate government interest. This test is triggered when a law discriminates against specific classifications, including age,³ poverty,⁴ developmental disabilities,⁵ and sexual orientation.⁶ In other words, the test applies when a law discriminates against anyone that is not considered a suspect class, a quasi-suspect class, or a fundamental right. The classifications mentioned above are not considered suspect because according to the Court, they do not meet certain criteria, which includes a history of discrimination, political powerlessness, immutability, and are not “discrete and insular.”⁷ Strauss (2011) writes in her article *Reevaluating Suspect Classifications* that the Court

² 403 U.S. 365 (1971).

³ See *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁴ See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

⁵ See *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

⁶ See *Romer v. Evans*, 517 U.S. 620 (1996).

⁷ Strauss, Marcy. 2011. “Reevaluating Suspect Classifications.” *Seattle University Law Review*.

appears to follow this set of criteria, but provides little context as to what it means by history of discrimination, immutability, political powerlessness, and discrete and insular. Strauss questions, “Is powerlessness measured by the inability to vote (so that minors under eighteen would be politically powerless), or by the ability to be adequately protected by the political process (so that minors would likely not be politically powerless)? And even if the substantive definition of political powerlessness were universally defined, there remains the question of timing. Should powerlessness be measured from the date the law was passed (i.e., a law passed discriminating against women at a time when women could not vote), or at the time of the legal challenge?” Because the criteria has not been sharply defined by the Court, it leaves the matter open to wide interpretation, which arguably leads to inconsistency in the Court’s reasoning. We can assert, however, that in the context of political powerlessness, the Court decided in *Massachusetts Board of Retirement v. Murgia*⁸ that should a group demonstrate a lack of political power, it may qualify as a suspect or quasi-suspect class.

Intermediate Scrutiny

The second tier, known as intermediate scrutiny, applies to what the Court has determined to be “quasi-suspect” groups. In this test, the state must prove that the law has a substantial relationship to an important government interest.⁹ Issues surrounding gender¹⁰ and illegitimacy¹¹ trigger this test. Cornell University Law School defines quasi-suspect in its legal information institute, writing, “A class is characterized “quasi-suspect” if the class is not entirely politically powerless, but traditionally lacks substantial political power.” Yet this fails to address

⁸ 427 U.S. 307, 313 (1975).

⁹ See *United States v. Virginia*, 518 U.S. 515 (1996).

¹⁰ See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

¹¹ See *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001).

immutability or historical discrimination, and the questions raised by Strauss are still applicable to this standard of political powerlessness. Certainly cisgender women can be considered immutable, and women have a long history of holding second-class status to men. Despite this, the Court has deemed that women are not entirely suspect and therefore the level of review at which a state must show a substantial relationship to an important government interest is not as rigorous as strict scrutiny.

Strict Scrutiny

To pass strict scrutiny, a state law must have a compelling government interest in imposing said law and achieve it through the least restrictive means.¹² This test is often referred to as being “strict in name, but fatal in practice” (*Adarand v. Peña*, 1995).¹³ When a claim is made that state law is discriminatory against race,¹⁴ alienage,¹⁵ or violates a fundamental right,¹⁶ this final test is triggered and used by the Court. The Court finds that race and alienage do constitute political powerlessness, immutability, and history of discrimination. Cornell University Law School writes, “As suggested by [*Carolene Products*, 1938], strict scrutiny represents an approach in which a presumption of constitutionality is shed in favor more exacting judicial review.”

The three-tiered test on its face appears to be rather simple. Tests are triggered dependent upon what class or classification is being discriminated against. The state must have a legitimate, important, or compelling interest in order to justify such discriminatory laws. But

¹² See *Fisher v. University of Texas at Austin, et al.*, 570 U.S. (2016).

¹³ 515 U.S. 200 (1995).

¹⁴ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹⁵ See *Graham v. Richardson*, 403 U.S. 365 (1971).

¹⁶ See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

what the Court claims to put into practice does not reflect reality, and these cases become far more complicated when they play out in the courtroom. The three-tiered test is layered at each level, each test more complex than the Court will admit to. In Evan Gerstmann's and Christopher Shortell's *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases* (2010), the authors analyze strict scrutiny and argue, "In practice, the process [of strict scrutiny] is rarely as simple as looking for a compelling government interest and then evaluating whether the law is narrowly tailored... [The] meaning of strict scrutiny varies tremendously from subject area to subject area within equal protection jurisprudence. Strict scrutiny in the area of remedial affirmative action is not the same as strict scrutiny in diversity-based affirmative action." (p. 4).

Rational basis "with teeth" has become the unofficial term for the Court's sharper version of the first test, often used when the Court does not want to grant suspect status or quasi suspect status to a particular group.¹⁷ William D. Araiza writes, "Indeed, Justice O'Connor was recently moved to acknowledge that cases such as *Cleburne* and *Romer* involved something more than traditional rational basis review, a suggestion the rest of the Court has not been willing to embrace, at least officially" (*The Section 5 Power and the Rational Basis Standard of Equal Protection*, 2005, p. 554). If the Court does not acknowledge that each level of review is not narrowly defined, it leaves the tests open to interpretation, which then gives way to the Court's ability to treat cases of discrimination with higher levels of scrutiny without granting suspect class status. Gerstmann, regarding *Levy v. Louisiana* (1968),¹⁸ writes, "Under a true rational-basis test, the law would have been upheld if it possibly had even a slight effect of discouraging out of wedlock births. The Court, therefore, was clearly applying a higher level of scrutiny than the

¹⁷ See *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁸ 391 U.S. 68 (1968).

traditional rational-basis test; in fact, many legal scholars interpreted *Levy* to mean that illegitimacy was now a suspect classification.”

The willingness to abandon the accepted definitions of the three tests, or to even define them precisely, casts shadows of doubt in the Court’s reasoning, and ultimately hinders its legitimacy among marginalized communities. The tests also appear to hold back the Court because of the nature in which it chooses to award suspect status to certain classes. Now more than ever, American society is broadening its lens surrounding race, gender, and sexuality. The United States is a true melting pot for diversity. Many citizens do not ascribe to a singular race; understanding of the gender binary has already broken down traditional social construction; and the fluidity of sexuality is becoming more accepted across the nation, particularly amongst younger generations. This begs the question of whether or not the Court should continue to work with the three tiered test as it stands now, or to do away with it entirely to be replaced by a new model that would be more inclusive to diverse communities. As earlier stated, the population in the United States is so diverse, it can no longer be confined to the borders that American society, including the Supreme Court, has set forth in an attempt to make sense of who people are. This is not to say that it has only recently been so; but recent years indicate that younger generations are discovering and coining terminology to further understand the diversity of people in race, gender, and sexuality. With this change in understanding of people, there will be a social push towards removing such constricting guidelines that we see within the Supreme Court. The question, some argue, should be whether or not a fundamental right is being violated as opposed to who is being discriminated against. A singular, inclusive test would include those who do not meet the three standards of suspect class and would erase the stigma of being considered suspect. Although to be suspect in the eyes of the law may seem favorable to minority groups,

the outcome may have a detrimental social impact. Flexibility and inclusiveness are key factors in a test that determines what a fundamental right is and whether or not a law is invidious.

In the following chapters, I will address discrimination cases with issues of race, gender, and sexuality, with an analysis of how the corresponding tests are used by the Supreme Court. A close look at various past cases addressed by the Supreme Court can grant us insight to future failings of the existing tests. In these chapters, I analyze the existing “boxes” the Court uses to contain its classifications and critique how its methodology allows for many diverse citizens to fall through the cracks of equal protection. By observing how social acceptance of diversity in race, gender, and sexuality has grown into what it is today, and comparing that acceptance of diversity to the three tiered test and what it calls for, we will find that the three tiered test is inefficient to meeting the reality of the diversity within the American people.

Chapter One: Race and the Supreme Court

The decision by the Court to use strict scrutiny in matters of racial discrimination can be traced back to *Skinner v. Oklahoma*¹⁹ and *Korematsu v. United States*.^{20,21} Despite being the first cases in which the Court used the terminology “strict scrutiny,” Siegel (2006) writes that it was not until the Warren Court that the elements of strict scrutiny were put into practice and followed. Siegel continues to say that, “Strict scrutiny varies from ordinary scrutiny by imposing three hurdles on the government. It shifts the burden of proof to the government; requires the government to pursue a ‘compelling state interest;’ and demands that the regulation promoting the compelling interest be ‘narrowly tailored.’”

Since *Skinner* and *Korematsu*, there have been a wide range of cases in which the Court has used strict scrutiny to weigh racial discrimination in state legislation. These cases have addressed varying issues, including marriage equality and affirmative action in higher education. However, the Court addressed racial discrimination as it pertained to the Equal Protection Clause before coining strict scrutiny, such as in *Plessy v. Ferguson*.²²

This chapter, while demonstrating the ways in which multiracial citizens are left behind by the Court’s current interpretations of Equal Protection, remains aware that multiracial people in the United States are not a new concept. Since the colonization of North American, children have been born out of unions between white settlers, their slaves, and Native Americans.²³ These unions were often forced, the enslaved and colonized women raped by slave owners. For much

¹⁹ 316 U.S. 535, 541 (1942).

