EUI WORKING PAPERS
LAW No. 2005/19

Scrutinizing Discrimination: a Conceptual and Normative Analysis of Legal Equality

WOJCIECH SADURSKI

EUROPEAN UNIVERSITY INSTITUTE
Department of Law

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

Scrutinizing Discrimination: a Conceptual and Normative Analysis of Legal Equality

WOJCIECH SADURSKI

EUI Working Paper **LAW** No. 2005/19

Printed in Italy
European University Institute
Badia Fiesolana
I – 50016 San Domenico di Fiesole (FI)
Italy

http://www.iue.it/
http://cadmus.iue.it/dspace/index.jsp

Abstract

Legal equality is a particularly troublesome ideal: it is at the same time non-negotiable (occupying a position lexically prior to other legal ideals shared by its proponents) and fundamentally ambiguous. The principal task for a theory of equality is to design a test for non-discriminatory classifications. This paper argues that no version of a "per-se theory" (relying on the belief that certain characteristics of individuals, when used as a basis for classifications, necessarily render a classification discriminatory) can be satisfactory. The main lesson of the critique of "*per se*" theories developed in this paper is that any test of non-discriminatoriness of classifications which ignores legislative purpose, and the relationship between classification and purpose, is doomed to fail. But relevance-based tests yield a circularity which results from the temptation of implying a classification's purpose from the terms of the classification itself. This danger can be overcome by heightening the level of scrutiny applied to the purpose, and to the fit between the classification and the purpose. However, we need some good reasons for heightening the level of scrutiny of the legislation, and these reasons must be embedded in a general theory of what renders a classification discriminatory. Such a theory can be reached by a method of "reflective equilibrium", that is, by reflecting upon the common evils of those discriminations which we consider intuitively to be particularly invidious. An intuitively justified answer to this question seems to be that a classification is tainted as discriminatory by certain wrongful motives for legislation, in particular, if the legislation is based on prejudice, hostility and stereotyping. But it is not easy to ascertain those motives directly, so that we need some more "objective" indicia of suspectness of classification; those indicia, again, can be gathered in by thinking about the common traits of undoubtedly invidious discriminations.

Keywords

Equality; equality before the law; discrimination; strict scrutiny; proportionality; affirmative action.

Scrutinizing Discrimination: A Conceptual and Normative Analysis of Legal Equality

Wojciech Sadurski*

1. INTRODUCTION: AFFIRMATIVE ACTION

In mid-2003, the Supreme Court of the United States handed down two decisions on affirmative action in public university admissions, thus re-opening its educational affirmative-action jurisprudence, last elaborated in the famous *Bakke* case, a quarter of a century ago.[1] The two decisions of 2003, which both originated with the University of Michigan admission programmes, if taken together, present a truly Solomonic package: in *Grutter v. Bollinger*,[2] the Court narrowly (by five justices to four) upheld the Law School's admission programme; in *Gratz v. Bollinger*[3] the Court, on the same day, and with multiple cross-references to its companion case, struck down as unconstitutional (by six to three) a somewhat different affirmative-action system for undergraduate selection. The criteria by which the cases were distinguished, and which were crucial to the two admission systems' upholding or invalidation, concerned first, the degree to which each selection programme, respectively, was "individualized"; second, the role of an applicant's status as a member of a given racial group in the decision to admit (in particular, whether such membership was only one among many *indicia* of diversity, and whether or not it could have been a "decisive" factor in the student's admission); and lastly, and perhaps most importantly, about how "narrowly tailored" a given system was to attaining a compelling purpose of diversity of a student body. This last point, in American legal parlance, translated into the success or otherwise of a system passing so-called "strict scrutiny" test which, according to the majority of the Court, is applicable to any racial classification. "Strict scrutiny", in this context, is a conceptual device which expresses a strong, *prima facie* hostility towards racial classifications and categorizations, while stopping short of an absolute prohibition; its effect is that only those racial classifications which are truly necessary to achieve a particularly

* Professor in the European University Institute in Florence, Department of Law, and in the University of Sydney, Faculty of Law.

[1] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). No other decision on affirmative-action in the universities has been handed down on merits by the Supreme Court between 1978 and 2003: in 1996 the Supreme Court denied *certiorari* after the Court of Appeal for the 5th Circuit found that racial preferences in the University of Texas student admissions system violated the constitutional equal protection clause, see *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996). Outside the field of university admissions, a number of important affirmative-action decisions were taken by the US Supreme Court between *Bakke* and 2003, some of which will be referred to further in this article. Of these, the most notable were *Wygant v. Jackson Bd of Education*, 476 U.S. 267 (1986) (invalidating a redundancy policy with preferences for minority teachers in a public school); *City of Richmond v. Croson*, 488 U.S. 469 (1989) (invalidating a city ordinance requiring contractors with the city to employ minority subcontractors for thirty percent of the work performed under their contracts); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (holding unconstitutional the federal government's practice of giving contractors a financial incentive to hire subcontractors controlled by individuals belonging to disadvantaged minorities). That most of these cases were decided by a 5-4 majority (excepting *Croson*, decided six to three) indicates the level of controversy and instability surrounding the constitutional status of affirmative action in the United States.

[2] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[3] *Gratz v. Bollinger*, 539 U.S. 244 (2003).

important aim can be lawfully sustained. That any regulation relying on a race-conscious classification, irrespective of its purported aims, needs to be scrutinized with such a rigor and hostility, is affirmed in these decisions, with only the dissenting judgment of Justice Ginsburg (in which Justices Souter and Breyer concurred in *Gratz)* in exception.

The different outcomes in *Grutter* and *Gratz* (and also the division between the majority and dissenters in *Grutter*) can be seen as hinging upon opposing views on two issues: first, how successfully the relevant programmes pass the strict scrutiny test; and secondly, whether that test has been rigorously and firmly applied or, alternatively, whether the test has in practice been diluted, permitting the majority to reach a decision to invalidate the programme (as the dissent in *Grutter*, and in particular Justice Kennedy's dissenting opinion affirms). [4] In both the 2003 decisions – one upholding, and the other invalidating, a preferential admissions system – frequent references were made to the Supreme Court's decision in *Bakke,* delivered by Powell J.[5] This decision has acquired an almost iconic status in American equal-protection jurisprudence, untouched in the twenty-five years that elapsed between *Bakke* to *Grutter,* during which the Supreme Court handed down several judgments on affirmative action in other contexts. *Grutter* and *Gratz* can be seen as an emphatic restatement of the principle established in *Bakke* that public universities are permitted to take applicants' race into account in admissions decisions – on one condition. The preference must be "narrowly tailored" to the compelling aim of achieving educational benefits through the diversity of the student body (and *not* to any remedial or compensatory purposes),[6] and such "narrow tailoring" must be assessed equally stringently as in any other case of racial classification, regardless of who the beneficiaries, and losers, are. Further factors considered relevant to determining narrow tailoring include the following: that membership in a disadvantaged racial minority is one among a number of *indicia* of diversity relied on by the admission system; that there is no numerical "quota" set aside for the minority applicants; and that consideration of applicants is properly "individualized", rather than "mechanical" or automatic". Though the first of these descriptors ("individualized") clearly pays a compliment, and the latter two are used as epithets, their conceptual boundaries remain unclear.[7]

---

[4] *Grutter*, supra note 2 at 387-395 (Kennedy J., dissenting).

[5] *Bakke*, supra note 1.

[6] Whether the forward-looking, educational-diversity-based rationale can be really separated from a compensatory-remedial rationale, especially when the defects in diversity would be caused by the lingering effects of past discrimination, is a puzzling issue. This is evidenced by the ambiguity which is displayed by Justice O'Connor's opinion of the Court in *Grutter*. While she insists continuously that only diversity-related educational benefits can properly figure as a rationale for preferential university admissions (see e.g., *Grutter* supra note 2 at 328), she also declares: "By virtue of our Nation's struggle with racial inequality, such [underrepresented minority] students are both likely to have experiences of particular importance to the Law School's mission, *and less likely to be admitted in meaningful numbers on criteria that ignore those experiences*" (*Grutter* at 337, reference omitted, emphasis added). I put aside a strange slip in the wording: after all, the lower opportunities for minorities are not due to the "Nation's struggle with racial inequality" but to racial inequality itself, and its present manifestations. The italicized words suggest that the actual work in justifying the preferences is done by a need to compensate for, or remedy, the lower opportunities of minority applicants in achieving sufficient race-neutral qualifications to earn admission to the law school "in meaningful numbers".

[7] Strictly speaking, no system of selection, or indeed any system assigning benefits and burdens to individuals, can be called "individualized" if it is governed by general rules about what set of characteristics count in a positive manner in the selection process. The only fully "individualized" system is one in which there are no criteria capable of statement in the abstract, beyond their application to a sole individual. See further Wojciech Sadurski, *Giving Desert Its Due* (D. Reidel: Dordrecht 1985) at 204-213.

The near-consensus position which is now implicit in the Supreme Court's view of race-conscious affirmative action is therefore the following: "yes" to race classifications in preferential admissions, but only where some special circumstances (i.e. captured by the "narrow tailoring" requirement) apply, and under the condition that they will be assessed with equal suspicion, and by the same tough set of standards, as any other racially defined legal categories, including the strong presumption *against* such classifications. This position occupies a large central area in the current Supreme Court's landscape. It is flanked by two "fringe" positions which depart subtly, but in interesting ways, for our purposes here, from the mainstream. A more conservative position implicitly regards the presumption against racial classifications to be so weighty as to amount, in practice, to an absolute prohibition. In his dissenting opinion in *Grutter,* Justice Thomas, while paying lip service to the "strict scrutiny" language (which presupposes that, at least under some circumstances, the regulations subjected to scrutiny *will* pass muster) at the same time sets the threshold so high that no imaginable affirmative action programme is likely to meet it. According to Thomas J., only prevention of anarchy or violence may figure as justifications for a permissible racial classification[8] (hence obviously excluding any preferential selection by universities and in the workforce). Even more tellingly, throughout his dissenting opinion, Thomas J uses the words "racial classification" interchangeably with "racial discrimination" [9] ; a race-based "classification" also becomes, in his language, "racial discrimination" which, as he puts it, "the Constitution clearly forbids".[10] Accordingly, here we no longer have a presumption against, and strong scrutiny of, racial classifications; rather these are subject to a plain and absolute prohibition.[11] On the liberal "fringe" of the current Supreme Court spectrum, Justice Ginsburg (dissenting, and joined in this respect by two other Souter and Breyer JJ) raises a challenge to the requirement for uniform scrutiny across all racial classifications. In *Gratz,* where affirmative action in undergraduate admissions was struck down as unconstitutional, Justice Ginsburg rejected the majority view that "consistency" requires application of a uniform standard of inspection of all race-conscious classifications; in her view, this interpretation of "consistency" ignores the persistent effects of law-sanctioned discrimination, and the endurance of racial disparities, bias and prejudice. Ginsburg J would therefore have overruled the one-standard-of-scrutiny rule, despite firm precedent (not only in *Bakke*, but also in the more recent racial classifications cases outside the university contexts)[12] in order instead to draw a clear line between actions "designed to burden groups long denied full

[8] *Grutter* supra note 2 at 353 (Thomas, J., dissenting).

[9] See, e.g. the following passage, in which Thomas J. contrasts two types of departures from "meritocracy" in university admissions: so-called "legacy preferences", under which the children of alumni may be given preferences, and race-conscious preferences for members of under-represented minorities: "What the Equal Protection Clause does prohibit are *classifications* made on the basis of race. So while legacy preferences can stand under the Constitution, racial *discrimination* cannot. I will not twist the Constitution to invalidate legacy preferences…. The majority should similarly stay its impulse to validate faddish racial *discrimination* the Constitution clearly forbids", *Grutter*, supra note 2 at 368 (Thomas J., dissenting) (footnote omitted, emphases added). What is merely a "classification" in the first sentence, becomes "discrimination" in the second and third.

[10] Id.

[11] In his rather sloppily worded and rhetorically charged dissent, Thomas J. oscillates between a firm prohibition, as in the just quoted passage, and a strong negative presumption. For example, later on in his opinion, he urges the majority of the Court to "commit to the principle that racial classifications are *per se* harmful and that *almost* no amount of benefit in the eyes of the beholder can justify such classifications" (*Grutter* supra note 2 at 371, Thomas J., dissenting) (emphasis added). The question is, of course, how big (or small) a space is defined by the word "almost".

[12] *Adarand* supra note 1 and *Croson* supra note 1. See *Gratz* supra note 3 at 298.

citizenship", on one hand, and measures undertaken to extirpate the effects of past discrimination on the other. In this context, Ginsberg J cited with approval the view suggested by Stephen Carter, that the struggle for racial equality was not aimed at "freedom from racial categorization", but rather at "freedom from racial oppression".[13] Justice Ginsberg additionally penetrates beyond the mere characterization of race as a "suspect category", to this characterization's rationale, leading her to suggest that when a racial category is not relied on in order to maintain racial inequality – and in particular, when it is used remedially, in other words, to undo the effects of race discrimination – there is no need to insist on colour-blindness as the default position.[14] As to the structure of scrutiny applicable to such benign racial classifications, she however remains somewhat vague. On one side, Ginsberg J uses phrases such as "careful judicial inspection" and a "[c]lose review" of race-conscious measures with asserted laudable purposes[15] (which may sound like code for so-called "intermediate scrutiny" – judicial assessment that is less stringent than "strict" scrutiny, but tougher than a routine means-ends test). At the same time she cites, with approval, and in the same context, a dictum drawn from a 1966 decision of the Court of Appeals for the Fifth Circuit, *United States v. Jefferson County Bd. of Ed*., which states: "The criterion is the relevancy of color to a legitimate governmental purpose".[16] Here, the words "relevancy" (as opposed to "necessity" or "narrow tailoring"), and "legitimate" (as opposed to a "compelling") do appear as coded references to the least exacting, most lenient level of judicial scrutiny applicable to regulations. There is a broad range of "legitimate" governmental purposes, only some of which can be qualified as "compelling", and "relevancy" is certainly less demanding than "narrow tailoring" when this is understood as resembling the necessity of using a certain measure if an appropriate aim is to be attained. So, Justice Ginsburg may be indicating that she would even venture "below" the level of so-called intermediate scrutiny of benign race-conscious regulations which was urged by liberal Justices Brennan, White, Marshall and Blackmun, voicing their dissent, twenty-five years beforehand, in *Bakke.*[17]

At this point I should reassure the reader: the point of this article is not to engage in a doctrinal analysis of the US Supreme Court's equal protection jurisprudence, as evidenced by the most recent, 2003 decisions on university race-conscious preferences in admissions. Indeed, I hope for the reader's pardon, and perhaps even thanks, for not describing at any greater length the detail of the decisions in *Grutter* and *Gratz*. While frequently referred to below, the burden of summarizing and discussing these judgments, and of how they continue, or diverge from, the line of existing 14th Amendment jurisprudence has been more than

[13] *Gratz* supra note 3 at 301 (Ginsburg J., dissenting).

[14] Id. at 301-302.

[15] Id. at 302.

[16] Id. at 302, quoting *United States v. Jefferson County Bd. of Ed*., 372 F.2d 836, 876 (CA5 1966). In *Jefferson County* this sentence appears in the context of the argument that, in some cases, the Constitution cannot be treated as colour-blind. The quoted sentence is followed by the examples of the use of race in jury *venires* (because juries must represent "a cross-section of the population", *id*. at 876), and in voter registration aimed at overcoming the legacy of racial discrimination, *id*. at 876-77; in turn, this is followed by this statement, by Judge Wisdom (notably *not* cited by O'Connor J. in *Gratz*), concerning the school desegregation plan subject to challenge: "Here race is relevant, because the governmental purpose is to offer Negroes equal educational opportunities. The means to that end … must necessarily be based on race" (id. at 877, footnote omitted).

[17] *Bakke*, supra note 1 at 324-80 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

satisfactorily discharged by other authors.[18] My ambition here is different. The introduction of these two recent affirmative-action decisions by the US Supreme Court merely sets the stage for a broader theoretical project, which is to reflect upon the theory of anti-discrimination in general. Affirmative action (or preferential treatment, as some prefer to call it), is thus only one particularly controversial and fascinating example of a sub-issue within the wider question, of legal equality. It is a sub-issue which has been tremendously well covered in the scholarly literature, and no wonder: it seems to encapsulate some of the most difficult, and controversial, aspects of the anti-discrimination principle. Of course, the general *problématique* of non-discrimination does not boil down to the question of affirmative action but it is, nonetheless, a particularly attractive case study. And while affirmative action has been on legal and political agenda in a great many jurisdictions around the world, nowhere has it elicited a greater density of intellectual responses than in the United States.

In Europe, for example, the European Court of Justice (ECJ), has yet to issue judgement in the area of race-based affirmative action,[19] and has had rather erratic history in dealing with gender-based affirmative action[20]. In the landmark decision *Kalanke v. Bremen*,[21] the ECJ invalidated a scheme of preferences for women in employment; this was followed by a series of decisions either invaliding or upholding a number of similar schemes,[22] but without a clearly discernible pattern from which the underlying legal

[18] The literature on these two decisions is already very rich; among the best analyses see, e.g., Susan Low Bloch, "The Future of Affirmative Action", *American. University Law Rev*. 52 (2003): 1507-1520; Neal Devins, "Explaining Grutter v. Bollinger", *Univ. of Pennsylvania Law Review* 152 (2003): 347-387; Goodwin Liu, "Brown, Bollinger, and Beyond", *Howard Law Journal* 47 (2004): 705-768; Joel K. Goldstein, "Beyond Bakke: Grutter-Gratz and the Promise of Brown", *St. Louis University Law Journal* 48 (2004): 899-954; Kenneth L. Karst, "The Revival of Forward-Looking Affirmative Action", *Columbia Law Review* 104 (2004): 60-74. For two particularly emotive assessments of the *Grutter-Gratz* package from opposite perspectives, see, from a pro-affirmative action viewpoint, Girardeau A. Spann, "The Dark Side of Grutter", *Constitutional Commentary* 21 (2004): 221-250, and from the opposite side, Larry A. Alexander & Maimon Schwarzschild, "Grutter or Otherwise: Racial Preferences and Higher Education", *Constitutional Commentary* 21 (2004): 3-14.

[19] Race based affirmative action is now permitted, within the EU, by the EU Directive implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin, Council Directive 2000/43/EC of 29 June 2000, Art. 5, which allows special measures to compensate for disadvantage suffered on grounds such as race, colour, national origin etc. It has been suggested that the limits set by the ECJ on positive discrimination in the case gender-based affirmative action are also likely to be applied in race discrimination cases, see Erica Howard, "Anti Race Discrimination Measures in Europe: An Attack on Two Fronts", *ELJ* 11 (2005): 468-486 at 477. Within the Council of Europe system there is an analogous norm mandating race-based affirmative action: European Commission against Racism and Intolerance (ECRI), a body of the Council of Europe, adopted in 2002 a General Policy Recommendation No. 7 on National Legislation to combat Racism and Racial Discrimination, see Recommendation CRI (2003) 8, ECRI, Council of Europe 2003, at http://www.coe.int/T/E/human_rights/Ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/, para. 5.

[20] Article 2(4) of the 1976 equal treatment directive (Council directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 76/207/EEC, OJ 1976 L39/40) allows measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities.

[21] Case C-450/93 *Eckhard Kalanke v. Freie Hansestadt Bremen*, 1995 ECR 3051.

[22] In *Marschall v. Land Nordrhein Westfalen*, Case C-409/95, 1997 ECR 6363, the Court upheld a scheme of employment preferences very similar to the one challenged in *Kalanke*, the difference being that the Court found that the scheme under challenge in *Marschall* did not amount to "automatic" preferences because of the savings clause which allowed, in individual cases, to withhold a preference for women. For an illuminating and critical discussion of the successive ECJ decisions under Article 2(4) of the Equal treatment Directive, see Sean Pager, "Strictness vs. Discretion: The European Court of Justice's Variable Vision of Gender Equality", *American Journal of Comparative Law* 51 (2003): 553-609 at 578-90.

philosophy of anti-discrimination in operation could be identified. One problem in trying to reach generalizations regarding these decisions may be the typically less explicit and less discursive nature of ECJ judgments. While this factor is, to be sure, mitigated somewhat by access to the more fully developed reasoning of Advocates Generals' opinions, at the same time, mechanically attributing this reasoning to the Court itself must be avoided. To illustrate, one may speculate that the Court in *Kalanke*, by narrowly construing the scope for preferential measures permitted under the Equal Treatment Directive was persuaded by AG Tesauro's argument, which was built on a strong distinction between equality of opportunity at the "starting points" and equality of results; by his emphasis on the "compensatory" rather than consequentialist rationale for employment "quotas", and by his suggestion that the scheme of preferences in question was, illegitimately, oriented towards equalizing results, rather than opportunities. But it cannot be known with certainty,[23] just as it cannot be known for sure whether, in the line of cases following *Kalanke,* the Court in fact changed its understanding of the operative principle of equality. In any event, beyond opacity of reasoning, the ECJ is not an especially attractive testing ground for an analysis of judicial review of equality norms. Which proportionality test applies is not just a function of the constitutional philosophy of anti-discrimination employed by the Court, but also flows from the different levels of deference exercised by the Court towards different aspects of Member States' national laws, depending on whether, in the Court's view, Member States retain primary competence in a given area.[24]

Questions concerning affirmative action have elicited great controversy in many other jurisdictions around the world.[25] But rather than assess these different jurisdictions for their treatment of affirmative action *per se*, this article will use the affirmative action *problématique* as an aid to appreciating the wider contours of the ideal of legal equality and non-discrimination.[26] And it is not a straightforward ideal: probably no other legal postulate has provoked so many debates, discussions and disagreement. We should not find this surprising. While many other concepts advanced as the essential values to be implemented by a just legal system (such as liberty, welfare, security, certainty and community) are also vague, lending themselves to differing conceptions of their "true" extent and boundaries, the

---

[23] As Anne Peters observes, "[t]he judgment is laconic and fails to pick up most of the themes the Advocate General Tesauro discussed", Anne Peters, "The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis", *ELJ* 2 (1996): 177-196 at 191. To be sure, the results/opportunities distinction has been explicitly mentioned in the Court judgment but in a less developed form than it is discussed in the Advocate's General opinion.

[24] Pager supra note 22 at 556-57.

[25] For a recent comparative treatment from a decidedly critical perspective, see Thomas Sowell, *Affirmative Action Around the World: A Comparative Study* (Yale University Press: New Haven 2004).

[26] As a matter of terminological convention, rather than substantive argument, I will use the concept of discrimination as a direct antithesis of equality, so that discrimination is, by definition, a violation of the principle of equality. Since equality is a positive value, "discrimination" is, once more, and by definition, not merely a characteristic, but also a defect of law: to find a law discriminatory is to criticize it as violating a precept of equality. While this terminological convention is adopted here by fiat, it is not arbitrary: using the word "discrimination" as equivalent to "invidious distinction" (rather than "distinction" *simpliciter*) became widespread in conventional and specialist legal language. For example McKean reports that, in the process of preparation of the UN Covenant on Economic, Social and Cultural Rights, "'[d]iscrimination' had come to mean 'unfair distinction' both in legal terminology and in everyday speech; arbitrary actions were precluded but legitimate distinctions allowed", Warwick McKean, *Equality and Discrimination under International Law* 147 (Oxford University Press: Oxford 1983), *see also id*. at 139-40, 147-48, 221-23, 286-88. *See also* Tom Campbell, "Unlawful Discrimination", in Wojciech Sadurski (ed.), *Ethical Dimensions of Legal Theory* (Rodopi: Amsterdam 1991) 153, 154 (proposing "to utilise the concept of discrimination as prejudiced disfavouring").

"problem" with the ideal of equality is different. Specifically, its difference hinges on two features: non-negotiability, and fundamental ambiguity.

The non-negotiability of the principle of legal equality means that those who are postulating this ideal are usually unprepared to accept any trade-offs between equality and other values, even those which they themselves would recognize as attractive. While the attitude of "non-negotiability" with respect to any other social ideal protected by law may in principle seem unduly rigid, with regard to equality it does not usually strike us as unreasonable. On the contrary, many of us would consider it bizarre if a lawmaker (or a legal commentator) were to argue along the following lines about a proposed legal rule: "While this rule admittedly introduces a degree of inequality before the law, this is more than compensated by the other benefits produced by the rule". The intuitive reaction to this sentence is that its first part conclusively disqualifies the rule in question, and that no alleged benefit, whatever its extent, could ever redeem it. In this sense, "equality before the law" is "lexically prior" to other values.[27] This is in clear contrast with most other ideals typically associated with a just legal system. Proponents of liberty, utility, wealth maximization and legal certainty are usually prepared to accept some limits upon the implementation of these ideals, only if the surplus in the implementation of other, competing ideals, makes up for the losses. Hence trade-offs are usually seen as acceptable – except with regard to legal equality.

The second distinguishing feature of legal equality is its fundamental ambiguity. By this, I mean not just the vagueness of a concept which lends itself to different interpretations, conceptions, and criteria for implementation; rather, and more fundamentally and disconcertingly, what is referred to is that one and the same ideal can be understood as implying two, mutually antithetical, but equally *prima facie* reasonable, sets of specific prescriptions. This goes beyond "mere" conceptual ambiguity. Let us compare, for example, the ideal of equality before the law with that of liberty protected by the law. Consider a specific controversy related to the latter principle: the dilemma as to whether laws committed to the protection of individual liberty can impose coercive restraints upon individuals to protect them against self-inflicted harm. In general, one could, *prima facie,* adopt a principle that coercing people for their own good is inconsistent with the principle of liberty. Of course, the matter cannot end there. It is not necessary to rehearse the arguments made in an extensive literature on "paternalism"[28] in order to conclude that a certain degree of coercion-backed protection against self-inflicted harm can be permitted (some would even say mandated) by the principle of legally-protected liberty. A number of reasons may be given to justify this: certain harms are so great and irreversible that they will annul the future liberty of an individual to act in a particular way; the process of forming preferences for a particular action may be distorted by many extraneous factors which can then be countered by paternalistic coercive interference; because the process of transforming preferences into individual choices is affected by ignorance on the part of an agent who is unaware of vital facts which render the choice incongruent with a preference; or because the consent of an agent who enters into a transactional agreement with another, which is harmful to the first party, is not genuine; or, again, because the only way of giving effect to an individual's true preferences, in a situation of collective action and the resulting Prisoner's Dilemma, is to impose coercive norms which

[27] On the concept of "lexical priority" *see* John Rawls, *Theory of Justice* (Harvard University Press: Cambridge Mass., 1971) at 42-43. Rawls assigns lexical priority to the principle of equal liberty within his set of principles of justice, *id*. at 43.

[28] See, generally, Rolf Sartorius, ed., *Paternalism* (University of Minnesota Press: Minneapolis 1983); Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law*, vol. 3 (Oxford University Press: New York, 1986).

ensure that the process of implementing individual preferences is not eroded by a perverse incentive structure which rewards non-cooperative action by individuals. Each of these cases, seeming to justify a rebuttal of our *prima facie* distaste for paternalistic interferences, requires a judgment of degree, for example, about how "genuine" a party's consent to the agreement may be. But the ambiguity that results from the possibility of disagreement about this judgment of degree is a "mere" ambiguity, rather than a fundamental one. Such ambiguity stems from the notorious fact that values allow for degrees. It is *not* that the value is itself inherently ambiguous, which is the case, for example, where, *regardless of judgments of degree*, two individuals can still in good faith disagree over whether the principle of liberty, properly understood, allows for paternalistic interferences with individual action or not.

But the equality ideal's ambiguity differs from the "mere" ambiguity sketched above because individuals can, and frequently do, disagree in good faith about its application, and may propose mutually antithetical specific prescriptions, without this being affected by any judgments of degree related to the values used in the process of argument. The controversy about affirmative action with which I opened this article is perhaps the most obvious example. Apart from any other arguments used by parties to the controversy, both proponents and opponents of the principle of affirmative action believe that their positions are *mandated* by the principle of equality before the law.[29] In contrast to my other example above – about liberty and paternalism – the disagreement here is not about the degree to which equality can be reasonably qualified by some affirmative action without losing its *bona fide* egalitarian character, but rather about whether the essence of the concept of equality is such that, under some empirically verifiable circumstances, it will mandate or prohibit affirmative action. This is, therefore, not a contest between different approaches to implementing the same ideal, but rather about the content of the ideal of equality itself: the question is which concept of equality best expresses, and accounts for, the moral and political importance equality holds in the eyes of the contestants. To use Dworkin's terms, it is a typically "interpretive" concept of value, i.e. one which lends itself to controversies not merely about "how important [equality] is or when it should be sacrificed to other values, but what it is".[30] In other words, the concept of legal equality is not just a neutral baseline upon which substantive controversies arise; disagreement about the very concept of equality, its meaning and parameters, is itself an element of these controversies.

There is a temptation, in this context, to dub legal equality an "essentially contested concept" with an obvious reference to W.B. Gallie's classic formulation.[31] This I will resist: Gallie's formula has become, I suspect, more often quoted than seriously studied and, as a result, is sometimes misused by those who would apply it to all vague, controversial, or contested notions.[32] What Gallie had in mind was not only that such concepts are (to use his

[29] Compare, for instance, Morris B. Abrams, "Affirmative Action: Fair Shakers and Social Engineers", *Harv. L. Rev.* 99 (1986) 1312, 1319 ("color-consciousness" in affirmative action programmes violates "the principles of equality before the law and neutral decision making) with Randall Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate", *Harv. L. Rev*. 99 (1986) 1327, 1334-37 (interpreting anti-discrimination law as based on "the principle of anti-subjugation" and arguing that failure to establish affirmative action programmes may "obfuscate racial subjugation").

[30] Ronald Dworkin, "Hart's Postscript and the Character of Political Philosophy", *Oxford Journal of Legal Studies* 24 (2004): 1-37 at 8. I have substituted the word "equality" for "justice" in Dworkin's sentence. Dworkin earlier undertook a more elaborate discussion of interpretive concepts in *Law's Empire* (Harvard University Press 1986) at 46-49 and 65-68.

[31] W. B. Gallie, "Essentially Contested Concepts", *Proceedings of Aristotelian Society* 56 167 (1956): 167-198.

[32] As is also noted by Waldron: see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?", *Law and Philosophy* 21 (2002): 137-164 at 148-153.

vocabulary) "appraisive"; refer to internally complex practices; address multiple parts and features of the practice; are open to modification in light of changing circumstances; and are also capable of being used both aggressively and defensively. These criteria, taken together, still do not mark a distinction between essentially contested concepts and those "which can be shown … to be radically confused".[33] In addition, therefore, Gallie added two conditions which any paradigmatically "essentially contested concepts" must meet: they must be "derivations … from an original exemplar whose authority is acknowledged by all contestant users of the concept"[34]; additionally, continuous competition amongst various usages of the concepts is "likely to lead to an optimum development of the vague aims and confused achievements" they capture.[35] To make what is perhaps at this point a premature assertion (because it anticipates this article's later argument) I do not believe that the controversies around the understanding of legal equality fulfill the first of these two final conditions. In this sense, equality differs from the examples given by Gallie himself: "Christian life", Art and Democracy, in that they (in his interpretation) do, indeed, all relate back to a certain original point of reference. But what "original exemplar" holds together various contestants in the controversies about equality? Perhaps it could be said that those controversies all have a certain common *concern* which they try to address in different ways, so that their answers are different solutions to a single question which would play the role of Gallie's "original exemplar"?[36] But, to put it somewhat flippantly, if equality is an answer, what was the question? It is unlikely that behind those various contested answers in terms of equality there is just one single concern.