²⁰ 323 U.S. 214,216(1944).

²¹ Siegel, S. (2006). *The Origin of the Compelling State Interest and Strict Scrutiny*. The American Journal of Legal History. Vol. 48, No. 4 (Oct., 2006), pp. 355-407.

²² 163 US 537 (1896).

²³ Cruz, B., Berson, M. (2001). *The American Melting Pot? American Miscegenation Laws in the United States*. OAH Magazine of History. Vol. 15, No. 4. Pp. 80-84.

of history, the children born out of these rapes were to be considered as black or brown as their mothers; no matter how white they appeared to be, any amount of nonwhite heritage was enough to be considered “colored.” It is for that reason that this chapter refers to multiracial individuals as a new concept for the Court to tackle since it can be argued that the rights of multiracial individuals grew with the rights of people of color.

Plessy is relevant to this chapter as it pertains to how the Court has addressed racially mixed individuals. Following a discussion of Plessy, this chapter focuses on exemplary cases addressing some of the various issues in racial discrimination to demonstrate the inconsistent logic the Court enforces through strict scrutiny. It is these inconsistencies in which this chapter argues that multiracial individuals will fall through the cracks of the Equal Protection Clause by the Court.

Plessy v. Ferguson

Homer Plessy boarded a train in New Orleans in the summer of 1892.²⁴ When he stepped into the train, he walked over to the seating reserved for “Whites only.” Plessy was 1/8th African American. At first glance, no other person on the train would think twice to remove Plessy from the whites only compartment of the train; Plessy passed as a white man enough to be unnoticed. But Plessy was, in fact, part of a grander scheme. Enlisted by the Citizens Committee to Test the Constitutionality of the Separate Car Law and attorney Albion Tourgee, Plessy was to sit in the whites only compartment so that the Committee could bring suit against the state. This could only happen if the Committee had the railroad management’s support, and since the segregation complicated the work of the train operators, they complied in helping the suit move forward. One

²⁴ Davis, T. (2012). *Plessy v. Ferguson*. Westport: ABC-CLIO, LLC.

of the conductors, knowing that Plessy was a plant, asked him to leave the train. After Plessy was forcibly removed, Tourgee could move the suit forward.

Tourgee argued before the Supreme Court that Louisiana was violating the Equal Protection Clause as the law in question was directed at the black race. He further argued that because the law failed to define “race,” it left open to interpretation what is black and white, allowing train conductors to discriminate with no basis. Representation for the state argued that the law was not a violation of Equal Protection as it separated both races from each other and accommodations were, supposedly, equal.

Justice Brown delivered the opinion for the Court. The Fourteenth Amendment, Justice Brown wrote, forbid the States from “...making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States.” However, Justice Brown found that, “Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.... We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”

With this line of reasoning and gas lighting of black citizens, the Court had endorsed the “separate but equal” doctrine, compelling the growth of Jim Crow. Endorsing “separate but equal” resulted in the affirmation that whites and blacks were equal in the face of the law, which we know did not reflect the reality of society. This case demonstrates the Court’s limited

categorization of people. Plessy was only 1/8th black, yet his white features were not enough to allow him to be considered for anything but the “black” box of the Court’s construction.

This came from the “one drop rule,” the standard by which Louisiana had used to keep even Homer Plessy separate from the “real” white people. The “one drop rule” was born out of issues the South was faced with when, as a result of white slave owners raping their black female slaves, interracial children were being produced at higher rates.²⁵ This rule was essential in keeping the white race “pure.” This rule was vital to the survival of white supremacy after the downfall of slavery; Jim Crow inherited this rule as a way to keep the line drawn between blacks and whites firmly in the sand. Sociologist Nikki Khanna writes that the “one drop rule” is still highly relevant today when we discuss multiracial identities. Khanna reasons that in more recent times, multiracial identities have “increased exponentially” due to the breaking down of antimiscegenation laws, increased visibility through multiracial celebrities in social media, and even the option for people to check multiple boxes on the Census in regards to race. While *Plessy* would eventually be overturned, this case is an example of how boxes are limiting the Court’s abilities to make decisions based on the reality of the impact of certain legislation as it pertains to Equal Protection. This also forces the Court to overreach by defining what race is in America, which is clearly not a one size fits all solution.

As races began to mix, this obviously became more of an issue for the Court. Golub writes, “Plessy’s ability to pass for white (and his publicly staged refusal to do so) called attention to the social and legal processes of racial sorting through which purportedly natural and discrete racial groups are produced and maintained. Reading Plessy as a case fundamentally about racial passing reveals the Court’s deep anxiety regarding mixed-race individuals and the

²⁵ Khanna, N. (2010). “IF YOU’RE HALF BLACK, YOU’RE JUST BLACK”: Reflected Appraisals and the Persistence of the One-Drop Rule. *The Sociological Quarterly*, 51(1), 96-121.

specter of interracial sexuality that ambiguously raced bodies necessarily signify. Within the Court's racial narrative, passing simultaneously constitutes a violation of white supremacist norms of sexual behavior and a challenge to the assumption of natural racial differences upon which the institutions of segregation depended.”²⁶

Golub examines Tourgee's argument to the Court, highlighting the attorney's hypothetical question to the Justices: what would the Justices do if despite their white ancestry, they had black features and were forced into the “blacks only” car of a train? Tourgee's point, Golub argues, was to showcase the arbitrariness of determining someone's race. Golub explains, “Tourgee's hypothetical demonstrated the power of law to impose racial subjectivity: it is not simply a matter of properly matching the race of each person to the appropriate train car. Rather, an individual's race may be a product of being assigned to a white or a colored car.”

Additionally, Golub points out the implications of Justice Brown's reasoning and strategy to reasoning that “separate but equal” was allowable per the Equal Protection Clause. Golub writes, “Significantly, both of Justice Brown's arguments are implicitly linked to questions of mixed race. The theory of symmetrical equality developed as a legal justification for anti-miscegenation laws, adopted by the Court in *Pace v. Alabama* (1883). As visible evidence of previous miscegenation, passing is closely related to the theme of mixed race. To the extent that race-thinking presupposes discrete or pure racial kinds, race requires the denial of mixed race. Where scientific theories of race attempted to define away the racially destabilizing implications of mixed-race people, anti-miscegenation laws sought to legislate against such disruptions. In this regard, Justice Brown's majority opinion can be seen as an exercise in containment, reacting against the destabilizing potential of passing in Tourgee's defense.”

²⁶ Golub, M. (2005). *Plessy as "Passing": Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*. *Law & Society Review*. Vol. 39, No. 3 pp. 563-600.

Plessy demonstrates the complications of a case involving a mixed race individual. How would the Court determine in which box to place such an individual? Is it based on ancestry, despite someone's ability to "pass" as white or black? Or would it be based on appearance, despite ancestry? Fortunately, society and the Court would change after time passed from the *Plessy* decision. Legislation banning biracial marriage would last until the late 1960's. By that time, unlike in *Plessy*, the Court would have developed the levels of scrutiny and be openly using strict scrutiny to cases involving racially discriminatory legislation. While the banning of biracial marriage is no longer alive in the country today, it is critical to understand the Court's decision in such cases as it points to the failures of categorizing people and cases by narrow classifications alone.

Loving v. Virginia

Richard and Mildred Loving were happily married in 1958 in Washington D.C.²⁷ The couple made the trip to the Capital from their home state of Virginia, where state law mandated that interracial marriage was illegal. Richard was white; Mildred was black. When they returned, the newlyweds began their new life together, not expecting the legal battle ahead of them.

It was just a couple hours past midnight, not yet one year into their marriage, when Richard and Mildred were woken up by the county sheriff standing at their bedside. Someone had informed law enforcement of the couple's union. The sheriff and his deputies promptly arrested the two for breaking the state's anti-miscegenation law.

When the couple stood before the county judge, they were found guilty. The judge presented them with a choice, however; they could either both spend one year in prison, or they could leave the state and not return for twenty-five years. There was no easy answer for the couple. Mildred was five months pregnant at the time of the arrest, and could not spend a year in

²⁷ Wallenstein, P. (1995). *The Right to Marry: Loving v. Virginia*. OAH Magazine of History, 9(2), 37-41.

prison without being forced to give birth there. The couple did not want to uproot themselves from their home; they had family, friends, and a community in Virginia. Instead, Mildred sought out legal help from the Attorney General. At his advice, she contacted the American Civil Liberties Union. Through the Union, Richard and Mildred were introduced to Bernard Cohen, a civil rights attorney. The ACLU agreed to pay for the attorney fees, and with Cohen joined Philip Hirschkop. The attorneys brought suit against the state of Virginia, claiming that the law which had displaced Richard and Mildred out of their home was a violation of the Equal Protection Clause of the Fourteenth Amendment.

By the time that *Loving v. Virginia*²⁸ had reached the Court, it had already been faced with an opportunity to dismantle antimiscegenation laws. Just a few years earlier, in 1955, *Naim v. Naim*²⁹ was dismissed before the Court on a technicality.³⁰ The Court at the time feared hearing a case regarding interracial marriage, since it was so soon after *Brown*. The stability of the Court was wavering in public opinion, given its very liberal decision. Dorr writes in his article regarding the case, “Opposition in *Brown* was mounting daily and, ‘The southern governors were talking about interposition.... Over and over again, the fear was expressed that *Brown* was going to lead to mongrelization of the races. The notion was that little black boys would be sitting next to little white girls in school, and the next thing would be intermarriage and worse.’” The attorneys representing the Lovings argued that *Brown v. Board of Education*³¹ should hold precedent for this case. *Brown*, the attorneys argued, laid framework that stated that the Fourteenth Amendment was violated by Virginia because it criminalized marriage only when it pertained to mixed race couples. The State argued that both parties were punished equally, and

²⁸ 388 U.S. 1 (1967).

²⁹ 350 U.S. 891 (1955).

³⁰ Dorr, G. (1998). *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*. The American Journal of Legal History, 42(2), 119-159.

³¹ 347 U.S. 483 (1954).

so the law was not a violation of the Fourteenth Amendment since not one party was punished more than the other for violating Virginia law.

After hearing oral arguments from Cohen, Hirschkop and the State, Chief Justice Warren himself wrote the majority opinion for the Court, which turned out to be a unanimous decision. Chief Justice Warren wrote that the Virginia law “cannot stand consistently with the Fourteenth Amendment.... [We] do not accept the State’s contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose....In the case at bar, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race....[The] Equal Protection Clause requires the consideration of whether the classifications drawn by any of the statutes constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”

In his argument for the Court, Chief Justice Warren held the Virginia statute against the test of strict scrutiny, in which he found that the law barring interracial marriage failed to identify a compelling government interest, let alone find the least restrictive means possible to achieve said interest. Chief Justice Warren found that, “the state court is no doubt correct in asserting that marriage is a social relation subject to the State’s police power, [however] the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment.” While he found that the institution of marriage is within the powers of the State, those powers, he concluded, could not outweigh the protections of the Fourteenth Amendment.

He continued, “Penalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period... The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause....”

The decision in this case was a victory for civil rights. *Loving* set precedent that anti-miscegenation laws are unconstitutional, which broke down a major foundation in white supremacy, as noted by Chief Justice Warren. However, as the chapter will further exemplify, *Loving* still fails to protect multiracial individuals. By using strict scrutiny to address the question of the case, the Court enforced the idea of classifications by race, the very boxes that are limiting the Court’s decision making when it comes to extremely diverse individuals. *Loving* allows biracial coupling, and as a result of biracial coupling, multiracial children are made. As noted before, multiracial children are no new concept to the United States. Yet after *Loving*, their existence was given validation in society. Legally, however, they are forced into the white box or non-white box in the question of Equal Protection. Neither of these boxes is a true testimony to the identities and experiences of these children and the very specific discrimination they may face as multiracial individuals. It also leaves open the door for the Court to place those individuals in boxes based off of heritage or physical features as was the concern raised in *Plessy*. If the Court is left to decide where to place multiracial people within a system of tests that views identity in a limited fashion, what will be the outcome of affirmative action suits brought by multiracial students?

Bakke and Fisher

Slavery is an ever-existing dark mark in our nation's history, a mark that many would like to forget, or rather ignore. In an attempt to remedy the evil committed in the eras of slavery and Jim Crow, public schools, particularly institutions of higher education, have implemented "affirmative action" policies. These policies often sought to lift minority students from their disadvantaged placement by reserving seats within admissions to universities for them.

The University of California at Davis Medical School was one such institution that felt compelled to use an affirmative action policy.³² After the school opened in 1968, it had only admitted three students of color within its first two years.³³ Recognizing the lack of diversity, the school fashioned two admissions programs: regular and special. The regular program evaluated prospective students in the traditional way by examining GPA, test scores, and resumes. This program took no consideration of the demographics of the applicant pool. The special program, however, was reserved only for students who demonstrated a disadvantage financially, educationally, or indicated being a person of color. The special program held its pool to the same standards as the regular admissions, but the pools were not competing against one another. Sixteen seats were left open to only those enlisted in the special admissions program.

Allan Bakke applied to the medical school and was rejected twice. Bakke believed he was rejected due to his whiteness, since his undergraduate GPA and test scores ranked higher than many minority applicants. Making the claim that his rejection was on racially discriminatory grounds, Bakke filed suit and the case made its way through the legal ladder and finally to the Supreme Court.

³² 438 U.S. 265 (1978).

³³ Epstein, L., Walker, T. (2015) *Constitutional Law for a Changing America: Rights, Liberties, and Justice (Ninth Edition)*. SAGE Publications.

The Court was presented with three questions: was the University's dual admissions program constitutional? Did the University wrongfully deny Bakke's applications? And is a consideration of race permissible when a University chooses to admit students?³⁴

Because there was a question of racial discrimination, despite the claim being made by a white man, the Court continued to use strict scrutiny in evaluating if the admissions program was acceptable under the Equal Protection Clause. The decision in *Bakke* was unusual and complex, and ultimately the decision was split five to four on two separate thoughts. Justice Powell wrote the opinion for the Court, but agreed with varying aspects of both the majority and the dissenting opinions. Chief Justice Burger and Justices Stuart, Rehnquist, and Stevens dissented, while the majority ultimately agreed that affirmative action programs should be allowed, so long as universities do not use quotas, in which case the program would be unconstitutional. Justices Brennan, White, Marshall, Blackmun, and Powell agreed that such admissions programs may be allowed and may consider race in admissions decisions.

Justice Powell reviewed the arguments of both parties as well as the decisions handed down by the lower courts, stating, "[Strict scrutiny, the University] asserts, should be reserved for classifications that disadvantage 'discrete and insular minorities.' [Bakke], on the other hand, contends that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded to a particular racial or ethnic classification hinges upon membership in a discrete and insular minority and duly recognized that the 'rights established [by the Fourteenth Amendment] are personal rights.' *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).... [The University] prefers to view [the program] as establishing a 'goal' of minority representation in the Medical School. [Bakke], echoing the courts below, labels it a racial quota."

³⁴ Hazard, W. (1978) *The Bakke Decision: Mixed Signals from the Court*. The Phi Delta Kappan. Vol. 60, No. 1. Pp. 16-19.

Justice Powell continues, “The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: ‘No State shall... deny to any person within its jurisdiction the equal protection of the laws.’ It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. 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.”

The question of how a white male such as Bakke could be considered a “discrete and insular minority” was also addressed by Justice Powell, who argued, “[Strict scrutiny] has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of ‘suspect’ categories or whether a particular classification survives close examination. Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect...” This reasoning appears to undermine the logic of how the Court assigns classifications to levels of scrutiny; if these standards do not determine what level of scrutiny is applied, why should they matter at all?

The admissions program was found to be unconstitutional by the Court, which “...tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational

diversity, they are never afforded the chance to compete with applicants from preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class. The fatal flaw in [the University's] preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.”

In short, the Court found that the special admissions program was not constitutional, that Bakke was wrongfully denied from the school. Additionally, the Court ruled that while seeking diversity in a student population is a compelling government interest, diversity cannot just be based on race and ethnicity. However, affirmative action programs are constitutionally valid so long as they follow this guideline and do not attempt to fulfill a quota.

Since *Bakke*, there has been a wave of civil suits against universities, claiming “reverse racism,” including cases like *Grutter v. Bollinger* in 2003. Most recently, the Supreme Court heard *Fisher v. University of Texas*.³⁵ Abigail Fisher, a white woman, applied for admission to the University of Texas’s undergraduate freshman class in 2008. Fisher was a high school senior, but because she was not in the top ten percent of her graduating class, she was not automatically admitted per the University’s policy. Instead, she would be considered in the standard admissions program, a program in which race was considered when students were admitted. When the University of Texas denied her application, Fisher filed suit, claiming discrimination on the basis of race. The district court as well as the Court of Appeals ruled in favor of the University, leaving Fisher the option of appealing to the Supreme Court.

The Court was asked if the Equal Protection Clause permitted the consideration of race in admissions decisions to undergraduate programs in universities. Justice Kennedy delivered the opinion for the Court, a four to three decision. Justice Kennedy wrote, “...it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race

³⁵ 579 U.S. _ (2016).

consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.”

The decisions between *Fisher* and *Bakke* were vastly different; while both parties were in similar situations, the Court recognized significant differences between the schools’ admissions programs. University of Texas, unlike the medical school in *Bakke*, used a different metric in evaluating race in their incoming class. “Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a ‘critical mass.’”³⁶ The vagueness of the admissions program to admit minority students allowed University of Texas to pass the strict scrutiny test, unlike the medical school, which specifically called for a reservation of 16 seats to students of color.