In any event, moving along these lines would lead to a considerable watering down of Gallie's notion of "essential contestation". Perhaps we should heed Gallie's own efforts not to over-extend this category. It is interesting – and not often acknowledged by those using Gallie's category – that Gallie refrained from qualifying the concept of "social justice" as essentially contested. Under Gallie's interpretation, this concept can be meaningfully used only in two senses: by reference to individual merit, and social cooperation. Even if this can be challenged, the more abstract description of the nature of the concept of social justice seems to be well suited to the way legal equality is understood here. As Gallie said, such a notion "suggests a bridge between those appraisive concepts which are variously describable and essentially contested and those whose everyday use appears to be uniquely describable and universally acknowledged".[37] Equality can be seen as such a bridging concept as well. It occurs as a limited number of variants; and it does not derive in any obvious way from "an original exemplar", as Gallie's original examples of essentially contested concepts did.

Gallie makes one interesting observation at the end of his essay, when he reflects upon some of the consequences of recognizing a concept as "essentially contested". An "optimistic" view[38] would be that, once people realize that a concept about which they disagree is essentially contested, they may in turn recognize that the uses of such concepts by their rivals may be of some "permanent potential critical value" to their own uses of the

[33] Gallie, supra note 31 at 180.

[34] Id. at 180.

[35] Id. at 186.

[36] This is similar to Waldron's defense of the Rule of Law as an essentially contested concept, understood as a "solution-concept" rather than an "achievement-concept": see Waldron, supra note 32, at 158.

[37] Gallie, supra note 31 at 187.

[38] Which is seemingly shared by Waldron: see Waldron, supra note 32 at 151-52.

concepts, which may later lead to raising the quality of argument. But next Gallie introduces a more pessimistic scenario. If we continue to believe (however deludedly) that our own use of a concept is the one that is capable of "honest and informed approval" by all (hence, is not essentially contestable) we may persist in the hope of persuading opponents of our viewpoint. However, once the essentially contested nature of a concept becomes clear, we may just abandon any effort at persuasion, instead applying non-persuasive means against our opponents.[39] Though often disregarded by enthusiastic supporters of Gallie's category, this sheds an interesting light on what Gallie meant by "essentially contested concepts", and explains why it would not be helpful to incorporate legal equality, as understood here, into this category. The argument which follows, especially in Sections 4 and 5, is offered as one that can be accepted through an "honest and informed approval" by all who use it. One must not hold on to a naïve illusion that this will actually happen; but lack of agreement about the meaning of a concept such as legal equality does not prove that it is *essentially* contestable: it only shows that it is in fact widely contested. The fact of a broad contestation is very unlikely to lead the protagonists of the controversy to abandon all efforts at persuasion and, in Gallie's words, "to cut the cackle, to damn the heretics and to exterminate the unwanted".[40]

2. CONDITIONS OF A TEST FOR NONDISCRIMINATORY CLASSIFICATIONS

Can we design a standard which will work as a test for equality *in* the law, as opposed to equality *before* the law,[41] that is, which will help us scrutinize the *substance* of legal rules from the point of view of their congruency with the ideal of equality? For starters, we should discard the temptation of opting for a "no classifications at all" standard. Some have thought that a good legal system that respects the equality of its citizens should not draw any legally relevant distinctions between citizens whatsoever. In his *Social Contract,* Jean-Jacques Rousseau claimed that the laws which truly represent "the general will" must be such that every legal act "either obligates or favors all Citizens equally, so that the Sovereign knows only the body of the nation and does not single out any one of those who make it up. … [I]t is never right for the Sovereign to burden one subject more than another. . . ."[42] For different reasons,[43] the United States Supreme Court Justice Jackson expounded a similar instruction to legislators in *Railway Express Agency v. New York*:[44] "[T]here is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally".[45] But this is both an impossible and unattractive ideal. It is impossible because you cannot treat everyone in the same way; "the same" means the same treatment of the same individuals, and since no individuals are exactly the same in every possible respect (otherwise they would be one and the same individual), the principle of "the same treatment" means the same treatment of

[39] Gallie, supra note 31 at 194-95.

[40] Id. at 194.

[41] For an elaboration of this distinction, see Sadurski, supra note 7 at 78-83.

[42] Jean-Jacques Rousseau, "Of the Social Contract", IV.II in Rousseau, *The Social Contract and Other Later Political Writings*, ed. and transl. Victor Gourevitch (Cambridge University Press 1997) at 63.

[43] Rousseau's maxim was based on his understanding of the "general will" as the true expression of popular sovereignty, and on his strong dislike of "factions" and other intermediary political forms (i.e. located between an individual and the state). Jackson's maxim is based on purely prudential grounds.

[44] 336 U.S. 106 (1949).

[45] Id. at 112 (Jackson, J., concurring).

individuals who possess the relevant characteristics to the same degree. The flip side of this is that individuals who do not have the relevant characteristics to the same degree must be treated differently. The "no-classifications at all" principle is also patently unappealing. Intuitively, we can think of circumstances in which it would be *prima facie* unfair (and, in an important sense, non-egalitarian) to accord the same treatment to two individuals, regardless of (what we consider to be) relevant differences between these two individuals.

The principal task that legal theory faces, as far as equality in the law is concerned, is to identify criteria for legal classifications of individuals which render those classifications discriminatory and thus offensive to the ideal of legal equality. Since *some* classifications of individuals are inescapable (and morally required), it is important to determine the test for non-discriminatory classifications. As a preliminary matter, it is important to realize that the test itself should meet certain conditions. First, the test should have a "working" character, that is, it should be capable of being accepted by people regardless of their fundamental substantive views about the overall justness of a given legal regulation. This is for the following reason: if we thought that the requirement of equality in the law collapsed fully into an overall judgment of the "justness" of a regulation, then all our considerations of equality in the law, as the specific normative ideal of law, would be redundant: we might as well talk directly about the requirement that the law be substantively just. However, our conventional discourse suggests that the ideal of equality in the law is narrower and more specific than an ideal of overall justness. It is an "intermediate" ideal, which is more specific than the substantive ideal of justice, while being more general than the set of particular judgments about particular legal regulations.[46] A "working" test of nondiscriminatory discrimination should be capable of being accepted by people who are on different sides in disagreements about justice. It does not follow that the test is morally neutral; what does follow is that it is at least possible for two people to agree about the discriminatory character of a given legal classification, while disagreeing, all things considered, about whether the classification is just.

The second condition of a test for non-discriminatory classifications is that it should be relatively independent of the actual views of people to whom it is purported to apply; hence, it should not be fully "subjective". Consider a test for equality in the law proposed by Friedrich Hayek which, for brevity, I will call the "double majority" test.[47] Hayek recognizes that "[t]he requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess".[48] However, "[s]uch distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognized as justified by those inside and those outside the group".[49] Hayek further explains:

> So long as, for instance, the distinction is favored by the majority both inside and outside the group, there is a strong presumption that it serves the

[46] I borrow the notion of an "intermediate ideal" from Joseph Raz, who applies it to assertions of rights, see Joseph Raz*, The Morality of Freedom* (Oxford University Press: Oxford, 1986) at 181.

[47] Friedrich A. Hayek, *The Constitution of Liberty* (Henry Regnery: Chicago 1960) 153-54, 209-10. The label "double majority" is my characterization of Hayek's principle and not his own. It should be also noted that, strictly speaking, Hayek is concerned a test for the "generality" of law, rather than for equality. But the context and argument suggest that what Hayek calls "generality" corresponds to what I call "equality in the law" in this article. At one point, Hayek describes the "double majority" condition as "one important requirement of "equality before the law" (id. at 209), the other requirement being the unforeseeability of "how a law will affect particular people" (id. at 210).

[48] Id. at 154.

[49] Id. at 154.

> ends of both. When, however, only those inside the group favor the distinction, it is clearly privilege; while if only those outside favor it, it is discrimination. What is privilege to some is, of course, always discrimination to the rest.[50]

But this will not do. One should realize than under the "double majority" test, even a perfectly unimpeachable distinction will likely be defeated, so long as a group that is defined by a regulation as carrying a particular burden objects to it. Likewise, it will be defeated by the objection of non-beneficiaries. Such views are very likely to be voiced and yet, in our everyday moral habits, they are usually not taken to be *sufficient* evidence that the rule in question is discriminatory. Can we really say that, since the majority of a group picked out by a rule would rather not carry this particular burden, the rule is *for that very reason* discriminatory? What is wrong about Hayek's "double majority" test is that it makes a finding of discrimination wholly dependent upon whether or not those to whom the rule applies consider it justified. But we must be able to distinguish between a judgment that a rule is discriminatory, and a finding that the majority considers it discriminatory. This is the difference between "positive" and "critical" morality, to use an old-fashioned distinction;[51] between, on the one hand, a description of prevailing standards within the community, and a normative judgment, on the other. If we, as citizens, are to draw guidance from a normative theory in shaping our preferences, then the normative theory cannot depend on our prior views about the matter under consideration. If a single citizen is to respond to a question about whether she considers a proposed regulation discriminatory, then her answer must not depend upon how others answer and whether, at the end of the polling, there it receives double majority approval. In this sense, a test for non-discriminatory classifications must be independent of the subjective views of persons to which those classifications apply.

3. *PER SE* THEORIES AND IMMUTABLE CHARACTERISTICS

The first test that I will consider here relies upon a proposition that there are certain criteria of classifications that inevitably render the classification discriminatory. In other words, the use of some properties of individuals by legal rules is *per se* discriminatory when such rules deploy these properties to divide individuals into beneficiaries of the relevant legal benefits (or, conversely, bearers of legal burdens) and those who are not. This is this test's main feature, and for this reason I will be calling it the "*per se* test". One striking fact about *the per se* test is that it is as widely accepted in legal thinking as it is theoretically implausible. This combination, of pervasiveness and philosophical unsoundness, is truly puzzling. By far the most popular practical version of a *per se* test is the concept of "colour-blindness", a theory suggesting that any classification based on the race of citizens is either presumptively or (in a stronger version) conclusively discriminatory.[52] In United States jurisprudence, the notion of "color blindness" was first articulated as a vehicle of protesting invidious discrimination against African-Americans, in a famous dissent by Justice Harlan in *Plessy v. Ferguson*[53]: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color. . . ."[54]

---

[50] Id. at 154.

[51] See H.L.A. Hart, *Law, Liberty, and Morality* (Oxford University Press: Oxford 1963) at 20.

[52] Another way of expressing "colour blindness" is by deeming race "constitutionally an irrelevance", see e.g. *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson J., concurring).

[53] 163 U.S. 537 (1896).

[54] *Id*. at 559 (Harlan, J., dissenting).

The slogan of "color-blindess" persisted, despite the change of context,[55] and was adapted to judicial[56] (and jurisprudential)[57] objections to affirmative action. In his dissenting opinion in *Grutter*, one of two cases with which this article opened, Justice Thomas declared that "[t]he Constitution abhors classifications based on race"[58], that the Equal Protection Clause "prohibit[s] … classifications made on the basis of race",[59] and that "racial classifications are *per se* harmful".[60] This restatement of "color blindness" appearing in Thomas's dissent culminates with the approving citation, by Thomas, of Harlan's "colour blindness" dictum in the latter's *Plessy* dissent.[61] However, these two statements are separated by ninety-seven years, during which all formal legal racial discrimination in the United States was abolished. Harlan's dissent attached to a judgment upholding racial segregation in public transport[62]; Thomas's dissent to a decision to uphold an public university's admissions programme that aimed at enrolling as students a "critical mass" of members of under-represented minority groups, including African-Americans, Hispanics and Native Americans. Yet the maxim *seems* to be exactly the same, in the implication that it is the very use of race (or colour) which is *per se* discriminatory, not the purpose for which this characteristic of individuals is invoked by a legal rule or, alternatively, the relationship between the property of race and the evil that the law purports to address.

Of course, the colour-blindness version of a *per se* theory of non-discriminatory classifications is not confined to American jurisprudence; nor is it unopposed within American judicial thinking on equality and discrimination.[63] In an important decision of the Australian High Court concerning the legality of a particular provision of a state law which restricted access of non-Aboriginal people to Aboriginal land,[64] the then Chief Justice Gibbs stated bluntly: "Speaking broadly, that subsection [of the Racial Discrimination Act] deals

---

[55] As Ronald Dworkin has perceptively remarked, the slogan of colour blindness "means . . . just the opposite of what it says: it means that the Constitution is so sensitive to color that it makes any institutional racial classification invalid as a matter of law", Ronald Dworkin, *Taking Rights Seriously* (Duckworth: London, 1978, 2nd ed.) at 229.

[56] See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 331-4 (1974) (Douglas, J., dissenting); *Fullilove v. Klutznick,* 448 U.S. 448, 523 (1980) (Stewart, J., dissenting).

[57] See, e.g., Alexander M. Bickel, *The Morality of Consent* (Yale University Press: New Haven 1975) at 132-33; Richard A. Epstein, "Affirmative Action for the Next Millenium", *Loyola L.Rev*. 43 (1998) 503, 504-07 (1998).

[58] *Grutter* supra note 2 at 353 (Thomas, J., dissenting).

[59] Id. at 368.

[60] Id. at 371.

[61] Id. at 378 (Thomas, J. dissenting).

[62] In *Plessy v. Ferguson* the Supreme Court upheld a 1890 Louisiana statute requiring railroads to provide "equal but separate accommodations for the white and colored races", and barred persons from occupying rail cars other than those assigned to their race, 163 U.S. 537-38.

[63] "[R]acial classifications are not *per se* invalid under the Fourteenth Amendment", *Bakke*, supra note 1 at 356 (Brennan, White, Marshall, Blackmun, JJ, concurring in part and dissenting in part); *see also id*. at 407 (Blackmun, J., concurring in part and dissenting in part) ("In order to get beyond of racism, we must first take account of race"). Actually, the "colour blindness" theory has never become the law in the United States, see *Fullilove*, supra note 56 at 482 ("we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion").

[64] For a detailed analysis and critique of this decision, *see* Wojciech Sadurski, "Gerhardy v. Brown v. the Concept of Discrimination: Reflections on the Landmark Case that Wasn't", *Sydney L. Rev*. 11 (1986): 5-43.

with acts of racial discrimination, i.e. with acts which make a distinction on racial grounds".[65] It is the "i.e." which is truly problematic here: racial *discrimination* is simply equated with a *distinction* on racial grounds. To emphasize this point, Gibbs provided a hypothetical reversal of a situation created by the above rule: "I see no distinction between the effects of [the provisions of the state act under challenge, which allowed exclusion of non-Aborigines], and that of a law which provided as follows: white men and women who are traditional owners of land in a particular town have unrestricted rights of access to that town; no-one else may enter it without their permission".[66] The reversal of black/white roles serves as a rhetorical amplification of the point that it is the very use of race (*whatever* race) which is the *indicium* of the discriminatory character of the law in question, and that it is the racial distinction *per se* that taints the law as discriminatory.

To see more clearly what is wrong with the colour-blindness maxim, it is useful to invoke one further statement of it, this time, in a dissent by Justice Stewart in *Fullilove v. Klutznick*,[67] a US Supreme Court decision upholding certain state government preferences for minority business enterprises. Stewart (joined by Justice Rehnquist) restated the slogan by saying: "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid".[68] Soon afterwards, Stewart goes on to formulate "one clear lesson" to be drawn from the "history" of the Supreme Court's treatment of racial classifications: "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race".[69] This is followed by an important sentence which brings us as close as we get in Stewart's dissent – and in the whole American equal-protection jurisprudence – to the rationale offered for colour-blindness: "The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible interest to government".[70] At first blush, there is something puzzling about this sentence: it consists of two parts, one of which is true but banal; and the other, interesting, but patently untrue. True and banal, is the characterization of colour (alongside country of origin) as immutable characteristics. The second part lists a number of factors potentially "of . . . interest to government", hence, which *can be* grounds for the conferral of benefits or imposition of burdens upon individuals, but none of which, in Stewart's claim, are related to one's skin colour or country of origin. This is patently untrue, at least as concerns one of the factors enumerated, namely "disadvantage". In many places and times in history, both skin colour and country of origin have influenced, if not determined, social advantage and disadvantage. Much of the majority's argument in *Fullilove* hinges upon the fact that Congress could reasonably adopt a special set-aside for minority business enterprises because "minority businesses have been denied effective participation in public

[65] *Gerhardy v. Brown*, 59 A.L.J.R. 311, 315 (1985) (Austl.). The "subsection" to which Chief Justice Gibbs refers in this sentence is s. 9(1) of the Racial Discrimination Act 1975 (Austl.) which reads: "It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life".