Both of the cases mentioned above applied strict scrutiny despite the fact that white students could not be considered “discrete and insular” based on skin color alone. Strict scrutiny is triggered when race is involved, white, black or brown. But the racial divide in the United States is becoming more of a blurred line as time passes.

In her article *Political Attitudes and Ideologies of Multiracial Americans: The Implications of Mixed Race in the United States*, Natalie Masuoka (2008) addresses this topic, writing, “While multiracial Americans make up approximately 2.4 percent of the population in 2000, Smith and Edmonston (1997) estimate that the multiracial population could make up as much as 21 percent of the population by 2050.... Indeed, individuals who self-identify as multiracial exemplify a new direction in racial identification. As individuals who have chosen an identity that falls outside the traditional racial spectrum, those who self-identify as multiracial resist the historical precedent to accept the racial identity that is imposed on them.... It is important to note that multiracial identities are not new phenomena in this country, but I argue

³⁶ 570 U.S. _ (2013).

that self-identification as such represents a recent and important trend. Historically, racial identities have been imposed on individuals. As a result, minorities have had to both accept and cope with the subordinate status associated with their race.” This is reflective of what Khanna said about multiracial identities and how the Court had used the “one drop rule;” the Court assigned individuals between the statuses of white and nonwhite. This cannot work in relation with the numbers that Masouka provides.

Others would argue that the current strategies of the Court reflect too heavily the notion of black and white, ignoring racial diversity among Americans. One such argument comes from Deborah Ramirez, who writes in her article *Multicultural Empowerment: It's Not Just Black and White Anymore* (1995) that, “When courts and legislatures first created race-conscious remedies in the 1960s, the United States was seen as a black and white society. Blacks constituted approximately 10 percent of the population, and whites nearly 90 percent.... Since the 1960s, however, three important demographic trends have changed the face of America and its race relations: first, the increasing percentage of persons of color; second, the increasing percentage of persons of color who are not black; and third, the increasing number of persons who consider themselves multiracial. These demographic changes affect existing color-conscious remedies in crucial ways. In fact, demographic shifts may be causing our race-conscious remedial system to implode. As the percentage of people of color in the population increases, so too will the "exclusionary" effects of affirmative action on non-minorities.”

In her article, Professor Ramirez questions the effectiveness of affirmative action programs as remedial tools to a history of oppression towards black Americans. She points out that while affirmative action was a response to slavery and Jim Crow, other people of color, such as Latinos and Asians, are benefiting from such programs. This begs the question, who is truly

uniquely disadvantaged? Ramirez asks, “If blacks are indeed uniquely disadvantaged, does the “lesser” history of discrimination against Latinos and Asians entitle them to a lesser remedy, or no remedy at all? In other words, should affirmative action programs treat Latinos and Asians as whites, as blacks, or as something in between?” While Ramirez is questioning the effectiveness of affirmative action programs, the same idea can be posed against strict scrutiny in racial discrimination claims. The Reconstruction Era followed the Civil War, and the 14th Amendment’s Equal Protection Clause evolved because of the enslavement of blacks. As Ramirez mentioned, legislation in the 1960s was meant to remedy the unfair treatment of black Americans. Yet the Court’s interpretation, based on decisions like *Bakke* and *Fisher*, indicate otherwise. Furthermore, there is no indication of how to handle cases involving multiracial people, or if the Court would recognize and handle these cases differently at all.

As Masuoka indicates, multiracial Americans are on the rise, but the Court, as demonstrated in the cases in this chapter, have carefully crafted boxes that distinguish a party’s class and classification. The current system in place by the Court to determine if a person is “discrete and insular” and if strict scrutiny applies does not answer the complex question of how to address discrimination against a multiracial individual. If *Fisher* or *Bakke* had been multiracial students claiming racial discrimination, how would the Court address such claims? Multiracial people are so diverse that some may look white, some may look brown. Would the Court examine a person’s physical characteristics to determine if someone may be a discrete and insular minority? As Khanna indicates in addressing *Plessy*, the “one drop rule” still presents a struggle for courts today. Can an otherwise white individual claim to be multiracial and identify with people of color if they are 1/32 Native American? Strict scrutiny is triggered by race

discrimination, but what does that mean for multiracial citizens? Or will the Court even recognize those individuals for who they are, as complex and diverse individuals?

Chapter 2: Gender and the Supreme Court

In March of 2017, the Supreme Court chose not to hear Gavin Grimm's lawsuit, opting to reverse the case back to the 4th U.S. Circuit Court of Appeals.³⁷ The Court's given reasoning for this decision was the elimination by the Trump administration of federal guidelines imposed on schools, mandating that transgender students be permitted to use bathrooms corresponding to their identities. These guidelines were put in place by the Obama administration, but have since been rescinded since Trump came into power. The 4th Circuit Court of Appeals sided with Grimm, agreeing that the school violated the Equal Protection Clause, in addition to Title IX.³⁸ The Supreme Court will inevitably hear similar cases in the future, but for now, it has yet to rule on cases of discrimination against transgender people.

According to a study completed in 2016, about 1.4 million American adults identify as transgender.³⁹ That is roughly 0.6% of the adult population in the United States and is double the number given by Gary J. Gates in his survey in 2011.⁴⁰ Coordinators of the 2016 study attribute this increase to "a perceived increase in visibility and social acceptance of transgender people." Given that gender has historically and socially been perceived as binary, the growing number of those who identify as transgender, like Grimm, are currently facing political and legal obstacles. In *Conformity Pressures and Gender Resistance Among Transgendered Individuals*, Patricia Gagne and Richard Tewksbury (1998) write, "Western industrial and post-industrial cultures share the ideological presumption that gender will correlate with the sex assigned at birth. Individuals whose seek to challenge this binary system of gender through enactments of

³⁷ Liptak, A. (2017). *Supreme Court Won't Hear Major Case on Transgender Rights*. The New York Times.

³⁸ Wheeler, L. (2017). *Supreme Court won't hear transgender bathroom case*. The Hill.

³⁹ Flores, A.R., Herman, J.L., Gates, G.J., & Brown T.N.T. (2016) *How Many Adults Identify as Transgender in the United States?* Los Angeles, CA: The Williams Institute.

⁴⁰ Gates, G. (2011). *How many people are lesbian, gay, bisexual, or transgender?* Los Angeles, CA: The Williams Institute.

androgynous gender or by crossing gender boundaries, including masculine women and feminine men, are likely to be stigmatized, ostracized, and labeled mentally ill.”⁴¹ There is a clear disparity in the way in which transgender people are treated socially compared to that of cisgender⁴² people.

As referenced by Gagne & Tewksbury, Western society is held by the pillars of the gender binary, among other long-held traditional social constructs. The Supreme Court is not exempt from maintaining such societal models and expectations, and this is demonstrated clearly when the Court applies intermediate scrutiny to gender discrimination claims.⁴³ A state passes intermediate scrutiny when the state can demonstrate that the law advances an important government interest and the law is substantially related to that specific interest. This test is less rigorous than strict scrutiny, but more so than the rational basis test. We also see the language surrounding intermediate scrutiny shift and change over the course of certain cases, such as in *U.S. v. Virginia*.⁴⁴

Because the Court would not hear Grimm’s case, we are left to speculate how the Court, if it had made a decision, would interpret transgender discrimination. Would the Court attempt to categorize transgender individuals according to the binary construct? Would the Court recognize the individual’s chosen gender, or persist in categorizing the individual with the gender printed on his or her birth certificate? How would the Court apply intermediate scrutiny in either scenario? While we cannot rely on Grimm’s case, looking at cases in the Court’s past offers insight to how the Court interprets gender discrimination, which in turn may help to predict the future of transgender rights in the Supreme Court. The Supreme Court over the years has

⁴¹ Gagne, P., Tewksbury, R. (1998). *Conformity Pressures and Gender Resistance Among Transgendered Individuals*. Social Problems. Vol. 45., No. 1.

⁴² See Merriam-Webster dictionary: of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth.

⁴³ See *Craig v. Boren*, 429 U.S. 190 (1976).

⁴⁴ 518 U.S. 515 (1996).

interpreted cases based on a fixed notion of gender, gender roles, and the gender binary.

Unfortunately, setting this kind of precedent leaves far too little room individuals who do not fit the mold of the gender binary. This chapter focuses primarily on how the Court has interpreted gender, specifically the gender binary, and how that may limit the Court's interpretation of transgender identities.

Craig v. Boren

In an attempt to avoid more traffic accidents, Oklahoma created legislation in 1972 which permitted only women 18 years of age and older to purchase alcohol while men were allowed to purchase alcohol at the age of 21 or older. A suit was brought forth by Mark Walker, a twenty-year-old student at Oklahoma State University, who teamed up with local store owner Carolyn Whitener. Walker and Whitener claimed sex discrimination, however, Walker would soon be turning 21, rendering the suit susceptible to dismissal. In order to avert such a scenario, Walker's eighteen-year-old friend, Curtis Craig was made party to the case. At the trial court, rational basis was used to evaluate the claim of discrimination on the basis of sex. In the year previous to the birth of the Oklahoma law, the Supreme Court had evaluated discrimination on the basis of sex through rational basis, the lowest form of scrutiny.⁴⁵ However, the Court had used language that implied a stronger form of rational basis in comparison to its traditional usage; this would be dubbed "rational basis with teeth." Craig and the rest of his party, on the other hand, argued that the trial court should apply strict scrutiny. With the use of rational basis, the Oklahoma law passed the test and the law was found to be constitutional.