[66] 59 A.L.J.R. at 317.

[67] Supra note 56.

[68] Id. at 523 (Stewart, J., dissenting) (citations omitted).

[69] Id. at 525, footnote omitted.

[70] Id. at 525.

contracting opportunities by procurement practices that perpetuated the effects of prior discrimination".[71] The majority's argument relies on a view that, when prior discrimination was based on racial grounds, "disadvantage" *was* determined by one's race; hence, "a person's skin" bears a clear relation to that person's "disadvantage", contrary to Stewart's explicit statement. For his part, Stewart could of course take issue with the majority's premise in various ways, for example, by pointing out (what he could consider to be) the regulation's over- or under-inclusiveness, or the weakness of empirical findings concerning past disadvantage. But instead he chooses to advance a general principle: not that, *in this particular case,* beneficiaries' skin colour bears no proper relation to the disadvantage targeted by the proposed law, but rather, that "the color of a person's skin" is *in general* unrelated to disadvantage.

Why should Stewart choose to pronounce, with such confidence, a proposition that so obviously flies in the face of social experience? We need to recognize that most of the work in Stewart's argument is done by the word "immutable": "The color of a person's skin and the country of his origin are *immutable* facts that bear no relation to . . . any . . . characteristics of constitutionally permissible interest to government". [72] Putting proper emphasis on "immutable", Stewart's proposition ceases to be an obviously false statement concerning empirical correlations of individual characteristics with disadvantage, and can be read, instead, as a purely normative thesis about which characteristics must never be relied on by governmental regulations. That is why "color", for Stewart, is accompanied by mention of "the country of origin", preparing the ground for a citation from *Hirabayashi*[73] which follows immediately after the sentence I have so far been interpreting: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality".[74] Note that the *Hirabayashi* Court does *not* mention "immutability" in this context. Stewart, however, establishes the link between race and country of origin by claiming, for the former, the same presumptive illegality already established in *Hirabayashi* for the latter – the relevant similarity being that both these factors are equally "immutable". In this context, Stewart's must be seen as a purely normative principle. The citation from *Hirabayashi* does not attempt to establish any empirical relation between a property of an individual (ancestry) and factors of permissible interest to government, such as disadvantage, but rather states a rule, that classifications based on ancestry are discriminatory *per se*. This is the principle that Stewart extends to the other immutable characteristic, namely, skin colour. Canadian legal theorist J.C. Smith expressed the same principle in more abstract terms: "No rule may differentiate between people in terms of properties the possession of which is immediately knowable and determinate at birth for every person, and which are never after subject to change for the persons possessing them".[75]

The salient question at this point is, what is it about "immutability" *per se* that makes a characteristic an impermissible basis for legal classification? We have moved from a very

---

[71] Id. at 477-78 (Burger, C.J., delivering the opinion of the Court).

[72] Id. at 525 (Stewart, J., dissenting) (emphasis added).

[73] *Hirabayashi v. United Sates*, 320 U.S. 81 (1943).

[74] *Id*. at 100, quoted in *Fullilove*, supra note 56 at 525 (Stewart, J., dissenting).

[75] J.C. Smith*, Legal Obligation* (1976) at 124. Smith further makes clear that what really matters is a person's capacity to change his or her group membership, and thus to become (or cease to be) an addressee of a norm: 'It is only a law limited solely in terms of a property determined at or by birth, such that a person can neither choose nor change it, which offends the principle of equality before the law by excluding a determined class from the domain of the rule. . . . Differentiations between persons must take place in terms of actions and events rather than the properties of personal and group identification.", *id*. at 124-25.

specific level (enumeration of some particular "impermissible" characteristics, such as colour and ancestry) to a more general level (identification of their common trait, namely immutability). But now we need a theory that would explain the wrongness of classifications based on *any* immutable properties of individuals. For, obviously, there are many other characteristics which are immutable, and yet, which do not strike us as rendering a classification inherently discriminatory: e.g. the characteristics of physical health in recruitment to the army, intelligence in admission to university, beauty in the selection of catwalk models, etc. *Vice versa*, we can also identify a great number of classifications based on characteristics which are perfectly "mutable" (such as wealth) and yet which figure as classifying criteria in clearly discriminatory laws (for example, property qualifications for voting eligibility in general elections). The general proposition that the very fact of immutability, as such, renders a classification discriminatory is so incongruent with our intuitive judgments about which laws are discriminatory and which are not, that it requires a particularly convincing moral theory to support it.

However, it is very difficult to find an explicit moral justification for hostility to classifications based on immutable characteristics; antipathy to them usually arises without argument. One has therefore to reconstruct this theory, in trying to find the best possible backing for the thesis that it is presumptively wrong for the law to classify people along the lines of immutable characteristics. The most obvious justification that springs to mind is connected to an intuitive feeling that there is something particularly unfair in categorising and selecting people on the basis of characteristics beyond their own control. The general intuition can be made more specific in two ways. In the first instance, we can say that immutable characteristics are, by their very nature, much more tightly linked to individual *identity* than are the alterable characteristics which are more defining of a person's changeable *roles* in society. Under this argument, "immutability" is just a proxy for identity-defining characteristics. Yet, unless this equivalence is a matter of definition, which would make the argument circular, it is a very imperfect proxy for identity. There are some characteristics which are immutable, but which may not define anything particularly significant about individual identity (for example, freckles); there are also characteristics which *may* be highly defining, but which are alterable (for example, membership of a political party). But even if immutability did properly capture identity-constituting characteristics, it would still be question-begging to say that legal classifications based on identity-defining characteristics are necessarily more suspicious than those based on more contingent properties. Presumably, this argument would have something to do with the perceived dangers of "identity politics", where rights and burdens granted on the basis of group identity may be seen, for instance, as leading to balkanisation and division in society.[76] Notwithstanding, as stated, this argument is too vague and contingent to amount to a solid case against such classifications.

A second (and better) reason why one might consider "immutability" as a suspicious criterion of legal classification is the unfairness of imposing legal burdens upon individuals when defined by criteria which do not allow them, as bearers of those burdens, any opportunity to get rid of those burdens (by escaping the burdened group). This was one of the reasons why Justice Brennan, in his concurring opinion in *Bakke,* would have applied "intermediate", rather than simple, rational-basis scrutiny, to classifications based on race, gender and illegitimacy.[77] Each of these properties, Brennan explained, "is an immutable

[76] For a depiction of the dangers of granting rights based on group identity, *see* Claus Offe, "'Homogeneity' and Constitutional Democracy: Coping with Identity Conflicts through Group Rights", *Journal of Political Philosophy* 6 (1998): 113-141 at 124-39.

[77] *Bakke*, supra note 1 at 360-62 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). It is important to emphasize that Brennan is not a proponent of the *per se* illegality of race-

characteristic which its possessors are powerless to escape or set aside"[78] adding that "such divisions are contrary to our deep belief that 'legal burdens should bear some relationship to individual responsibility or wrongdoing'". [79] The key feature disqualifying immutable characteristics as a basis for legal classifications, therefore, is that individuals so classified cannot, through acts of their own volition, escape burdensome classifications. Yet, just articulating this reason is sufficient to discredit it. It is analogous to an argument that hate speech addressed against a racial minority would be less harmful if members of that minority could easily change their skin colour. Heightened protection against discrimination (and likewise against insult) should not be contingent upon the inescapability of a protected category. Consider the case of discrimination (or, in a parallel argument, offensive speech) against gay men and lesbians. Would it make any difference to the wrongness of the discrimination (or the offence) if we found a strong confirmation that sexual orientation is an inborn characteristic, rather than a freely chosen "life-style"? Corollary to the view that "alterability" of sexual orientation should lessen protection against homophobic discrimination is the argument that gay men and lesbians may easily avoid discrimination by changing their sexual orientation to a heterosexual one, and so no heightened protection – reserved for "truly immutable" characteristics – is warranted. But this argument collapses, because the central question is whether it is *fair* for a society to impose a penalty (in the form of lower protection against discrimination) upon members of a group who do not renounce the relevant conduct, values, or set of beliefs.

The immutability criterion's weakness is equally obvious in considering religious groups. Religion is usually listed, alongside with race, as one of those characteristics which should be banned from serving as a basis for legal classifications of citizens.[80] Superficially, it could be a counter-argument to the "immutability" theory because, while religion is certainly viewed as constitutive of personal identity, and to a very high degree, there is nothing "immutable" about it. Perhaps, though, the immutability argument should be split into one of "entry" and "exit" points: it *might* be claimed that, while we all have the opportunity to abandon a particular religion ("exit"), we do not "enter" religions voluntarily, rather being born into them. But this is obviously untrue in a great number of cases: for non-believers who at a certain stage of their life discover a religious truth for themselves, or for those who convert from one faith to another. Why should those people whose religious affiliation was *not* a matter of conscious choice enjoy a higher level of protection against discrimination?

---

based classifications; indeed, the burden of his argument is to support race-conscious remedial regulations, such as the one under challenge in *Bakke*. However, the context of the argument from which the citations in the main text are taken is the justification of a stricter than usual scrutiny of race-conscious classifications (i.e. intermediate scrutiny); this argument is preceded by another which shows why remedial racial classifications should not trigger strict scrutiny, that would be likely to invalidate the classification under challenge, see id. at 356-58.

[78] Id. at 360.

[79] Id. at 360-61, quoting *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164, 175 (1972).

[80] See, e.g., *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring) (describing "race, creed or color" as constitutionally irrelevant). Title VII of the U.S. Civil Rights Act of 1964 prohibits discrimination based on "race, color, religion, sex, or national origin" in employment, 42 U.S.C. § 2000e-2(a) (1982). The Canadian Charter of Rights and Freedoms prohibits discrimination based, in particular, on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability", s. 15(1). *See also* Universal Declaration of Human Rights Art. 2 (1984) (no distinction of any kind based on, *inter alia*, religion; American Declaration of the Rights and Duties of Man Art. 11 (1948) (no distinction as to, *inter alia*, creed); Council of Europe 1950 Convention for the Protection of Human Rights and Fundamental Freedoms Art. 14 (no discrimination based on, *inter alia*, religion).

Such a suggestion could only be justified by identifying the involuntariness of a given characteristic (lifestyle, beliefs, preferences, etc.) with depth of commitment. This is patently implausible. On the contrary, it would seem that we are often *more* committed to those values, relationships and lifestyles which we have chosen voluntarily or, at least, to those which we *can* abandon, but prefer to retain, notwithstanding a feasible exit option. So, the immutability argument seems at odds with the "constitution of identity" argument, if depth, or strength, of commitment are seen (as they should be) as indicative of those characteristics defining a person's identity to a very high degree.

The example of religion also suggests that the very act of drawing a line between immutable and mutable characteristics, and then characterizing a given property as falling on one or the other side of the line, is not neutral towards members of a group defined by this property.[81] Whether you believe religion to be an immutable or mutable characteristic depends to a large extent on whether you are religious or not: secular liberals tend to describe religion as an "alterable" characteristic which can be affected by a person's choice, while those with a religious outlook complain that such an approach trivializes and distorts the nature of religious commitments. According to Michael Sandel, a liberal approach "depreciates the claims of those for whom religion is not an expression of autonomy but a matter of conviction unrelated to choice", and fails "to respect persons bound by duties derived from sources other than themselves".[82] Perhaps there is a tendency (though by no means universal) for adherents of a given set of beliefs, values and commitments, to perceive them as not having been freely chosen, not being "mere preferences", and not being discardable through an act of free will. Indeed, in the passage just quoted, Sandel further complains that a liberal approach to religion (linking religion with the exercise of free choice) "may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity".[83] If any group's self-awareness is positively built upon a sense of originating from something other than free choice, then any attempt by the law to classify some characteristics as "immutable" and others as "alterable" is non-neutral between groups characterized by immutable characteristics and those who are not. If, as the case of religion shows, there is a link in people's minds between recognition of the strength of a commitment and characterization of a commitment as unrelated to choice, then a legal characterization of some properties as immutable is parasitic upon a judgment about the depth, strength, sincerity and significance of the given belief or commitment. As a result, not much remains of "immutability" as such – it merely becomes a vehicle for disguised distinction between beliefs which the government respects to a greater extent, and those which it respects less, and to which it thus accords lower legal protection against discrimination.

The upshot is that the "immutability" of a characteristic is, in itself, neither a sufficient nor a necessary condition of the discriminatory nature of a classification based on that

[81] There are many other reasons why, in practice, it may be extremely difficult to draw a clear line between immutable and alterable characteristics. Consider a person's wealth and social class: these seem to be alterable characteristics, yet if the criterion is the ease with which a person may actually affect her membership in a given class, the characterization of wealth and social status as "mutable" becomes dubious. As has been pointed out, "some elements such as social class . . . though in theory neither hereditary nor unchangeable in the sense that race is, may in fact depend very much on the luck of birth and may often be changed only with difficulty", Note, "Developments in the Law: Equal Protection", *Harv. L. Rev*. 82 (1969): 1065-1192 at 1167.

[82] Michael J. Sandel, "Freedom of Conscience or Freedom of Choice?", in J. D. Hunter & O. Guinness, eds., *Articles of Faith, Articles of Peace: The Religion Liberty Clauses and the American Public Philosophy* (Brookings Institution: Washington D.C., 1990): 74-92 at 89.

[83] Id. at 89.

characteristic.[84] There are classifications based on "alterable" characteristics that are manifestly discriminatory, and classifications based on "immutable" characteristics that are perfectly unobjectionable. But the lesson to be drawn from the above discussion is not limited to "immutable" characteristics. It is impossible to identify *any* characteristic which inevitably implies that a classification based upon it violates the principle of legal equality. In this sense, the argument against "immutability" as a test for discrimination is meant to serve as an argument against the whole "*per se*" family of tests of non-discriminatory classifications. And yet, so far, I have proceeded as if the only *prima facie* plausible rationale for a *per se* theory, in particular in its colour-blindness version, was the immutability of grounds of prohibited classifications. But is it the only, or the only plausible, rationale for any *per se* theory? Naturally, the answer here is no and, insofar as there may be other rationales for such theories, the argument thus far against a *per se* approach may be seen as inconclusive. As a result, in concluding this section of the article, we need to contemplate the other candidates for such a rationale.

An obvious place to start looking are the two affirmative action cases with which we began, because it was precisely in these decisions that a strong connection between race-based classifications (an indicium of a *per se* theory) and strict scrutiny (which brings us close to outright prohibition) was made. Indeed, majority judgments (O'Connor in *Grutter*; Rehnquist in *Gratz*) in both these cases begin with, and use as an organizing principle for the argument that follows, a restatement of the current doctrine of the Court that all racial classifications must be reviewed under strict scrutiny.[85] And yet, there is precious little in either opinion by way of defence and justification of this link, despite its central importance in each case. Certainly, the justices now endorsing this link can be partly excused for omitting a justificatory theory on grounds that the principle can be plausibly depicted as an established, authoritative doctrine of the Court, going back at least to Powell's opinion in *Bakke*, and reinforced by equal-protection decisions ever since.[86] From our perspective, however, this misses the point because our aim is to reconstruct such a justificatory theory from the *per se* theory's judicial endorsements.

Grutter's majority decision lacks any such justificatory theory, directly or indirectly expressed: that all racial classifications should trigger strict scrutiny is asserted, not argued for. *Ditto* Chief Justice Rehnquist's majority opinion in *Gratz* – though perhaps he nears a hint at justification, in quickly supplementing his assertion of strict-scrutiny of racial classifications with an emphasis (attributed, with approval, to Powell in *Bakke*) on "considering each particular applicant as an individual, assessing all the qualities that individual possesses…".[87] Implicit, here, would be the theory that a race-based classification is inherently anti-individualistic, and that it considers persons only as members of larger classes rather than in their own right. But this will not do, because classifications based on properties *such as race* are still not distinguishable in any meaningful way from any other classification, based on different types of individual properties, which also create classes of individuals from the point of view of that rule. In other words, Rehnquist's approach does not identify what it is that makes race qualitatively different, so that race-based classifications must be treated with

---

[84] For a general critique of immutability theory, see J.M. Balkin, "The Constitution of Status", *Yale L.J.* 106 (1997): 2313-74 at 2366.

[85] *Grutter* supra note 2 at 326; *Gratz* supra note 3 at 270.

[86] *Bakke*, supra note 1 at 290-9 (Powell, J.). For successive statements of the principle that all racial classifications must trigger strict scrutiny, see, inter alia, *Croson* supra note at 494; *Adarand* supra note at 224.

[87] *Gratz* supra note 3 at 271.

greater suspicion than any other legal categories. And, if the reason is that race (and few other characteristics) is more "group-defining", in that it is less apt to be changed by individual action, then we have arrived back at the immutability theory.

Perhaps better attempts at justification are to be found in the dissenting opinions. In *Grutter*, Justices Thomas and Kennedy each devote considerable attention to the question of the standard of review. In a rare attempt explicitly to justify his antipathy for all racial classifications, he states: "The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes races relevant to the provision of burdens or benefits, it demeans us all".[88] This sentence holds the nuclei of three distinct arguments: that racial classifications may be detrimental to their purported beneficiaries; that they are (note, "are", rather than "may be") based on illegitimate motives; and that they "demean us all". The third is a purely rhetorical claim unsupported by further argument[89]; the second is neither explained, nor accompanied, by further argument elsewhere in the dissent; the first, however, is developed at greater length. Later, Thomas makes the general announcement that "racial classifications are *per se* harmful",[90] and attempts to show that race-conscious preferences for minority applicants are harmful to minorities themselves – because those admitted as a result of racial preference are relatively unprepared and, therefore, will necessarily "underperform" (requiring continued racial preference, throughout the years of study and at the hiring stage), and also because it generates doubt vis-à-vis minority students who would have been admitted without racial preference.[91] Hence, racial preference creates the "problem of stigma", and a "badge of inferiority" that tars all members of a preferred group.[92]

I do not need here to go into the merits of these arguments (as I have done elsewhere[93]); for present purposes, all that matters is that they are purely contingent, hinging on empirical findings and, as such, cannot serve to justify universal hostility towards racial classifications *per se*. A system of preferential admissions *may* produce a phenomenon of stigma; equally, however, a very low number of minority students (in the absence of a system of preferences) may also stigmatize minority members even further by reinforcing the stereotype that members of these minorities are not qualified to study at elite professional schools. It may well be that any phenomenon of stigma will be more than offset by real advantages derived by minority students from an opportunity to access such studies, and, on balance, will be seen as worth suffering, for the sake of the overall benefits the system brings. Girardeau Spann has put it nicely: "One is better off having resources than being thought well of while continuing to languish in a perpetual underclass".[94] After all, if minorities experienced preferential admissions as bringing *disadvantage*, rather than benefits, one would

---

[88] *Grutter* supra note 2 at 353 (Thomas J., dissenting).

[89] The sentence quoted is followed immediately afterward by a quotation from Thomas's concurrence in *Adarand* which announces, without more, that racial classifications "have a destructive impact on the individual and our society", *Grutter* supra note 2 at 353-53 (Thomas , J., dissenting, quoting *Adarand* supra note at 240, Thomas J., concurring in part and concurring in judgment).

[90] *Grutter* supra note 2 at 371 (Thomas J., dissenting).

[91] Id. at 372-73

[92] Id. at 373.

[93] See Sadurski, supra note 7 at 192-96.

[94] Spann, supra note 18 at 238.

expect minority groups, organizations and leaders to protest strongly against such preferences and, notwithstanding individual African-American scholars' and writers' opposition to affirmative action,[95] it is not the case that minority groups *en masse* are rejecting such programmes: if anything, the reverse seems to be true. In such circumstances, it is hard to see why the Supreme Court (even by the mouth of its only African-American member) should be announcing to minorities what is truly in their best interest.[96] Thomas' arguments fall short of explaining why it would be the case that any legal classification drawn in terms of race will necessarily or always disadvantage those individuals whom the policy behind such a classification attempts to benefit and, crucially, what especially distinguishes race from all other criteria of legal classification so as to produce such perverse consequences.

One other dissenting opinion in *Grutter* offers an explicit explanation as to why any racial classification, regardless of its aim, should be strictly scrutinized by the courts. After deploring the majority's failure, in his view, properly to apply strict scrutiny, Justice Kennedy recounts the history, post-*Bakke*, of judicial affirmations of "the absolute necessity of strict scrutiny when the state uses race as an operative category"[97], offering this explanation: "Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality".[98] But "confidence in the Constitution" and in "the idea of equality" will be undermined only if it turns out that race-based classifications are necessarily and inherently unconstitutional and contrary to the principle of equal protection of the laws – precisely the issue in debate. If, *arguendo*, race-based classifications can be, under some circumstances, warranted by the Constitution then confidence in the Constitution will be undermined by *rejection,* rather than acceptance of, race-conscious affirmative action by the State. Inconsistency with the constitution cannot at the same time figure as the premise and conclusion of the argument – as it does in the passage just quoted. "Divisiveness", to which Kennedy refers, will be a morally weighty argument only if the reasons for disapproval of race-conscious affirmative action are based on good constitutional arguments. Otherwise, any state action which benefits or burdens a particular group (racial or otherwise) may be "divisive", in the sense that its non-beneficiaries may resent it; just as school desegregation could be seen as "divisive" (for raising the ire of segregationists). "Divisiveness", without more, carries no moral or constitutional weight. Indeed, that legislators are not entitled to track the patterns of unreasonable prejudices and social animus, even if the interest in public peace and harmony would, superficially, argue for the policy of placating racists, is a principle long established by the US Supreme Court[99] – and it is precisely this principle that withdraws all moral and constitutional significance from Kennedy's "divisiveness" argument: either "preferment by race" is constitutional, and whether it is divisive or not is immaterial, or racial preference is unconstitutional, and the policy has to be struck down, divisive or not.[100]

For the sake of completeness, one last attempt to justify strict scrutiny should be mentioned, as potentially helping to clarify the status of race and other "immutable characteristics", under a plausible theory of judicial review of equality-related regulations. In

---

[95] E.g., Sowell, supra note 25.

[96] See similarly Spann, supra note 18 at 238.

[97] *Grutter* supra note 2 at 388 (Kennedy J., dissenting).

[98] Id. at 388.

[99] See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984).

[100] See, similarly, Alexander and Schwarzschild, supra note 18 at 7.

the same year *Grutter* and *Gratz* were decided, the US Supreme Court also handed down the momentous decision, *Lawrence v. Texas*[101], in which it struck down a Texas penal provision prohibiting private homosexual conduct even between consenting adults. In her separate opinion, Justice O'Connor described, in the following way, the determinants of the level of scrutiny under the Equal Protection Clause:

> Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes'. We have consistently held, however, that some objectives, such as 'a bare … desire to harm a politically unpopular group', are not legitimate state interests. When a law exhibits such *a desire to harm a politically unpopular group*, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.[102]

Here is a theory behind stricter scrutiny completely different to, and much more attractive than, a *per se* theory. Even if the first part of the proposition by O'Connor (that deferential scrutiny is justified by the ease of legislative revision of a challenged law) is implausible, as Robert Post has rightly noted,[103] the second part is sensible: a legislative desire to harm an unpopular group calls for a more exacting scrutiny. This stricter scrutiny may, but does not have to, be justified, *á la* John Hart Ely,[104] by the difficulties faced by unpopular minorities in trying to amend statute through normal democratic processes (as "unpopular", they will find it difficult to co-opt other groups to form majority alliances capable of democratic reversals). The ease of legislative reversal is a speculative and *ex-ante* unverifiable criterion, and in any event, why should courts tolerate a blatantly discriminatory provision even if there is some hope that, some time in future, the provision will be struck down? What about the victims who suffer discrimination in the meantime? However, a case for stricter scrutiny can be made here, directly and straightforwardly, by reference to a particularly important right at risk, namely "the right not to be harmed merely because one belongs to an unpopular group".[105] One may claim that, notwithstanding the perspective of legislative reversal, such laws, once passed, must be seen with suspicion and hostility, with deference to lawmakers in these cases being unfounded. But of course, the very exposition of the theory behind this argument for strict judicial review immediately reveals it as being very far from any *per se* theory, such as color blindness, or gender blindness, or any other immutable-characteristic-blindness. The operative words in the conception encapsulated in the last quoted passage from O'Connor are "desire to harm". It is the "desire to harm a politically unpopular group" which calls for a suspicion; not the desire to benefit, nor the desire to classify in any other way which cannot be captured by the word "harm". The purpose of a classification is, under this theory, as important as the nature of the group picked out by the law. It is, therefore, the inverse of any *per se* theory.

---

[101] 539 U.S. 558 (2003).

[102] Id. at 579-580 (citations omitted) (O'Connor, concurring in the judgment) quoting *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) and *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 677, 686 (1973) (emphasis added).

[103] Richard C. Post, "The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law", *Harv. L. Rev*. 117 (2003) 4 at 51.

[104] John Hart Ely, *Democracy and Distrust* (Harvard University Press: Cambridge Mass. 1980).

[105] Post, supra note 103 at 51.

4. RELEVANCE, CIRCULARITY, AND LEVELS OF SCRUTINY

A critique of "*per se*" theories leads to a positive alternative candidate for a test of non-discriminatory classifications. What was wrong with *per se* theory was that, as a matter of principle, it disregarded any link between a classification and its purpose. In contrast, the relevance-oriented theory identifies this link as the main benchmark for judging whether a given classification is discriminatory or not: non-discriminatory classifications are those that differentiate among individuals in terms germane to the acceptable purposes of legislation. Yet the test's apparent simplicity is deceptive. Given inevitable uncertainties about legislation's specific purpose, there is a temptation to infer its objectives from the terms of legislation itself, hence from the classification, in which case the whole exercise becomes circular. Suppose a critic of legislation claims that the classification, *C-1,* is not rationally related to the purpose of the legislation, *P-1*. A supporter of the legislation might respond that it is not the case that *P-1* was the only purpose of the legislation, or even *a* purpose of legislation. After all, legal acts do not always parade their purposes on the face of their texts and, in any event, legal acts usually target a number of purposes, attempting to attain them to varying degree. The very fact that the legislator has used classification *C-1*, the defender of the statute might say, suggests the desire to achieve an aggregate of purposes *P-1*, *P-2* and *P-3*, with *P-2* and *P-3* being in a more satisfactory relationship to *C-1* than *P-1* was. If those purposes are inferred from the classification used by the legislator, there can, however, be no circumstances in which any legislation can ever be criticized as violating the relevance test. As noted by Terrance Sandalow, in a classic article:

> The potential multiplicity of legislative objectives means that it will always be possible to draw from the terms of a statute legislative purposes to which the statutory classification is rationally related. The burdens or benefits created by a statute suggest at the very least a purpose to burden or benefit all those who share the classifying characteristic. The statutory classification must be rationally related to that purpose because the purpose has been derived from the classification.[106]

Schlesinger v. Ballard,[107] a 1974 US Supreme Court decision, usefully illustrates the danger of such circularity, as well as the route to overcoming it. Under challenge was a differential promotion system for men and for women in the United States Navy. More stringent criteria applied to men (a male officer who twice failed to be selected for promotion was subject to mandatory discharge) resulting in different periods of tenure for male and female officers. One male officer challenged this classification as discriminatory. Justice Stewart, writing the majority opinion, disagreed with the petitioner's argument, finding instead, the different situations of male and female officers relevant to the purpose of the statute under challenge. Male and female line officers in the Navy were "*not* similarly situated with respect to opportunities for professional service"[108] because of restrictions on female participation in combat duty. It was, therefore, rational for Congress to believe that "women line officers had less opportunity for promotion than did their male counterparts",[109] and that

---

[106] Terrance Sandalow, "Racial Preferences in Higher Education: Political Responsibility and the Judicial Role", *U. Chi. L. Rev*. 42 (1975): 653-703 at 659-60 (1975). See also, generally, Note, "Legislative Purpose, Rationality, and Equal Protection", *Yale L.J.* 81 (1972) 123 at 128: "It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it".

[107] 419 U.S. 498 (1974).

[108] Id. at 508.

[109] Id. at 508.

more lenient rules of discharge for women were consistent with the goal of creating more fair and equitable programmes of career advancement.[110] Justice Brennan (in a dissent joined by Justices Douglas and Marshall) disagreed. As he complained: "[T]he Court goes far to conjure up a legislative purposes which *may* have underlain the gender-based distinction here attacked".[111] This was unjustified, according to Brennan, as there was "nothing in the statutory scheme or the legislative history to support the supposition that Congress intended . . . to compensate women for other forms of disadvantage visited upon them by the Navy".[112] This neatly illustrates the circularity problem described above: unless the purpose is ascertained independently of the terms of classification, any analysis of the relevance of the classification to its purpose will be circular, and therefore meaningless.

While this is one aspect of disagreement between the majority and the dissent in *Ballard*, there is another, related, dimension, which concerns the standard of scrutiny by which gender-based classifications should be tested. For our purposes, this is an important point, because it indicates a way of overcoming the circularity problem identified above. Stewart's majority opinion in *Ballard* is framed within a simple rationality requirement: it does not explicitly discuss the level of scrutiny, but rather implicitly assumes that all that is required, in order to redeem the classification, is to see whether it is rationally related to a permissible purpose.[113] The dissenters, in contrast, require more. They claim that "a legislative classification that is premised solely upon gender must be subjected to close judicial scrutiny", defined as follows: "Such suspect classifications can be sustained only if the Government demonstrates that the classification serves compelling interests that cannot be otherwise achieved".[114] Heightening the level of scrutiny (in contrast to the "simple" requirement of a classification's relevance to the goal pursued) consists of two steps: a requirement that a purpose pursued by the legislation must be "compelling", rather than merely "permissible"; and a requirement that the classification be a "necessary" way of achieving this purpose (so that the purpose "cannot be otherwise achieved").

This last point embodies a certain over-simplification, however. Identifying a means as "necessary" to attain a particular goal is a shorthand formulation which cannot be taken literally: the class of "necessary" means is dependent upon the identification of alternatives, and yet some alternatives (which do not carry the defect of a measure under scrutiny) may be so outlandish that to cite them as an argument that our measure under scrutiny is not a necessary one (and does not pass the test) would be disingenuous. This is, I believe, what triggered Justice O'Connor's clarification, in *Grutter,* that "[n]arrow tailoring does not require exhaustion of every possible race-neutral alternative", but rather "require[s] serious, good faith consideration of *workable* race-neutral alternatives that will achieve the diversity [of student body] the [U]niversity [of Michigan] seeks".[115] This perfectly reasonable and

---

[110] Id. at 508.

[111] Id. at 511 (Brennan, Douglas and Marshall, JJ., dissenting).

[112] Id. at 511 (footnote omitted). According to one interpretation of *Schlesinger*, the majority simply legitimized the underlying inequality of the combat restrictions; hence, it allowed one inequality (in tenure provisions) to be justified by another (in combat restrictions); *see* Note, "Toward a Redefinition of Sexual Equality", *Harv. L.Rev.* 95 (1981) 487, 496-97.

[113] Stewart says, for example, that in enacting the statute under challenge, Congress "may … quite *rationally* have believed that women line officers had less opportunity for promotion than did their male counterparts". Id. at 508 (emphasis added).

[114] *Id*. at 511 (Brennan, Douglas and Marshall, JJ., dissenting).