When the case reached the Supreme Court, Justice Brennan wrote the opinion of the Court in a seven to two decision. He stated, "To withstand constitutional challenge, previous

⁴⁵ See *Reed v. Reed*, 404 U.S. 71 (1971).

cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives... *Reed v. Reed* has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, ‘archaic and overbroad’ generalizations could not justify use of a gender line in determining eligibility for certain governmental entitlements... the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*’s requirement that the gender-based difference be substantially related to achievement of the statutory objective.”

Justice Brennan in his reasoning is recognizing roles that are assigned to gender as being “tenuous” in relation to this law. The law itself affirms the notion that young men are reckless, are trouble makers, or the phrase “boys will be boys.” This is implied by the fact that the state does not trust young men to consume alcohol responsibly in the same way it trusts young women. This is because the opposite stereotypes are applied to this group; young women are seen as demure, responsible, or reasonable. In this case, Justice Brennan found that these assumptions by the state were not sufficient to justify discrimination against young men. However, Justice Brennan does not seem to fight the gender roles of the “two genders.” He only finds that the stereotypes are not strong enough evidence to support such a law.

Here, Justice Brennan has established the requirements of intermediate scrutiny, the first time the Court would use that term. However, it was Justice Rehnquist in his dissent who used that phrase, arguing, “...the Court’s application here of an elevated or ‘intermediate’ level scrutiny, like that invoked in cases dealing with discrimination against females, raises the question of why the statute here should be treated any differently from countless legislative classifications unrelated to sex which have been upheld under a minimum rationality standard.”

Just as the Court attempted to deal with issues revolving around race with the answer of strict scrutiny, the Court attempted to remedy gender discrimination with intermediate scrutiny. This remedy, however, is only sufficient if gender is viewed as a simple binary in which men and women are born into their roles and accept their gender assignments at birth.

In the majority opinion, Justice Brennan writes, “...statutory classifications that distinguish between males and females are ‘subject to scrutiny under the Equal Protection Clause...’ In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.” This language reflects the gender binary to which the Court recognizes in order to assess gender classifications. While the Court does not accept the state’s reasoning for the law, it reasons that the law could meet the standards of intermediate scrutiny should the state have provided more evidence to support the assumption about young men and alcohol. The reasoning leaves little space for a discussion about how such a law may impact transgender identities and the implications of gender assignment at birth correlating with stereotypes about that gender. Transgender issues were not at the social front at the time of this case, of course, however transgender issues are impacted by this case.

Additionally, the Court in this case presaged the *Bakke* line of reasoning. Although men do not meet the standards to be considered suspect, that does not bar that group from being protected under the same level of scrutiny as women, who the Court considers quasi-suspect class. Similar ideas played out five years later, only this time, the matter was regarding a more sinister act.

Michael M. v. Superior Court of Sonoma County

Michael M. was just shy of turning 18 when he violated California's statutory rape law.⁴⁶ He had forced himself onto a 16 year old girl and raped her. They had met at a bus stop with a group of other teenagers, and together the group had walked to the nearby railroad tracks and drank.⁴⁷ Michael and the teenage girl walked away from the group together and proceeded to kiss. The intimacy progressed and Michael attempted to have sex with her; she refused, and he struck her in the face. After that, Michael proceeded to remove her pants and rape her.

California law forbade that any man, or boy, have sex with a girl under the age of eighteen. Prosecutors moved forward with the violation of the statutory rape law, as opposed to holding Michael accountable for the forcible rape (this was due to the fact that proving such an act would be difficult to prove in court). Michael's attorney argued that the statutory rape law was unconstitutional because it discriminated against males, a violation of the Equal Protection Clause. When the case reached the Supreme Court of California, the Court sided with the state and found that the state had a compelling interest in preventing teenage pregnancies.

When the case reached the Supreme Court, Justice Rehnquist delivered the judgement for the Court. Relying on *Craig v. Boren*, Justice Rehnquist wrote that the law surpassed intermediate scrutiny as the Court applied it, and that "the fact that the sexes are not similarly situated" leaves room for this level of gender discrimination to be considered constitutionally acceptable. Additionally, the law acted as a deterrent to underage males just as the risk of pregnancy was a supposed deterrent to underage females, or so Justice Rehnquist argued.

This reasoning against statutory rape, while an older and outdated reasoning of the Court nonetheless is harmful to any victim of sexual assault who does not fit the model of a pure, cisgender woman. The reasoning of the Court leaves out male victims and trans women and

⁴⁶ 450 U.S. 464 (1981).

⁴⁷ Lauer, R. (1981). *Fourteenth Amendment. Statutory Rape: Protection of Minor Female and Prosecution of Minor Male*. The Journal of Criminal Law and Criminology (1973-), 72(4), 1374-1392.

although the Court claims to use intermediate scrutiny equally across discrimination against males and females, this decision demonstrates otherwise. Lauer writes, “...the Supreme Court's decision in *Michael M.* suffers from three major flaws. First, the Supreme Court should not have accepted the pregnancy prevention rationale without questioning it. Second, the gender-based classification cannot bear a substantial relation to the prevention of teenage pregnancies because the statute is impermissibly overbroad. Finally, the statute also fails to satisfy the substantial relation test since the classification is underinclusive...[The *Navedo*] conclusion was based on a finding that the statute was underinclusive since it excluded a class of males, those under twenty-five, which could have intercourse with and cause pregnancy in minor females. Accordingly, the *Navedo* court found the pregnancy prevention justification implausible... By accepting the pregnancy prevention rationale [in *Michael M.*] without question, the United States Supreme Court participated in this rationalization process and thus denied equal protection to the defendant.”

Furthermore, Lauer asserts, “If the prevention of teenage pregnancies is to be accomplished through a statutory rape law prohibiting consensual intercourse, the state of California should be required to exempt from the operation of the statute acts of intercourse which cannot result in pregnancy. If individuals engaging in consensual intercourse without risk of pregnancy are not exempt from prosecution under the statute, some other purpose must be used to justify the prohibitions of the statutory rape law as applied to them. Finally, if pregnancy prevention is the only purpose of the statute and if it includes within its prohibitions sexual intercourse with individuals who are not yet of childbearing age or who are sterile or exercise birth control, the statute must fail as being overinclusive in violation of equal protection.”

The Court had a very limited definition of gender in this case and the realities for those genders. This logic left out a host of identities, and in particular, trans men and trans women. Viewing pregnancy as the sole deterrent for women seriously limits future cases that reflect similar laws, especially when the victims of such cases cannot physically become pregnant. According to a recent study, half of all transgender people have experienced sexual assault, and those numbers are only from those who have reported the assault.⁴⁸

The lack of inclusion in the Court's decision leaves out a host of identities, which is a failure to protect all citizens in similarly situated circumstances equally. As time progressed the Court would hold the states to higher standards that arguably exceeded the standards of intermediate scrutiny, yet held on to the label of intermediate scrutiny.

U.S. v. Virginia

After complaints from female high school graduates, the federal government sought to sue the Virginia Military Institute, or VMI. VMI was a single-sexed school established in 1839, with only men admitted, and prided itself on making "citizen soldiers." To achieve this goal, the school relied on the adversative method, which entailed physical training and absolutely no privacy for students. Because of this method, for all its history VMI only ever admitted male students. Claiming that the school violated the Equal Protection Clause by discriminating on the basis of gender, the federal government took legal action. The district court sided with the school, stating that single-sexed institutions offered educational benefits that other institutions could not. At the 4th Circuit Court of Appeals, the lower court's decision was reversed in favor of the federal government. In an attempt to appease the decision of the Circuit Court, VMI

⁴⁸ Stotzer, R. (2009). Violence against transgender people: A review of United States data. *Aggression and Violent Behavior*, 14, 170-179.

created the Virginia Women's Institute for Leadership, set to be the alternate program for women. The VWIL, however, was noticeably inferior to VMI as its resources were scarce and did not hold the same prestige as the original institute. Unsatisfied with this answer from Virginia, the federal government brought the case before the Supreme Court for review.

In a 7 to 1 decision, Justice Ginsburg wrote the majority opinion for the Court. In assessing whether a women only academy was sufficient enough to counterbalance VMI's male only program, the Court decided it did not meet the standards of Equal Protection and therefore was a violation of the Fourteenth Amendment. Justice Ginsburg wrote, "Virginia's public institutions of higher learning include an incomparable military college, Virginia Military Institute. The United States maintains that the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords. We agree... 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration... [S]uch classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women... State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'"

The fixed notions to which Justice Ginsburg refers to is indicative of the gender binary, but this leaves little room to interpret how the Court would address "fixed notions" of trans men and women if there were any fixed notions at all. In its decision, the Court did not find the alternative institute to be a sufficient answer to the issue of giving female students the same opportunity as male students. In the Court's attempt to deal with gender, it had deadlocked itself by promoting the gender binary and writing this opinion in terms of cisgender individuals. Could Grimm and future parties disputing bathroom laws within schools use *Virginia* to argue that

forcing trans students to use any bathroom but the bathroom of their choice violates Equal Protection?