[115] *Grutter* supra note 2 at 339, emphasis added.

commonsensical concession undermines the architectural elegance of the necessity requirement, and brings a degree of indeterminacy into the characterisation of a given level of scrutiny as strict or otherwise; it was precisely this aspect that provoked the dissenters' claim in *Grutter* that, "[a]lthough the Court recites the language of our strict scrutiny analysis", it was in fact deploying a more deferential, and much less stringent, standard.[116]

It is worth pausing for a moment over this point, because there is a misleading straightforwardness to the "necessity" scrutiny, whether in the US idiom of strict scrutiny, or in the more European-sounding "proportionality" test. In United States Supreme Court jurisprudence (whose impact has of course radiated out to academic legal theory) both the appeal, and the ambiguity, of "strict scrutiny" depend on the malleability of the notion of "necessity" of means to ends. Many years ago, in a now largely forgotten case on affirmative action, *United States v. Paradise*, Justice O'Connor protested against what she called "a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny".[117] *Paradise* was a case about a court-ordered plan for preferential promotions for African-Americans in the Alabama Department of Public Safety. The District Court had decided that, due to past systematic exclusion of minorities from employment in the Department, one half of all promotions should go to African-Americans if qualified applicants were available; the Supreme Court upheld the plan by six to three, largely on the basis that it served a compelling state interest in remedying past and present discrimination by a specific state actor. Dissenting, Justice O'Connor complained that the District Court had used a quota without considering any alternatives, making it impossible to suggest that this was "necessary". On this basis alone, she concluded that the quota could not survive strict scrutiny (which she sometimes describes with reference to "necessity", and at other points, and somewhat more vaguely, as "narrow tailoring"[118]). Driving home her point, however, she reiterated that, "to survive strict scrutiny, the District Court order must fit with greater precision than any alternative remedy".[119]

Though allegedly "strict", this test is significantly more lenient than the traditional "necessity". It is one thing to say that a classification, in order to survive scrutiny, must be "necessary" to achieve a compelling aim; it is another to say that it must fit the attainment of this aim better than any alternative remedy. The former test allows for trumping of racial classifications even by less precise alternatives, wherever the costs of this diminished "precision" are outweighed by the benefits of not using a racial classification, with all its usual drawbacks. The latter test (of "fitting the aim with greater precision than any alternatives") does not allow for such a calculus: a racial classification will survive strict scrutiny if all the alternatives fit the aim "less precisely". Such a prediction is relatively easy to make if, for instance, "less precisely" means postponement in time, or higher side-effects in terms of under- and over-inclusiveness, or higher costs. Hence, the test of "greater precision", described by O'Connor herself as "strict scrutiny", is in fact substantially different (and much more lenient) than her own test of necessity.

The European tradition of "proportionality" analysis is even better evidence of the malleability and inconclusiveness of the "necessity" criterion. The idiom of proportionality (as a preferred jargon of arguing about the balancing of various rights and other goods when

---

[116] *Grutter* supra note 2 at 380 (Rehnquist, J., dissenting); similarly, id. at 387-88 (Kennedy, J., dissenting); id. at 362 (Thomas, J., dissenting).

[117] *United States v. Paradise*, 480 U.S. 149, 197 (1987) (O'Connor, J., dissenting).

[118] Id. at 201.

[119] Id. at 199.

some rights have to be restricted) is here entangled with the notion of "necessity" more intimately than in the American taxonomy of different levels of scrutiny (which may be seen as separating the notion of necessity from a more lenient notion of relevance). For example, in the case law of the European Court of Human Rights (ECtHR), the requirement of "necessity" contained explicitly in Articles 8-11 of the European Convention on Human Rights (which demands that restrictions on the rights of privacy, of freedom of religion, freedom of expression and freedom of association must be, among other things, "necessary in a democratic society") has actually acquired a meaning synonymous with "proportionality"; or, to put it more precisely, the test of "proportionality" has been found to be an important factor in establishing whether the "necessity" requirement has been met. The ECtHR has advanced, in a number of decisions, the same authoritative interpretation of the Convention's formula "necessary in a democratic society": interference with a right must correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued".[120] As one commentator has noted, "from 'necessity' to proportionality is but a small step"[121] – and one that has been repeatedly taken. Indeed, the notion of "pressing social need" has been authoritatively established as a test for "necessity". Under this interpretation, "necessity" *qua* proportionality is a rather flexible notion that allows for a relatively broad range of measures to be found "necessary" – even if they are not "necessary" in the sense of being "indispensable", or being *sine quae non*. Significantly, at times, the ECtHR jurisprudence has also held "necessity" to be analogous to the requirement that reasons for a restriction be "relevant and sufficient".[122]

On the face of it, this last proposition rests on a confusion: a measure may be relevant (i.e. related to achievement of its aim) and sufficient (that is, once the measure is applied, the aim will be achieved without requirement for further action) and yet not "necessary", because that same aim can be achieved by using some other means. For instance, if we wish to make sure that there are no car-related traffic accidents in our suburb, we may prohibit (and make physically impossible) the entry of cars into the suburb. The measure will be "relevant" (there is a connection between the means and the aim) and "sufficient" (applying, and strictly enforcing it will be enough to achieve the goal) and yet hardly "necessary", in the sense of being *sine qua non*. In turn, if we find that a given measure *is* necessary (on a "but for" test) then it is *ipso facto* proportionate: if a legislator is required to pursue a particular goal, and a measure is "necessary" to achieve that goal, then this measure cannot be found to be disproportionate. Holding any genuinely "necessary" measure disproportionate would amount to disabling legislators from pursuing a goal that they are obliged or entitled to pursue.

Taken on its own, the notion of "relevance" is an extremely rudimentary threshold test which, in itself, hardly does any work at all. As Robert Alexy puts it, the test of relevance (which he translates into English as "suitability"), used by the German Constitutional Court in its three-tiered principle of proportionality,[123] can be conceptualised as a maxim that "excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they were adopted".[124] However, if the measure in question does not promote "any principle or goal" for which it was adopted, then this can be

---

[120] See e.g. *Goodwin v. United Kingdom* 22 E.C.H.R. 123, 143-4 (1996); for discussion see Alastair Mowbray, *Cases and Materials on the European Convention of Human Rights* (Butterworths, London 2001) at 411-2, 448.

[121] Marc-Andre Eissen, quoted by Mowbray, id. at 413.

[122] See P van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (Kluwer Law International: The Hague, 1998) at 81.

[123] The three tiers are: the principles of suitability (relevance), necessity, and proportionality *sensu stricto.*

[124] Robert Alexy, "Constitutional Rights, Balancing, and Rationality", *Ratio Juris* 16 (2003): 131-40 at 135.

seen as so irrational as to defeat the legislative restriction, even without further investigation into how it "obstructs" realisation of any other principles. At the other extremity of the spectrum, the test of "necessity" is very difficult to meet because it involves a counterfactual: namely, an inquiry into whether there are any other measures imaginable, which are less intrusive (or otherwise problematic) than the proposed one, and which would also lead to the constitutionally mandated goal. Theoretically, postulating "necessity" as a criterion for a measure's constitutionality must result in its invalidation, as long as we can plausibly think of some other measures that do not have the defects that triggered our scrutiny in the first place, while *also* attaining the goal pursued by the measure under challenge.

If that were the end of the story, the distinction between "necessity" and "relevance" (or "suitability", "rational basis" etc.) scrutiny would be sharp, and any blurring of the lines between these types would be a sign of conceptual confusion. But it is not, and the distinction sketched in the previous paragraph is highly pedantic, and ultimately useless. It does not take into account the "efficiency" of the attainment of the goal – understood as the degree of achievement of that goal, relative to the extent of any negative side effects (defined in terms *other* than the failure to achieve fully the goal). Suppose that a measure under challenge, *M-1*, which has a defect (for instance, in restricting a constitutional right *R-1*), is adopted by the legislator in order to achieve goal *G*. Under a pedantic reading of the necessity test, *M-1* is unconstitutional if we can plausibly think of another measure, *M-2*, that is also capable of achieving *G* but that does not restrict (or restricts to a lesser extent) *R-1*. But what if *M-2* achieves *G* to a lesser extent than *M-1* does, and/or produces higher negative side effects (in terms other than the restriction of *R-1*) that are also constitutionally relevant? It is this situation which seems to be well captured by O'Connor's "greater precision than any alternative remedy" requirement.

The two possible scenarios just depicted – relative under-attainment of the pursued goal, and relative excess of negative side-effects – may be considered as two *different* situations, raising somewhat different problems from the point of view of means-ends efficiency.[125] For our purposes, however, they can be collapsed into a single net inefficiency variable. Our question is this: is it enough, to dub a measure "necessary", that a measure is the most net-efficient (i.e. compared to other imaginable measures leading to the same goal)? If the answer is yes, then the test of necessity is really the one of relative efficiency, and the use of the word "necessity" is misleading and redundant; necessity is watered down, and the architectural elegance of the taxonomy of different levels of scrutiny (with a sharp line separating necessity from relevance) is eroded. If the answer is no, the price to pay for the integrity of the taxonomy of levels of scrutiny is rather high: the test is rendered pedantic, divorced from reality, and virtually unattainable (because we can almost always identify another measure leading to this goal, if the relative under-attainment or side effects do not disqualify a new measure from defeating the one under challenge).

The lesson which can be drawn from this analysis is *not* that the use of the "necessity" requirement in the scrutiny of law is meaningless. Rather, the "necessity" test must be seen for what it really is: a shorthand for something that is less than necessity, in the literal sense of the word, and which is, rather, located somewhere on a spectrum ranging from mild efficiency, at one end, to strict necessity at the other. Under mild necessity, a challenged measure will be redeemed if it is even marginally superior over alternative measures, in terms of degree of attainment of the goal, and lower negative side effects; whereas under strict necessity, the availability of any feasible alternative measure, no matter what its costs in terms

[125] For an analysis considering these two situations separately, see Wojciech Sadurski, *Rights before Courts* (Springer: Dordrecht, 2005) at 269-70.

of under-attainment or side effects, amounts to a disqualification. The foregoing analysis also demonstrates the malleability of the "necessity" requirement, hence also of the taxonomy of levels of scrutiny. But malleability is not the same as meaninglessness, and from now on in this article I will proceed as if the different levels of scrutiny can be meaningfully distinguished from each other (i.e. as if "necessity" *was* meaningfully different from mere relevance), subject to the caveats just made.

Consequently, in what follows, I will employ a highly stylized, simplified distinction between "strict" and "lenient" scrutiny. In doing so, I take my cues from the tiers-of-scrutiny analysis of the US Supreme Court, and cut across the increasingly complex – at times confusing – scholarly and judicial controversies surrounding two questions: first, of the precise meaning of any of the three tests – rational-basis,[126] intermediate,[127] and strict[128]; and second, of the assignment of particular types of classification to any of these tests. While these issues go beyond the subject-matter of this article, a key point is that the very heightening of the level of scrutiny (whether to an "intermediate" or to the "highest" level) can be seen as a way of overcoming the circularity problem discerned above, at the beginning of this section of the article. To explain why, it is useful to simplify the taxonomy of levels of scrutiny, reducing it to two extreme instances: lenient scrutiny (also called rational-basis scrutiny) and strict scrutiny. The argument about strictness also applies to an "intermediate" level, but with correspondingly less force, depending on the distance separating "intermediate" from "strict" scrutiny.

Beforehand, however, it is important briefly to canvass the *ramifications* of both ideal types of scrutiny of legal classifications. They may be roughly described in the following way. First, lenient scrutiny expresses a low degree of suspicion by the scrutinizer (a constitutional judge, a citizen-critic, a legal scholar etc.) that the classification gives effect to invidious discrimination; strict scrutiny, in contrast, is triggered by heightened suspicion that the classification in question is discriminatory. This is a fundamental point, discussed in greater detail in Part 5 of this article. Second, whereas lenient scrutiny is likely to uphold legislation containing a classification under challenge, strict scrutiny is likely to invalidate legislation as discriminatory. Third, rational-basis scrutiny displays a high tolerance for inevitable under- and over-inclusiveness of legislation. In other words, a relatively broad range of cases which are not captured by legislation and yet which should be captured by it because of its purpose, and, conversely, a relatively broad range of cases which fall under a classificatory scheme even though they should be left out, do not necessarily defeat the scheme as discriminatory. In contrast, strict scrutiny, in its extreme version, permits no under- or over-inclusion whatsoever: all, and only those, who are similarly situated with respect to the purpose of the law should be included in the category identified. Fourth and last, under lenient scrutiny, the burden of argument rests on the critic, who must provide compelling arguments that a classification is discriminatory; under strict scrutiny, the onus shifts onto the legislator, who needs to prove the classification non-discriminatory.

As I forewarned, this presentation simplifies and schematizes the contrast between "lenient" (or rational-basis) and "strict" scrutiny – concepts which I am using, not as terms of art with specific technical meanings in the 14th Amendment jurisprudence but rather as broad

[126] A rational-basis scrutiny examines whether a classification is *rationally* related to a *legitimate* state purpose; it is usually applicable to ordinary economic and social classifications.

[127] The "intermediate test" is usually characterized as requiring that a classification must serve *important* governmental objectives, and must also be *substantially* related to the achievement of these objectives.

[128] "Strict test" usually means that the classification must be shown to be a necessary means to a compelling or overriding state interest.

descriptions of two opposite ideal types of scrutiny of legal classification applicable within any legal system that entrenches a principle of equality in the law. The task now is to show how the move from "lenient" to "strict" scrutiny, with all the ramifications described above, helps overcome the circularity problem immanent in relevance theory. Under lenient scrutiny, all that is required is a *permissible* purpose; strictness of scrutiny consists of restricting the range of purposes which may figure in the justification of a classification by adding the requirement that they should be of compelling importance. To recall, the problem of circularity arose in the first place from the fact that the classification will always be relevant to the purpose, if the purpose has been inferred from the terms of the classification itself.[129] Manufacturing a purpose, *ex post fact*o, becomes possible where the criteria for acceptability of purposes are lax. To be sure, *some* purposes will still be disqualified under the "permissibility" criterion. But it is unlikely that the legislator will frequently pursue an impermissible purpose i.e. one forbidden by explicit constitutional rules. Only rarely has the US Supreme Court struck down legislation on grounds of impermissible purpose, for example a purpose informed by hostility to a particular racial group.[130] It has been observed that "the requirement of permissibility seems little more than a caveat intended to make the formula [of the equal protection] logically secure against the assertion that 'this classification is valid because it is rationally related to the purpose of promoting inequality'".[131] But avoiding such an eccentric "defence" of discrimination is, arguably, a marginal, and atypical task in the scrutiny of legal classification. Much more usual is its use in resisting the manufacture of purposes which *are* permissible (in the sense of not violating any specific constitutional prohibition against the governmental purposes being pursued) and which have yet been inferred from the terms of the classification, rather than from external sources. This is precisely the nature of Brennan's objection in *Schlesinger v. Ballard*, described above.[132] In these circumstances, the requirement of "permissibility" is incapable of avoiding the danger of circularity; however, the problem can be remedied by tightening up the criteria for "purpose" which may figure in the scrutiny of relevance. If not just *any* permissible purpose will do, the possibilities for the scrutinizer to manufacture purpose are accordingly reduced. At the limits, the range of particularly "important" or "compelling" purposes is very narrow; so are the opportunities for a defender of the legislation to redeem it, by inferring those purposes from the terms of a classification itself. If classification *C-1* does not lead rationally to the purpose *P-1,* but is defended, instead, on grounds of the purpose *P-2,* which is more germane to the terms of classification, the latter defence becomes more difficult if we insist, in addition to relevance, that the purpose *P-2* is important, and not just "permissible".

As this indicates, and as stated earlier, one useful way of looking at levels of scrutiny is through the lens of the degree of tolerance for over- and under-inclusion. Suppose a legislator draws a classification, *C,* related to the purpose *P*; as a result of the classification, all members of the group *X* are subject to conferral of a particular burden or benefit. Inevitably, there will be some members of *X* who, while suffering the burden or enjoying the benefit, will not contribute to attainment of purpose *P*. This is a case of overinclusion. Conversely, there will be some non-members of *X* who will escape the burden or miss out on the benefit in question, even though their being so advantaged or disadvantaged would be

[129] See text accompanying notes 106-114 above.

[130] See, e.g., *Yic Wo. v. Hopkins*, 118 U.S. 356 (1886) (refusing laundry licenses to Chinese people because of racial hostility deemed impermissible and therefore in violation of the equal protection clause).

[131] Supra note 81 at 1081.

[132] See text accompanying notes 111-112 above.

instrumental to *P*. This is a case of underinclusion. Overinclusion and underinclusion are inevitable consequences of regulating social affairs by rules rather than on a case-by-case basis,because rules' criteria never fully correlate with the justifying bases for the classifications they make.[133] The discrepancy between a classification's justifying basis, and its criterion, leads to the twin phenomena of under- and over-inclusion.

Suppose you are a legislator who is to determine criteria for eligibility for drivers' licenses, and one of your key purposes is to maximize road safety. You decide that one criterion will be age: people under 18 (for the sake of argument) are not eligible. There is an obvious discrepancy between the justifying basis (picking out all and only those who promise to be good and responsible drivers) and the basis of classification. But there is only so much that we can do to individualize criteria of classification, without incurring enormous administrative costs, on one side, and enhancing the discretionary powers of those responsible for deciding about whom to award licenses, on the other. For this reason, in many cases we are prepared to live with the inevitable over- and under-inclusiveness of rules, considering this as a cost that is outweighed by the benefits of a lower administrative burden, and a lesser risk of arbitrariness stemming from inflated administrative discretion.

In different spheres of legal regulation we are prepared to accept varying degrees of over- and under-inclusion: the higher the level of scrutiny of the relationship between a classification and its purpose, the lower is our tolerance for over- and under-inclusion. It is also important to emphasize that, in particular circumstances, over- and under-inclusion may pose qualitatively different problems, warranting different levels of toleration. This largely depends on whether a given regulation imposes a burden or confers a benefit on a group. Offhand, it would seem that, in the case of burdens, overinclusion is less tolerable, while in the case of the benefits, underinclusion seems more objectionable. But this is a simplification, because the conferral of a benefit on a group can be seen as a relative burden to those outside the group, so that overinclusion may be seen to be grossly unfair to those others. Consider, again, *Fullilove v. Klutznick.*[134] Special preferences in public contracts accorded to minority business enterprises ("MBEs") were justified on the basis of compensating for past barriers to competitive access.[135] But of course, not all MBEs had suffered such discrimination, and not only MBEs suffered it. The lack of a complete correlation between the justifying basis and the classification criterion (MBEs) triggers under- and over-inclusion. In his plurality opinion, Chief Justice Burger anticipated, and refuted, both objections of under- and over-inclusion. As to the former, his response was to invoke a "one thing at a time" theory: "a legislator may take one step at a time to remedy only part of a broader problem . . . ."[136] This sounds convincing: a legislator should not be disabled from addressing a particularly important *part* of a broader problem because not the *whole* problem is thereby addressed. It has been stated that "the legislature is free to remedy parts of a mischief or to recognize degrees of evil and to strike at the harm where it thinks it most acute".[137] As to overinclusion (which he characterizes as the objection that the classification "bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination"[138]) Burger

[133] *See* Frederick Schauer*, Playing by the Rules* (Oxford University Press: New York 1991) at 31-34.

[134] 448 U.S. 448 (1980).

[135] Id. at 477-78.

[136] Id. at 485.

[137] Note, supra note 81, at 1084 (footnote omitted).

[138] *Fullilove*, supra note 56 at 486.

responds by describing the provisions for waiver and exemptions in the administrative scheme for MBEs.[139] Burger notes that that statute envisages administrative scrutiny, to identify and eliminate from participation in the scheme those MBEs "who are not '*bona fide'* within the regulations and guidelines; for example, spurious minority-front entities can be exposed".[140] This would leave the problem of those MBEs which are not "spurious", and yet which had not suffered past discrimination. In response to this aspect, Burger notes that "waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i e.* a price not attributable to the present effects of past discrimination".[141]

Burger's answer indicates that, even in the context of benefits, overinclusion may be treated as equally troublesome as underinclusion. Indeed, in *Fullilove,* the answer to the problem of overinclusion is more consistent with the call for a higher "fit" of classification to purpose than is the answer to the underinclusion problem. Underinclusion is dealt with by an appeal to a "one thing at a time" theory, an admittedly unsatisfactory answer under any scrutiny requirement stricter than the most lenient one. How do we know that the legislator, in some undefined future, will address the cases presently left out? As overinclusion seems successfully remedied by the combined devices of exemption and waiver, as described by Burger, there is a certain asymmetry between the two.

The final task before us now is to see how heightening scrutiny addresses the initial problem of possible circularity in the relevance tests. It may be recalled, that under the simple relevance model, circularity occurred because purpose was inferred from the classification itself, and such purpose reflected could not fail to be attainable by that classification. But a "perfect fit" requirement (no over- and under-inclusion) reduces the possibility of *ex post facto* rationalizations of the classification. The reasons why are best explained by John Hart Ely and so important that he deserves to be quoted at length:

> The goal the classification in issue is likely to fit most closely, obviously, is the goal the legislators actually had in mind. . . . [W]here the requirement is simply the Court's standard call for a "rational" relation between classification and the goal, [the fact that the goal that fits the classification best is unconstitutional] will seldom matter: even if the goal the classification fits best is disabled from invocation, there will likely be other permissible goals whose relation to the classification is sufficiently close to be called rational. The "special scrutiny" . . . , however, insists that the classification in issue fit the goal invoked in its defense more closely that any alternative classification would. There is only one goal the classification is likely to fit *that* closely, however, and that is the goal the legislatures actually had in mind.[142]

We now see why, as scrutiny of fit between classification and purpose becomes stricter, the more difficult is the "manufacturing" of purposes and the attempt to establish a classification's relevance to those purposes. As Ely shows, the application of stringent scrutiny can be seen as a way of discerning *actual* legislative motives. If those real purposes are improper, they taint the legislation as discriminatory. But if the classification can be seen

---

[139] *Id*. at 486-89.

[140] Id. at 487-88.

[141] Id. at 488 (references omitted).

[142] Ely, supra note 104 at 145-46 (1980) (endnotes omitted).

as related to some proper purposes, and we insist upon a perfect fit, we will likely avoid the dangers of *ex post facto* reconstruction of purposes that renders the whole exercise circular.

5. SUSPECTNESS AND DISCRIMINATION

As should by now be clear, a decisive step in the argument about discrimination is the determination of a proper level of scrutiny of the relationship between a classification and its purpose, and of the importance of the purpose itself. One and the same classification is likely to be validated as nondiscriminatory under a lenient scrutiny and condemned as discriminatory under a more demanding test. To use an example already enlisted above, the age threshold for eligibility for a driver's license will probably pass (in the eyes of most people) lenient scrutiny in which a relatively large incidence of over- and under-inclusion does not matter, but will fail a test intolerant of substantial under- and over-inclusiveness. An apparently preliminary decision about the character of the test is therefore largely decisive of the final result.

What considerations should inform decisions about the "strictness" of scrutiny? American 14th Amendment jurisprudence employs, amongst other terms of art, a concept of "suspect classifications" i.e. classifications which can be upheld only if shown to be necessary to accomplish a compelling state interest.[143] I propose to use this notion in a conventional, rather than a technical sense. "Suspicion" is the right word in this context. We normally "suspect" when we have doubts about something, while not being absolutely sure. For this reason, suspicion is an attitude well suited to the use of strict scrutiny: if we had *no doubts* about legislation, we would settle for a simple, lenient scrutiny; on the other hand, if we *knew* legislation to be discriminatory, no scrutiny would be needed, and we might as well reach directly for our conclusion. However, it is somewhat glib to say that suspicion suffices to warrant strict scrutiny, because we know that the decision to employ strict scrutiny is, more often than not, fatal to the classification in question. So we need more than mere "suspicion"; we need at least some rough contours of what makes the suspicion justified. In turn, this can be spelled out only if we have some general theory about what constitutes "discrimination"; we cannot describe our grounds of "suspicion" unless we have at least some preliminary ideas about what constitutes discrimination in the first place.

One could perhaps protest, at this stage, that the whole framework of the relevance test turns out to be redundant. For the relevance test operates using varying levels of scrutiny; the decision about scrutiny is triggered by a degree of suspicion; and now it is claimed that the suspicion is justified, in so far as it is informed by our theory about the nature of discrimination. But if we offer such a theory, what is the point of the whole framework of scrutiny of the relationship of the classification and its goal? We might just as well, this argument would go, directly test a given classification by the lights of our criteria of discrimination. But this objection fails to recognize that the "theory" of discrimination required as a ground for ascertaining the level of "suspicion" would amount to no more than a pre-theoretical judgment of what comprises the nature of discrimination. This is much too vague to serve as a standard of discriminatory classifications; being merely a belief about what renders a given treatment discriminatory; about what taints our treatment of others as

[143] On racial classifications as suspect, see *inter alia Korematsu v. United States*, 323 U.S. 214 (1944); McLaughlin v. Florida, 379 U.S. 184 (1964); *Fullilove* supra note 56 at 508 (Powell, J., concurring). Race is not the only suspect basis of classification in the United States; alienage and national origin would be suspect (see, respectively, *Graham v. Richardson*, 403 U.S. 365, 372 (1971) and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) and, under certain interpretations, sex, although the Supreme Court itself has adopted an intermediary standard for sex-based classifications, see *Craig v. Boren*, 429 U.S. 190 (1976).

unequal; about what is the true evil targeted by the anti-discrimination principle. In order to be applied as a standard for discriminatory classification this intuitive judgment must be translated into something more precise and capable of application.

Earlier in this article, I rejected two possible pre-theoretical judgments about the nature of discrimination: that it consists of *any* classification of citizens by legal means, and that it consists of the classification of citizens by legal means along lines determined by certain "impermissible" characteristics, in particular, by "immutable characteristics", such as race. An alternative approach discerns the nature of discrimination in the impermissible *motives* for imposing burdens (or conferring benefits) upon a particular class. There are classifications that may be irrational, but which are not triggered by any wrongful motive; these can be seen as errors of judgment on the part of the legislator, and should be detected even by a rational-basis scrutiny, without any need for suspicion-based strict scrutiny. To set the level of eligibility for a driver's license at the age of thirty would most probably be considered irrational, producing excessive underinclusion intolerable even under a very lenient scrutiny. Hence, any further move towards strict scrutiny, and the associated suspicion-triggered test, would be unnecessary. But when we reflect upon paradigmatically invidious discriminations historically and at the present time, we do not usually come up with examples such as this. Rather, we think immediately about racist, sexist, homophobic, or religious discriminations that cannot simply be characterized as "error in legislative judgment": they are intentional evils, not mistakes. We consider them to be wrong because they stem from bad faith motives, not from merely mistaken judgments about a classification's rationality; and we believe that they are triggered by prejudice, hostility, dislike, self-imposed ignorance, unfair stereotyping, etc. Tom Campbell has captured this well in asserting: "Discrimination is the perpetration of unjustifiable inequality in consequence of bigotry". [144]

A motive-based view of the nature of discrimination resonates with a broader approach in constitutional theory which deems laws unconstitutional in so far they are based on wrongful motives; the benchmark of unconstitutionality is within the area of motives rather than external effects. [145] This approach has been propounded in many areas of constitutional jurisprudence other than constitutional equality, specifically in the fields of freedom of speech[146] and freedom of religion.[147] But we need not be concerned here with the broader theory of unconstitutionality. All that is relevant is whether the motive-based view properly captures strong intuitive convictions about the sources of the wrongness of discrimination. And, on the basis of my perception of what is usually seen as being *really* wrong about some unquestionably invidious discriminations, I believe that the response given by a motive-based view is a persuasive one. Consider, for example, the following argument in favour of a deferential scrutiny of legislation: "[T]he distinctive legislative response . . . to the plight of those who are mentally retarded demonstrates that . . . the lawmakers have been addressing their difficulties in a manner that *belies a continuing antipathy or prejudice* and

---

[144] Campbell, *supra* note 26 at 163. *See also* Ronald Dworkin, *A Matter of Principle* (Harvard University Press: Cambridge Mass., 1985) at 302, 314, 330; Dworkin*, Law's Empire* supra note 30 at 384, 396.

[145] On unconstitutionality based on impermissible legislative purposes, *see* Richard H. Fallon, Jr., "The Supreme Court, 1996 Term – Foreword: Implementing the Constitution", *Harv. L.Rev*. 111 (1997): 54-152 at 90-102.

[146] See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

[147] For example, one of the three prongs of the test for the establishment of religion is whether a statute had a secular legislative purpose, *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

corresponding need for more intrusive oversight by the judiciary".[148] By clear implication, suspicion of "antipathy or prejudice" would trigger more "intrusive" scrutiny of legislation.

Like any motive-related theory of statutory unconstitutionality, however, this faces a fundamental problem: how to ascertain the legislator's *true* motives? Second-guessing reasons for action, including that of law-making, is an extremely risky enterprise, and arguments that the very attempt to discover true legislative motives is either theoretically incoherent,[149] or practically impossible,[150] are legion. But these arguments have also been exposed to important rebuttals.[151] As far as our particular topic is concerned, it would fly in the face of common sense to say, for example, that in the case of racial segregation on public transport, we are fundamentally incapable of deciding whether a regulation was triggered by racist animus, hostility and prejudice, or by some more benign motive, such as the aesthetic value of having people of different races sit together in different sections of a train.[152] As Richard Fallon has observed, "In light of history and familiar psychology . . . some types of actions – as identified either by their contents or their effects – can be seen in the aggregate as likely to reflect forbidden purposes".[153] However, not all cases are as clear-cut. Truly "hard cases" will call for the employment, in our decisions about the level of scrutiny of the classification, of a working theory of discrimination, for example, race-conscious preferential university admission or protective labour legislation for women, etc. To say, simply, that strict scrutiny is justified whenever any such classification appears to be based on prejudice, hostility, or other invidious motives would leave us with a standard almost impossible to apply in concrete cases. We need more objective *indicia* of wrongful motives in order to avoid the need to second-guess the true motives moving legislators to enact a particular regulation.[154]

Before I offer such indicia of suspicion that invidious discrimination is at work, it is useful to explain the methodology for identifying such indicia. The method is the same as in the case of identifying the motive-based view of discrimination as plausible. It can now be described more abstractly: it is akin to the method of "reflective equilibrium", or any other coherence-based theory of moral argument. "Reflective equilibrium", in Rawls's explanation, consists of achieving rough coherence between our "considered convictions of justice" (understood as specific and intuitive moral responses to situations lending themselves to evaluations in terms of justice) and our "principles of justice" (understood as general and

---

[148] *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 443 (1985) (emphasis added).

[149] See, e.g., Dworkin, *Law's Empire*, supra note at 313-24.

[150] See, e.g. *Edwards v. Aguillard*, 482 U.S. 578, 636-39 (1986) (Scalia, J., dissenting).

[151] See, e.g., Jeffrey Goldsworthy, "Originalism in Constitutional Interpretation", 25 *Federal L. Rev*. 25 (1997) 1.

[152] This paraphrases a hypothetical example of Paul Brest's, about a school principal "who seats the blacks on one side of the stage at the graduation ceremony and the whites on the other, and defends it in aesthetic terms", Ely, supra note 104 at 148, summarizing the argument in Paul Brest, *Processes of Constitutional Decision-Making* (Little, Brown, 1975) at 489.

[153] Fallon, supra note 145 at 95 (footnote omitted).