United States v. Virginia is notable among legal scholars for its unique use of intermediate scrutiny, which adds to the inconsistencies committed by the Court in cases of Equal Protection. David Bowsher writes, “The language used by the Court in *United States v. Virginia* differed from the language normally used in gender-based equal protection cases. Instead of examining VMI’s admissions policy in terms of its ‘substantial relationship to important governmental objectives,’ the Court placed new emphasis on the presence or absence of an ‘exceedingly persuasive justification’ for the policy and introduced the phrase ‘skeptical scrutiny’ to refer to its inquiry.”⁴⁹ The use of a seemingly more forceful version of intermediate scrutiny almost implies that the Court has a goal of protecting the classification of gender more so than it has in previous cases like *Craig* and *Michael M.* Still, however, gender is not considered suspect enough to qualify for strict scrutiny, and intermediate scrutiny remains the official test applied to gender discrimination cases. From this, we can see that the Court is struggling to adapt to each case as it presents itself; *Virginia* uses a more forceful version of intermediate scrutiny, and this action of straying away from this level of scrutiny’s official terms reveals that intermediate scrutiny is not efficient in protecting certain classes, such as women. If the Court struggles to consistently apply intermediate scrutiny as an answer to gender discrimination within the context of the gender binary, how could it possibly answer questions regarding the treatment of trans individuals? This instability in the way intermediate scrutiny applies would completely undermine trans rights should the trans community be considered oppressed enough to be classified as quasi suspect. It demonstrates a lack of consistency in that on a case by case basis, the Court could shy away from the language of intermediate scrutiny, for

⁴⁹ Bowsher, D. (1998). *Cracking the Code of United States v. Virginia*. Duke Law Journal, 48(2), 305-339.

better or for worse. In the case of *Virginia*, the Court, albeit slightly, advanced cis women's rights.

In the event the Court should choose to include transmen and transwomen within the classification of cisgender men and women, would transmen and transwomen only be considered quasi suspect? This does not seem to fit since, as was mentioned above, the trans community is socially ostracized and stigmatized. "Transgender people, especially transgender women of color, continue to be targeted in vicious attacks all throughout this country. The simple act of walking down the street is cause for real fear and anti-transgender political rhetoric only serves to embolden those who harass and intimidate people simply because of who they are," said Human Rights Campaign's President Chad Griffin in a comment about the Crimes Report done in 2016.⁵⁰ "The tragic impact of hate crimes is felt by families, friends and entire communities, creating fear and instability that ripple across the country. With a wave of bias-motivated harassment in the wake of the recent election, HRC will continue to push for more accurate reporting of hate crimes to the FBI so that we truly understand the full scope of the violence."

In her article about transgender legal advocacy, author Demoya Gordon writes, "For the most part, courts adjudicating these claims have found that transgender persons do not fall into an enumerated protected class based on [the rationale that]...the plain meaning of the word 'sex' does not include transgender status or identity."⁵¹ Gordon notes arguments made by Ginsburg before she earned the title of Justice. In these arguments, Ginsburg "[tapped] into fields such as history, biology, and philosophy in order to convince the courts that many of the perceived

⁵⁰ Human Rights Campaign. (2016). *New Hate Crimes Report Shows Trans Community Targeted with High Levels of Violence & Harassment*.

⁵¹ Gordon, D. (2009). Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer? *California Law Review*, 97(6), 1719-1762.

differences between the sexes were not biologically inherent, but were rather learned through social stereotyping.” Ginsburg’s argument can apply to the trans community as it pertains to social stereotyping of gender; however, this argument was not made during a major trial when she sat on the bench as a Justice, so it does little to advance trans rights in the Supreme Court.

Chapter 3: Sexuality and the Supreme Court

If the state in question is not discriminating against a suspect or quasi-suspect class, then the law which the state imposes must pass the rational basis test, the lowest level of scrutiny. Classifications include age, wealth, disability, and sexual orientation. In order to appease Equal Protection in the act of discriminating against one of the aforementioned classifications, the state law must pertain to a legitimate state interest and the law must be rationally related to said interest. In the previous chapters, I addressed the Court's limited view on race and gender. When it comes to sexual orientation, this pattern continues: gay and straight. The cases in this chapter demonstrate the struggle the Court has in addressing discrimination of sexual orientation. Sexuality is a complex matter, a spectrum which leaves room for fluidity. The Court struggled with race and gender, but more so struggles with sexuality as it is not so easily defined. It becomes more difficult to categorize someone on their sexuality when sexuality cannot be seen. As a way to address this issue, part of which includes the lack of immutability, the Court has established that sexual orientation cannot be given suspect classification status. By this act, the Court has denied the spectrum of sexuality equal protection under the law.

As mentioned above, the Supreme Court has deemed sexual orientation a classification without suspectness. By doing so, the Court holds that the Lesbian, Gay, Bisexual, Pansexual, and Queer⁵² communities do not have a history of discrimination, are not immutable, and do not lack political power. They cannot be afforded the same protection under the Fourteenth Amendment as racial minorities or women, or even white men for that matter.

But as Evan Gerstmann writes in his book *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection*, the Supreme Court has failed to

⁵² This chapter is focused on sexuality and the level of protection it receives under the law. For that reason, I am not including transgender in this chapter, as that would begin to shift focus to gender, which has already been addressed in the previous chapter.

provide an adequate answer as to why the LGBTQ community is not protected as a suspect or quasi-suspect class. Gerstmann argues that the “class-based approach” by the Supreme Court has denied justice to the LGBTQ community, and analyzes how this status that has been bestowed upon the queer community influenced the outcome of cases such as *Romer v. Evans*.⁵³ In regards to the status of the queer community within equal protection under the law, Gerstmann writes, “Gays and lesbians are told that they must remain at the bottom of the constitutional hierarchy because they are too politically powerful to require heightened scrutiny. In order for this assertion to make sense, we would have to believe that gays and lesbians are more powerful as a group than are women, or, even more implausibly, than are the white students who were recently given the protection of heightened scrutiny in their challenges to the University of Michigan’s affirmative action policies.”

Furthermore, rational basis becomes even more complicated when the Court struggles to protect marginalized groups it does not want to grant suspect status to, but rational basis is an insufficient answer. For a host of reasons, Gerstmann notes, the Court is resistant to adding groups to the existing list of those that qualify for suspect classification. When this happens, we see results such as rational basis “with teeth.” This unofficial test can be seen in cases like *Reed v. Reed* before gender became a quasi-suspect classification. The test is regarded unofficial by legal scholars since the Court used all of the terms of traditional rational basis, yet clearly held the state in question to a higher form of scrutiny that was not quite strict or intermediate.

This chapter reviews the cases of *Romer v. Evans*, *Lawrence v. Texas*,⁵⁴ and *Obergefell v. Hodges*⁵⁵ as a way to track how the Court has viewed sexuality over time. Although *Lawrence* and *Obergefell* dealt with Due Process and Equal Protection claims, the Court in both cases

⁵³ 517 U.S. 620 (1996).

⁵⁴ 539 U.S. 558 (2003).

⁵⁵ 576 U.S. __ (2015).

found violations of Due Process but not any violations of Equal Protection. Despite this, these cases are important in order to contextualize where the LGBTQ community stands in cases of discrimination; they are examples of how the Court further complicates class-based protection by choosing to view the wide spectrum of sexuality as a simple binary consisting of gay or straight.

Romer v. Evans

Amendment 2 of the Colorado State Constitution was enacted by voters in order to halt and prevent any government protection of the gay and lesbian community. Even within the language of the law, we see an implication of the binary that the law recognizes. Certain cities within Colorado had enacted laws that granted sexual orientation the same protection as race and gender from discrimination. After Amendment 2 was passed, Richard Evans, an employee for the municipal government of Denver, along with other affected parties, sued Governor Roy Romer and the state government. Evans claimed the Amendment was a violation of the Equal Protection Clause and brought the suit to the Colorado Supreme Court, which found the Amendment unconstitutional. The review of the Colorado Supreme Court was held under strict scrutiny, as the Court found that a fundamental right was being violated, and so triggered the highest level of scrutiny. Colorado State appealed and the case was heard before the Supreme Court.

Under the test of rational basis, the Court reviewed the suit and Justice Kennedy delivered the opinion of the Court, a six to three decision. Guided by Justice Harlan's dissent in *Plessy*, Justice Kennedy wrote, "...We cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or person. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered, for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.... It is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.... Amendment 2... in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.... We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."

The language used by Justice Kennedy, such as the repeated use of the word "homosexual," projects the notion of the gay-straight binary which the Court follows. This language fails to address possible discrimination against any other sexuality on the spectrum that falls in between gay and straight, which sets up sexual orientation discrimination to be addressed with limited means. While this case may seem like a victory for the queer community, it did little

to address the status of gays, lesbians, bisexuals, and others in the eyes of the Supreme Court as it applies to the Equal Protection Clause. Not only did the Court's use of rational basis kept the queer community at the bottom of the equal protection totem pole, it used it as a way to reinforce the gay-straight binary. Whether or not this was an intentional act is difficult to determine, but it is clear from this case that the Court struggles to grasp the diversity of sexuality. Gerstmann writes, "*Romer*... [did not grant] gays and lesbians any affirmative constitutional protection against discrimination. *Romer* held that, when gays and lesbians manage to convince state and local legislatures to pass protective laws, these protections cannot be voided wholesale via a state constitutional amendment." The way in which the Supreme Court deems the queer community to not qualify for suspect or quasi-suspect status, due to having supposed political power, the Court is saying that men who benefit from quasi-suspect classification or whites who benefit from suspect classification do in fact lack political power, which is why they are given a certain level of suspectness. Many would agree that this is problematic and lacks common sense.

Gerstmann argues that the Court utilizes a "class/classification switch" in order to justify the shaky reasoning. "If racial minorities are a suspect class," Gerstmann writes, "then race is a suspect classification. Women are a quasi-suspect class, but gender is a quasi-suspect classification. When gays seek to move up in the equal protection hierarchy, the courts tell them they are not a suspect class because they are not politically powerless. But when whites seek protection against affirmative action programs, courts do not ask them to prove that they are politically powerless (obviously they are not). Instead, courts subtly switch terminology; they hold that race is a suspect classification and thereby protect whites from racial preferences.... By switching between the terms suspect class and suspect classification, the Supreme Court can

require some groups to show that they are politically powerless but allow other, far more politically powerful groups to benefit from strong constitutional protection.”

Romer was celebrated as a victory for the queer community under the Equal Protection Clause, yet it did little in the grand scheme of things to propel the queer community up the ladder of Equal Protection or to recognize the queer community as a whole. *Lawrence v. Texas*, while a victory for Due Process and not Equal Protection, is another example of how the Court limits sexuality to a gay-straight binary, restraining itself from addressing all sexualities equally.

Lawrence v. Texas

On the night in question, Houston police officers entered the residence of John Lawrence due to a 911 call reporting a “weapons disturbance.” When the police searched the home, they found Lawrence engaged in sexual relations with another man, Tyron Garner. Texas law specifically prohibited “homosexual conduct,” reinforcing the gay-straight binary, barring sodomy specifically in gay and lesbian relationships. Lawrence and his partner Garner challenged the law, claiming it violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment. Texas courts sided with the state, citing *Bowers v. Hardwick*.⁵⁶ The case was appealed to the Supreme Court, where Justice Kennedy delivered the opinion of the Court, a decision that was split six to three. In this decision, the Court found that the Texas law was a violation of Due Process, but was not, however, a violation of Equal Protection. By ignoring the law as it would stand under Equal Protection, the Court did not have to address the status of the queer community as it pertained to discrimination on the basis of sexual orientation.

Justice Kennedy wrote, “We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of

⁵⁶ 478 U.S. 186 (1986).

their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution...”

The idea of consenting adults is the key element to Justice Kennedy’s reasoning; unlike reasoning under Equal Protection, this school of thought bypasses sexuality all together and addresses consenting adults as a group, not broken down by sexual orientation. This choice by the Court to only hold the law accountable under Due Process as opposed to Equal Protection halts the advancement of LGBTQ rights and recognition under the law since it does not address where the queer community outside the gay-straight binary.⁵⁷ Justice O’Connor wrote a concurring opinion in which she did address Equal Protection, stating, “Texas treats the same conduct differently based solely on the participants. Those harmed by this law are people who have a same sex sexual orientation and thus are more likely to engage in behavior prohibited by [the state]. The Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct and only that conduct subject to criminal sanction.... Texas argues, however, that the sodomy law does not discriminate against homosexual persons... It is instead directed toward gay persons as a class.”

In his critique of the *Lawrence* decision, Reinheimer writes, “While the majority, concurring, and dissenting opinions provide different perspectives on how the statute in question operated, whom it affected, and its constitutional standing, all of the opinions left several major issues and concepts unaddressed. Notably, the Court declined to invalidate the statute on equal protection grounds, although certiorari was granted on whether the Texas statute violated the Equal Protection Clause, and equality arguments were made during litigation. More specifically, the statute's facial classification-sex went almost completely unmentioned.” However, ignoring

⁵⁷ Reinheimer, J. (2008). *What Lawrence Should Have Said: Reconstructing an Equality Approach*. California Law Review. Vol. 96, No. 2 pp. 505-551.

Equal Protection also failed to remedy the assumption that sexuality is binary as it was reinforced in *Romer*.

The same issue would come up again the matter of *Obergefell v. Hodges* in 2015. Similar questions were brought before the Court, demanding that the Court determine if a state law banning same-sex marriage was a violation of both Due Process and Equal Protection. Once again, the Court would push aside the issue of Equal Protection and the queer community would prevail under Due Process.

Obergefell v. Hodges

Ohio law only recognized marriages between one man and one woman; officiants in Ohio could not marry same-sex couples and marriage licenses given to same-sex couples from other states were void. James Obergefell and John Arthur were in a happy relationship for just over twenty years when Arthur was diagnosed with terminal amyotrophic lateral sclerosis, or ALS. The couple wanted to marry before Arthur was set to pass, and so they traveled to Maryland and were wed on July 11, 2013. That was a few months before Arthur died. Before his death, Arthur and Obergefell filed suit against Ohio, claiming its ban on same-sex marriage was a violation of Due Process and Equal Protection. The couple wanted Arthur's marriage to Obergefell to appear on the death certificate. While the district court ruled in favor of the couple, the Ohio State Supreme Court reversed the decision. When the case reached the Supreme Court, Justice Kennedy once again delivered the opinion of the Court, this time in a five to four decision.

Justice Kennedy wrote, "Under the Due Process Clause of the Fourteenth Amendment, no state shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. In addition these liberties extend to certain personal choices central to individual

dignity and autonomy.... The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”

Once again, the petitioners have asked the Court to review whether state law violates Due Process and the Equal Protection Clause, but here the Court has seen fit to centralize its answer in response to Due Process. Some legal scholars see this case as an advancement from *Lawrence*; their analyses indicate that the Court did answer the question of Equal Protection, but placed Due Process ahead of this answer.⁵⁸ Others believe Justice Kennedy’s opinion was deeply problematic because it did not make Equal Protection the forefront of his argument, setting up a long term problem for the Court and future questions it may have to answer.⁵⁹ I would argue that either way, the reasoning would have been flawed, even if Justice Kennedy included an addressment to Equal Protection. The binary that the Court deflects onto its interpretation of Equal Protection is highly limiting and leaves many questions unanswered, questions that may not be all too appropriate to be answered by the Court. Huntington writes, “A substantive due process analysis required the Court to define marriage and explain its social importance. This meant the Court had to choose between competing images—social fronts—of marriage. If it had used an equal protection analysis, the Court would not have had to decide whether marriage is traditional or marriage is more plural. Instead, the Court would have espoused a thinner notion of marriage—that, whatever its essential nature, marriage must be available on equal grounds unless the state can convincingly argue otherwise. An equal protection analysis also would have

⁵⁸ Yoshino, K. (2015). *A New Birth of Freedom?: Obergefell v. Hodges*. Harvard Law Review. Vol. 129. No. 1

⁵⁹ Huntington, C. (2015). *Obergefell’s Conservatism: Reifying Familial Fronts*. Fordham Law Review. Vol. 84, No. 23.

obviated the need for Justice Kennedy's paean to marriage. There are two lamentable consequences of the Court's framing. It unnecessarily disrespects people who in good faith have a different view of the social front of marriage. And it reifies marriage as a key element in the social front of family, further marginalizing nonmarital families." One might also argue that this reasoning not only perpetuates a thin notion of marriage, but also a thin notion of sexuality.

The use of Due Process within the Court's reasoning is highly limiting for future cases that involve discrimination on the basis of sexual orientation. Failure to acknowledge this discrimination by standard of the Equal Protection Clause maintains the gay-straight binary and significantly weakens the chance of the queer community in its entirety to be better protected under the Fourteenth Amendment. This is all in spite of the fact that, as mentioned by Gerstmann, men are able to utilize intermediate scrutiny and whites are able to utilize strict scrutiny. While strict scrutiny and intermediate scrutiny have their failures in protecting certain groups, rational basis does little to protect minorities in sexual orientation. Furthermore, the Court does little to protect the queer community from discrimination, and this is exemplified in the aforementioned cases. The actions of only utilizing the rational basis test or not using Equal Protection at all in cases of discrimination against the LGBQ community serves only to keep the queer community in the margins of the law while simultaneously only recognizing the gay-straight binary. This is a major failure of Equal Protection as it is interpreted by the Supreme Court.