[154] This approach resonates with the view of Tom Campbell, who contrasts "moral and political analysis" of discrimination based on a two-tiered criterion ("requiring the operation of prejudice and resultant detriment") with, on the other hand, "legal definitions of unlawful discrimination", which "should standardly omit the elements of motive or origin of the unlawful acts. . . .", Campbell, *supra* note 26 at 154-55. The main difference between our approaches is that Campbell would "substitute specifications of the groups or types of person who are to be protected. . . .", id. at 155, while I propose to use relatively "objective" *indicia* to test a suspicion that the law had indeed been triggered by prejudicial (or other wrongful) motives.

abstract moral maxims).[155] The general underlying view is that we all hold certain moral beliefs of different levels of generality, and we hold them with different strengths of conviction. Rawls's methodology of "reflective equilibrium" consists of using those judgments which we hold with the greatest force of conviction as our "provisional fixed points", and then building on this basis a coherent set of both general, and specific, moral beliefs and judgments, if necessary, by altering the initial "provisional" starting points. This methodology seems to be particularly well-suited to our purposes. Remember, we need to identify cases in which our initial "suspicion" of discrimination is appropriate, and in which a stricter than usual scrutiny of relevance needs to be undertaken. This means that, by the very nature of the exercise, we deal with "hard cases" when we are of two minds about whether the classification is indeed discriminatory: otherwise we would not be talking about "suspicion" but about certainty. Reflective equilibrium is designed precisely to test those "hard cases" (as Rawls says: "where our present judgments are in doubt and given with hesitation"[156]) by an appeal to our fixed moral points (in Rawls's words, those "judgments . . . which we now make intuitively and in which we have the greatest confidence").[157] In the area of anti-discrimination law, many of us are relatively uncertain about whether remedial racial preferences, or protective bans upon the employment of women in some positions, or the exclusion of women from active combat duty are discriminatory or not. Furthermore, even if some of us have strong views about these matters, we face disagreement between rational people arguing in good faith about the acceptability of relevant regulations. But we do not have similar doubts, and we do not face similar disagreements, concerning, for example, whether racial segregation in public transport, refusal to grant voting rights to women, or religious tests for public office are wrong. The point is thus to elaborate the test of prejudice, hostility and other wrongful motives, using the latter (unquestionable) cases of discrimination as a starting point, so as then to be able to apply them to those moral disagreements and dilemmas actually faced by our societies.

Here I wish to offer three *indicia* of wrongful motivations, identified in such a fashion, through a "reflective equilibrium" process. First, it is intuitively plausible to say that, historically, invidious discrimination has usually been a product of action by a politically powerful group against those unrepresented (or inadequately represented) in the political and legislative process. Hence, the burdens imposed by a majority (in a democratic system), or by a political elite, upon a minority or upon an unrepresented group, raise immediate suspicion of activation by invidious motives. In contrast, this suspicion is not warranted when a legislator grants *benefits* to a group which is beyond, or at the margin of, the political process, while burdens of the new regulation are to be borne by the majority whom the legislator represents. As said famously by Judge J. Skelly Wright, "when a decision maker chooses to disadvantage members *of his own* racial or ethnic group, it may hardly be supposed that he is acting out of prejudice, ignorance, or hostility. . . . When the majority group acts to disadvantage itself for the benefit of the minority, there should be a strong presumption of legality".[158] And as stated earlier, in similar vein, by John Hart Ely: "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being

[155] Rawls, supra note 27 at 19-20.

[156] Id. at 19.

[157] Id. at 19.

[158] J. Skelly Wright, "Color-Blind Theories and Color Conscious Remedies", *U. Chi. L. Rev*. 47 (1980) 213, 234-35 (footnotes omitted).

unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."[159]

The second ground for suspicion that a classification is motivated by hostility or prejudice is that it has the effect of perpetrating, strengthening or freezing an existing pattern of disadvantage. One feature of discriminatory regulations has usually been that they, so to speak, add insult to injury, in petrifying the existing structure of social burdens and disadvantages.[160] In the American equal-protection doctrine, this test is reflected in the concept of "discrete and insular minorities"[161]: if the group that bears the burden of a regulation can be so characterized, there is a justified fear that the burden will exacerbate existing disadvantages. That fear is greatly allayed, on the other hand, if a group burdened by a regulation matches the description in *San Antonio Independent School Dist. v. Rodriguez*[162]: "the class is *not* saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process".[163] A broadly similar insight is expressed in Justice Ginsburg's dissent, in *Gratz,* where she mentions "[a]ctions designed to burden groups *long denied full citizenship stature*"[164] as requiring especially careful judicial scrutiny. We may conclude, that in cases where the burden of a particular regulation falls *un*evenly on different groups, burdens borne by a group which is generally disadvantaged and traditionally worse-off, raise much higher suspicions of prejudice or hostility than burdens suffered by the traditionally privileged.

The third indicium of suspicion is linked to the stigmatizing effect of the discrimination. One of the most powerful effects of unquestionably invidious discrimination is that, in addition to imposing disadvantage upon a typically already disadvantaged group, it also fosters a sense of the group's inferiority *vis-a-vis* the rest of the community.[165] Stigmatization may (and usually does) work in both ways: reinforcing a sense of inferiority on the part of victims, and confirming grounds for contempt towards victims in the eyes of

---

[159] John Hart Ely, "The Constitutionality of Reverse Racial Discrimination", *U. Chi. L. Rev*. 41 (1974) 723, 735.

[160] Frank Michelman suggests that one of the characteristics of "invidious" discrimination is "a high degree of adaptation to uses which are oppressive in the sense of *systematic* and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence", Frank I. Michelman, "The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment", *Harv. L. Rev*. 83 (1969) 7, 20 (emphasis added).

[161] See *United States v. Carolene Products Co*., 304 U.S. 144, 152 n.4 (1938): "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry". The concept of "discrete and insular minorities" has been invoked with the aim of applying an intermediate, rather than strict, judicial scrutiny of benign racial classification, see *Bakke*, supra note 1 at 361-62 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part). It should, though, be noted that this is not a unanimously accepted view, see id. at 290 (Powell, J., delivering the judgment of the Court). See, generally, Wojciech Sadurski, "Judicial Protection of Minorities: The Lessons of Footnote Four", *Anglo-Amer. L.Rev*. 17 (1988): 163-181 (1988).

[162] 411 U.S. 1 (1973).

[163] Id. at 28, emphasis added.

[164] *Gratz* supra note 3 at 301 (Ginsburg J., dissenting) (emphasis added).

[165] "The distinction between discrimination against blacks and discrimination against whites is that the former is part of a system that stigmatizes the group and treats its members as inferiors, and the latter is not", Judith A. Baer, *Equality Under the Constitution* (Cornell University Press: Ithaca 1983) at 139. See also *Bakke*, supra note 1 at 357-58 (Brennan, White, Blackmun, Marshall, JJ., concurring in part and dissenting in part).

perpetrators. Discrimination is, after all, the end result of a process whereby external differences (in race, class, religion) are transformed into differences of value, or worth, of particular groups. Perhaps discrimination's most invidious effect is reflecting and strengthening stereotypes and prejudices against a group as a whole; so that it is a legal weapon in the service of an irrational hatred. The International Convention on the Elimination of All Forms of Racial Discrimination, in its Preamble, links racial discrimination to "doctrine[s] of superiority based on racial differentiation", which it describes as "scientifically false, morally condemnable, socially unjust and dangerous".[166]As the social scientist who has given the most illuminating account of the "stigma" phenomenon has put it:

> By definition ... we believe the person with a stigma is not quite human. On this assumption we exercise varieties of discrimination, through which we effectively, if often unthinkingly, reduce his life chances. We construct a stigma theory, an ideology to explain his inferiority and account for the danger he represents, sometimes rationalizing an animosity based on other differences, such as those of social class.[167]

Clearly, the stigmatizing effect is one of the major objects of attack by anti-discrimination law.[168] The landmark decision in the United States, *Brown v. Board of Education,*[169] invalidated school segregation on the ground that it "generates a feeling of inferiority as to [African-Americans'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone".[170] Racial stigma was characterized movingly by Brennan in his concurrence in *Bakke*, by contrasting it to an effect of remedial affirmative action upon a non-member of a preferred minority:

> [Bakke was not] stamped as inferior by the Medical School's rejection of him. . . . [T]here is absolutely no basis for concluding that Bakke's rejection as a result of [the University's] use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in Brown I would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color.[171]

We now have three indicia of reasonable suspicion that a classification is motivated by wrongful reasons, such as hostility or prejudice: the fact that the regulation burdens a politically powerless group (or at least, a group underrepresented in the lawmaking process); the fact that a regulation contributes to, or freezes, the existing pattern of social disadvantage; and that the burdens inflicted upon a target-group by a regulation in question have a

---

[166] International Convention on the Elimination of All Forms of Racial Discrimination (1965), Preamble.

[167] Erving Goffman, *Stigma* (Simon & Schuster: New York 1963) at 15 (footnote omitted). Goffman develops his account around stigmas related to physical disabilities, but it applies equally well to racial, religious and other stigmas as well.

[168] *See* Note, supra note 81 at 1127.

[169] 347 U.S. 483 (1954).

[170] Id. at 494. See also *Bakke*, supra note 1 at 401: "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by law" (Marshall, J., dissenting in part and concurring in part).

[171] *Bakke* supra note 1 at 375 (Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

stigmatizing effect. Arguably, these do not amount to a fully "objective" test, and people may still disagree whether a given regulation matches any of these three conditions. Nonetheless, these indicia are certainly much less subjective, vague and indeterminate than a mere criterion of prejudice or hostility. Therefore, they lend themselves better to a *working* theory of discrimination which can be adopted by people who otherwise disagree about their fundamental values, such as justice.

Precisely because each of these three *indicia* allows for judgments of degree (which is why there reasonable disagreements may occur, concerning whether a particular regulation matches any one of them), it is unnecessary to decide, in abstract terms, whether they should all be activated, or whether one is enough, to subject a given regulation to a heightened scrutiny. If there is a very high correlation between a given regulation, and only one indicium, this would probably be sufficient to warrant stricter than usual scrutiny. But the presence of two, or all three, in a given regulation, certainly strengthens the case for strict scrutiny. The set of three together should be considered, not as a strict algorithm to detect discrimination, but rather as a translation of a broad and vague motive-based view into something more determinate and usable. In any event, it is rather clear that the three indicia are interrelated. It is also important to remember that, even if all are present, it will not be the end of the story; this only comprises a sufficient reason to subject a regulation displaying these characteristics to strict scrutiny. Ultimately, a discriminatory classification may pass this test[172]; arguably, however, this will be a rare and unusual outcome. A telling fact is that the recent *Grutter* decision, with which we began this article, was only the second case in the history of the United States Supreme Court's equal protection jurisprudence in which a racial classification scheme was found to pass the test of strict scrutiny![173]

Just as it is feasible (though not very likely) that a legal classification will *pass* a strict test, so it is feasible (though perhaps equally unlikely) that a legal classification will *fail* a lenient, rational-basis test. It is not impossible to think of examples of classifications which do not raise any suspicions that they were motivated by prejudice, hatred or stereotyping, and where none of the three *indicia* of "suspectness" can be detected, and yet which are so "off the mark", as far as the relationship between the classification and its purpose is concerned, that they have to be disqualified as discriminatory. There can be discrimination which does not match the paradigm cases of invidious discrimination which we know from history, but which, rather, does result from fundamental errors of legislative judgment about the relevance of the means to the ends. Classifications based on such mistaken judgments are discriminatory but we do not need to engage any special moral insight in making this statement; those cases of discrimination can be routinely picked up with the use of simple, lenient scrutiny, which calls for the rational relationship of classification to its purpose.

CONCLUSIONS

Legal equality is a particularly troublesome ideal: it is at the same time non-negotiable (occupying a position lexically prior to other legal ideals shared by its proponents) and

[172] In *Fullilove v. Klutznik*, the plurality opinion written by Chief Justice Burger mentions, *obiter*, that the classification under challenge (i.e. special set aside contracts for minority business enterprises) "would survive judicial review under either 'test' articulated in the several Bakke opinions", supra note 56 at 492, that is, also a strict test, compare *Bakke*, supra note 1 at 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination") and id. at 299 (racial and ethnic classification must be "precisely tailored to serve a compelling governmental interest").

[173] The first was the now discredited *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Court for the first time established such a test for racial classifications, upholding the exclusion of Americans of Japanese extraction living in the West Coast from their homes in the time of perceived danger of Japanese invasion.

fundamentally ambiguous. The idea that a regime of legal equality should minimize, and ideally avoid altogether, classifying individuals by means of legal rules is neither plausible nor attractive; a truly difficult task before legal theory is therefore to coin a test for non-discriminatory classifications. The test itself must meet, minimally, two conditions: it must avoid collapsing into substantive, global judgments of justice "everything considered", and it must avoid collapsing into subjective judgments of non-discriminatoriness held by persons to whom the legal rules under scrutiny apply.

Some of the most popular, and widely used, tests of non-discrimination belong to the family of "*per se*" theories, based upon the belief that certain characteristics of individuals, when used as a basis for classifications, necessarily render a classification discriminatory. The most typical version of a "*per se*" test is a theory of "colour blindness" and, more generally, of immutable characteristics: this is the belief that a classification based on race or other characteristics which are involuntary, unalterable and beyond an individual's control, is presumptively or even conclusively discriminatory. But that theory is intuitively implausible: there are many cases of non-discriminatory classifications based on immutable characteristics, just as there are many instances of discriminatory classifications based on alterable characteristics. More importantly, such a theory cannot invoke, in its support, a morally convincing rationale. The best possible rationale for such a theory – which appeals to the alleged wrongness of the inescapability of legal burdens and benefits – is surprisingly weak: its corollary would be that it is right to treat individuals unfairly, so long as it lies within their power to escape their unfair predicament.

The main lesson of the critique of "*per se*" theories is that any test of non-discriminatoriness of classifications which ignores legislative purpose, and the relationship between classification and purpose, is doomed to fail. But relevance-based tests yield a circularity which results from the temptation of implying a classification's purpose from the terms of the classification itself. This danger can be overcome by heightening the level of scrutiny applied to the purpose, and to the fit between the classification and the purpose. If we demand that the government's purpose in legislating be of sufficient importance, and not merely permissible, we restrict the range of purposes which can figure in any justification of the legislation, thus reducing the possibility of manufacturing purposes from the terms of the classification. If, in addition, we demand a narrow tailoring of the classification to the purpose, so that the classification must be a necessary means to the achievement of the important purpose, we increase the likelihood that the purpose which will match perfectly the classification under challenge will be the same purpose that the legislators actually had in mind, and not a purpose conjured up *ex post facto*.

The heightening of the level of scrutiny of the purpose, and of the relationship between the classification and the purpose has some very important ramifications: it expresses a high degree of suspicion that discrimination might be at work behind a given classification, it abandons the presumption of legislative validity, and it displays little tolerance for the over- and under-inclusiveness of classifications from the point of view of its rationale. In sum, it is likely to result in invalidation of the classification. Hence, we need some good reasons for heightening the level of scrutiny of the legislation, and these reasons must be embedded in a general theory of what renders a classification discriminatory. Such a theory can be reached by a method of "reflective equilibrium", that is, by reflecting upon the common evils of those discriminations which we consider intuitively to be particularly invidious. An intuitively justified answer to this question seems to be that a classification is tainted as discriminatory by certain wrongful motives for legislation, in particular, if the legislation is based on prejudice, hostility and stereotyping. But it is not easy to ascertain those motives directly, so that we need some more "objective" *indicia* of suspectness of classification; those *indicia*,

again, can be gathered in by thinking about the common traits of undoubtedly invidious discriminations. Three such *indicia* seem to justify a high level of suspicion that discrimination might be at work: when legislatively imposed burdens fall upon a group which has had a disproportionately low impact upon the adoption of legislation; when they are imposed upon a group traditionally disadvantaged and discriminated against; and when they stigmatize a burdened group as inferior – intellectually, morally or otherwise. These three *indicia*, whilst not sufficient to support a finding of discrimination, seem to comprise a reasonably workable set of factors which should normally trigger higher than usual suspicion, and therefore, a stricter than usual scrutiny of classification.