CONCLUSION

The makeup of the United States is incredibly diverse by standards of race, gender, sexuality, and other identity markers. In recent years, we have witnessed marginalized groups gain ground in the fight against oppressive systems. After *Virginia* was decided, women were admitted to the prestigious school of Virginia Military Institute in 1996; marriage equality for same-sex couples was finally won in *Obergefell* in 2015; and affirmative action was protected in *Fisher* in 2016. While each of these cases is a victory, there are limitations and downfalls due to the Supreme Court's method of interpreting equal protection. This is because the Court relies on binary notions to interpret race, gender, and sexuality. When the Supreme Court decides the level of scrutiny to apply based on who is being discriminated against, the Court is in fact not protecting all citizens equally under the law as the Equal Protection Clause calls for. Past decisions imply that certain identities are binary, and we can see that this leaves cracks in the foundation of Equal Protection when it is being protected by the Court. The Equal Protection Clause states, "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. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." For the Supreme Court to determine who is more suspect than another through the context of binaries is not only harmful, but outside the scope of the Court's power. It is not the duty of the Supreme Court to make such determinations as to rank classes based on who appears to have more political power, is more immutable, or has more of a history of discrimination. Furthermore, it is not the duty of the Court to determine what constitutes identity within race, gender, or sexuality. Not only does the hierarchy of scrutiny fail to protect all equally under the law; the standards of strict scrutiny, intermediate scrutiny, and rational basis fail to protect individuals who do not fall into the narrowly defined categories the Court has established over

the course of time. The Court cannot adequately protect multiracial individuals, transgender individuals, and all queer individuals when there are such rigid standards for race, gender, The Failures of Equal Protection 53 and sexual orientation classifications. It becomes far too messy for the Court to have to interpret when already it should not be attempting to determine who is more politically powerful by social and historical context. If the Court continues to use this model of the three-tiered test, it will continue to drive a wedge in equal protection for all under the law. The three-tiered test model cannot continue if marginalized groups are to achieve equality under the law. The test outright labels certain groups more suspect based on perceived political powerlessness. Justice Harlan in his dissent in *Plessy* wrote, "...the Constitution neither knows nor tolerates classes among citizens." If the Supreme Court dismantles and rids itself of the test, then it will need to replace it with new guidelines to follow in Equal Protection cases. In his book, Gerstmann writes, "If the Courts were to concentrate on the issue of what rights should be protected for all people without attempting to divide people into separate classes based upon the Court's estimate of complex historical and social facts, it would be a great advancement toward a fairer vision of constitutional equality." In the last chapter, Gerstmann advocates for such a model that would examine not who was being discriminated against, but rather what right was being violated. Much of the last chapter relies on J.H. Wilkinson's "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality," in which Wilkinson sponsors the same model. I would further this argument that by abandoning the current methods, the Court would also be able to get rid of the binary standards, which would in turn open Equal Protection to all identities. The cons outweigh the pros in the existing three-tiered test model. Far too many are at risk of falling through the cracks of Equal Protection. In order see better results in protecting all citizens equally, all citizens need to be held to the same standard of review equally. The model proposed by Wilkinson and Gerstmann may be the better alternative to the existing model. Until the Supreme Court abandons the three-tiered test, equal protection for all will continue to fail.

REFERENCES

- Araiza, W. (2005). *The Section 5 Power and the Rational Basis Standard of Equal Protection*. Brooklyn Law School Review. Vol. 79. No. 3.
- Bowsher, D. (1998). *Cracking the Code of United States v. Virginia*. Duke Law Journal, 48(2), 305-339.
- Busby, J. C. (2009). *Suspect Classification*. Retrieved May 25, 2017. Cornell Law School LII.
- Choudhry, S. (2004) *The Lochner Era and Comparative Constitutionalism*, 2 *Int'l J. Const. L.* 1.
- Cruz, B., Berson, M. (2001). *The American Melting Pot? American Miscegenation Laws in the United States*. OAH Magazine of History. Vol. 15, No. 4. Pp. 80-84.
- Davis, T. (2012). *Plessy v. Ferguson*. Westport: ABC-CLIO, LLC.
- Dorr, G. (1998). *Principled Expediency: Eugenics, Naim v. Naim, and the Supreme Court*. The American Journal of Legal History, 42(2), 119-159.
- Epstein, L., Walker, T. (2015) *Constitutional Law for a Changing America: Rights, Liberties, and Justice (Ninth Edition)*. SAGE Publications.
- Flores, A.R., Herman, J.L., Gates, G.J., & Brown T.N.T. (2016) *How Many Adults Identify as Transgender in the United States?* Los Angeles, CA: The Williams Institute.
- Foner, E. (1999). The Strange Career of the Reconstruction Amendments. Yale Law Journal. Vol. 108(8).
- Gagne, P., Tewksbury, R. (1998). *Conformity Pressures and Gender Resistance Among Transgendered Individuals*. Social Problems. Vol. 45., No. 1.
- Gates, G. (2011). *How many people are lesbian, gay, bisexual, or transgender?* Los Angeles, CA: The Williams Institute.

- Gerstmann, E., Shortell, C. (2010). *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Case*. University of Pittsburgh Law Review. Vol. 72. No. 1.
- Golub, M. (2005). *Plessy as "Passing": Judicial Responses to Ambiguously Raced Bodies in Plessy v. Ferguson*. Law & Society Review. Vol. 39, No. 3 pp. 563-600.
- Gordon, D. (2009). *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?* California Law Review, 97(6), 1719-1762.
- Hazard, W. (1978) *The Bakke Decision: Mixed Signals from the Court*. The Phi Delta Kappan. Vol. 60, No. 1. Pp. 16-19.
- Human Rights Campaign. (2016). *New Hate Crimes Report Shows Trans Community Targeted with High Levels of Violence & Harassment*.
- Huntington, C. (2015). *Obergefell's Conservatism: Reifying Familial Fronts*. Fordham Law Review. Vol. 84, No. 23.
- Khanna, N. (2010). *"If You're Half Black, You're Just Black": Reflected Appraisals and the Persistence of the One-Drop Rule*. The Sociological Quarterly, 51(1), 96-121.
- Lauer, R. (1981). *Fourteenth Amendment. Statutory Rape: Protection of Minor Female and Prosecution of Minor Male*. The Journal of Criminal Law and Criminology (1973-), 72(4), 1374-1392.
- Liptak, A. (2017). *Supreme Court Won't Hear Major Case on Transgender Rights*. The New York Times.
- Masuoka, N. (2008). *Political Attitudes and Ideologies of Multiracial Americans: The Implications of Mixed Race in the United States*. Political Research Quarterly, 61(2), 253-267.

- Ramirez, D. (1995). *Multicultural Empowerment: It's Not Just Black and White Anymore*. *Stanford Law Review*, 47(5), 957-992.
- Reinheimer, J. (2008). *What Lawrence Should Have Said: Reconstructing an Equality Approach*. *California Law Review*. Vol. 96, No. 2 pp. 505-551.
- Siegel, S. (2006). *The Origin of the Compelling State Interest and Strict Scrutiny*. *The American Journal of Legal History*. Vol. 48, No. 4 (Oct., 2006), pp. 355-407.
- Stotzer, R. (2009). *Violence Against Transgender People: A Review of United States Data*. *Aggression and Violent Behavior*, 14, 170-179.
- Strauss, Marcy. 2011. "Reevaluating Suspect Classifications." *Seattle University Law Review*.
- Wallenstein, P. (1995). *The Right to Marry: Loving v. Virginia*. *OAH Magazine of History*, 9(2), 37-41.
- Wheeler, L. (2017). *Supreme Court won't hear transgender bathroom case*. *The Hill*.
- Yoshino, K. (2015). *A New Birth of Freedom?: Obergefell v. Hodges*. *Harvard Law Review*. Vol. 129. No. 1.

CASE LAW

Pace v. Alabama, 106 U.S. 583 (1883).

Plessy v. Ferguson, 163 U.S. 537 (1896).

United States v. Carolene Products Company, 304 U.S. 144 (1938).

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

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

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

Naim v. Naim, 350 U.S. 891 (1955).

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

Louisiana, 391 U.S. 68 (1968). *Graham v.*

Richardson, 403 U.S. 365 (1971). *Reed v.*

Reed, 404 U.S. 71 (1971).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1975).

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

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

City of Cleburne, Texas v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

Bowers v. Hardwick, 478 U.S. 186 (1986).

Gregory v. Ashcroft, 501 U.S. 452 (1991).

Adarand v. Peña, 515 U.S. 200 (1995).

M.L.B. v. S.L.J., 519 U.S. 102 (1996).

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

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

Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001).

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

Lawrence v. Texas, 539 U.S. 558 (2003).

Fisher v. University of Texas, 570 U.S._ (2013).

Obergefell v. Hodges, 576 U.S._ (2015).

Fisher v. University of Texas at Austin, et al., 571 U.S._ (2016).