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TWO CONCEPTS OF DISCRIMINATION

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A philosophical battle is being waged for the soul of equal protection jurisprudence. One side sees discrimination as a comparative wrong occurring only where a law or policy fails to treat people as equals. The other side embraces a fundamentally noncomparative view that defines impermissible discrimination as a failure to treat each individual as she is entitled to be treated. This Article distinguishes between these conceptions, demonstrates why they are normatively distinct, and identifies specific and seemingly unrelated controversies in modern equal protection jurisprudence that are in fact manifestations of this single schism. The insights in this Article cannot resolve all of these doctrinal controversies, but they can reveal which controversies involve a philosophical muddling of the two competing conceptions and which will require the Supreme Court to choose.

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INTRODUCTION

EQUAL protection jurisprudence is a mess. Its moral foundation is uncertain, its doctrinal structures are eroding, and its distinctiveness is in question. Consider a few examples. First, scholars[1] and at least one Supreme Court Justice[2] have suggested that the disparate impact liability mandated by Title VII of the Civil Rights Act of 1964[3] is on a collision course with the Equal Protection Clause. Should it be? Second, no one knows whether rationality review is real. Is it? Third, cases increasingly fuse the Equal Protection and Due Process Clauses, claiming that "[e]ach concept—liberty and equal protection—leads to a stronger understanding of the other."[4] In fact, statements like this leave most of us scratching our heads. These confusions result from the fact that

[1] Professor Richard Primus was the first to put forward this view in a piece that has been very influential. See Richard A. Primus, Equal Protection and Disparate Impact: Round Three, 117 Harv. L. Rev. 493, 496 (2003).

[2] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (wondering "[w]hether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

[3] 42 U.S.C. §§ 2000e et seq. (2012).

[4] Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

Fourteenth Amendment jurisprudence is animated by two normatively distinct and conceptually irreducible conceptions of discrimination. Each grounds different parts of our equal protection doctrine where they compete with one another in a largely unseen battle.

This Article brings that battle into the limelight. It answers each of these questions and provides an overarching framework through which we can better understand our constitutional discrimination jurisprudence. First, it shows why the alleged clash between equal protection and disparate impact does not exist. Second, it explains the doctrine's conflicting response to irrational state action. Finally, it allows us to read cases, like *Obergefell v. Hodges*,[5] which explicitly fuse the clauses and make sense of what is really going on.

Fourteenth Amendment doctrine is animated by two competing accounts of discrimination—one grounded in principles of comparative justice and one grounded in principles of noncomparative justice. As Professor Joel Feinberg describes: "[J]ustice consists in giving a person his due, but in some cases one's due is determined independently of that of other people, while in other cases, a person's due is determinable *only* by reference to his relations to other persons."[6] If we can look only at one person and assess what treatment she should get in light of some standard, we make a judgment of noncomparative justice. If we can't determine one person's treatment without also looking at how others are treated, we make a judgment of comparative justice.

Yet people often disagree about which sort of justice is called for in a particular context. Consider a familiar example: law school grading. In many law schools, grading is treated as a matter of comparative justice. These schools use a mandatory grade curve that sets the mean grade for a class and provides guidelines for the distribution among various grades. When such a curve is in place, a professor grading Exam #1 of 50 cannot assign a grade to that exam. She cannot know whether Exam #1 should get an A- until she knows the quality of the other exams. She then must set the grades for all these exams more or less at the same time. If Exam #1 gets an A-, then Exam #10 (which is some degree less good) should probably get a B+, and so on.[7]

[5] 135 S. Ct. 2584.

[6] Joel Feinberg, Noncomparative Justice, 83 Phil. Rev. 297, 298 (1974).

[7] As Professor Frederick Schauer has pointed out, this system does not entail that like cases are treated alike. Several exams of varying quality will all be given the same grade. If, in a class of fifty people, only five different grades are assigned (A, A-, B+, B, and B-) but

This system not only operates using principles of comparative justice, it is typically justified in comparative justice terms as well. As some faculty members might be harder graders than others, a student randomly assigned to a section with a hard grader would be disadvantaged relative to a student assigned to a section taught by an easier grader. If the students have written exams of the same quality, the claim that it is unfair for one to get a better grade than the other is a claim of comparative justice.

Some faculty and students find grade curves troubling and they do so, often, because they think grading is a matter of noncomparative justice. The professor might object that a set of exams is just weak and he simply cannot give the best ones As if they don't deserve it. Students might ask: "What if everyone does a great job?" This professor and these students see grading as a matter of comparing an individual student's performance to a standard and not to the performance of other students and the treatment (grades) those performances were assigned.[8]

The dispute about whether comparative or noncomparative justice principles ought to govern in a particular field animates more serious matters too. Consider criminal sentencing. Retributivists about punishment think noncomparative justice principles ought to govern sentencing. An offender ought to get the punishment he or she deserves, as determined by reference to standards of culpability but not by reference to how others have been punished.[9] Someone else, drawn more to principles of comparative justice in sentencing, thinks that the

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the exams differ from one another more than that—that is they don't sort themselves into five quality types—then differents will also be treated alike. Frederick Schauer, Profiles, Probabilities, and Stereotypes 201 (2003).

[8] If the noncomparativist seems to stand on weaker ground, this may be because the purpose of grading (to sort students for the benefit of employers or others outside of the school) seems to require comparative perspective. Indeed, even the professor who argues that no students in this year's class deserve As may well be comparing this year's students to students from previous years rather than comparing the performance of this year's students to some independent standard.

[9] Feinberg's description of the noncomparative approach seems to capture what a retributivist may say about punishment even in those cases where a judge deviates from it to accommodate the fact that a prior criminal was sentenced too leniently in the past:

> *His* rights-or-deserts alone determine what is due him; and once we have come to a judgment of *his* due, that judgment cannot be logically affected by subsequent knowledge of the condition of other parties. We may decide, on the basis of information about other parties, to withhold from him his due; but no new data can upset our judgment of what in fact *is* his due.

Feinberg, supra note 6, at 300.

sentence a given offender ought to receive depends in significant part on the sentences that have been meted out to others. The prohibition on "cruel and unusual punishment" found in the Eighth Amendment may itself encapsulate a principle of comparative justice if we interpret it to prohibit punishments that are unlike others meted out at a particular historical period.[10]

A similar dispute animates our discrimination jurisprudence. Discrimination is either a comparative wrong or a noncomparative wrong. If it is comparative, the treatment one person receives must be compared to the treatment accorded to others in order to determine if a law or policy wrongfully discriminates. If it is noncomparative, a law or policy wrongfully discriminates when it treats a person in a manner that departs from how she is independently entitled to be treated. Each of these accounts animates portions of our equal protection doctrine where they are silently at war.

The Article begins by drawing a distinction between the comparative and noncomparative conceptions of discrimination. It describes the two accounts and explains which familiar features of equal protection doctrine derive from each account. Part I focuses on the comparative account of discrimination, and Part II focuses on the noncomparative or "independent" account.[11] The goal of these Parts is to produce an "aha" response. I hope the reader begins to see this distinction elsewhere, saying to oneself, "Oh, I see, Justice or Judge So-and-so is here arguing for a noncomparative view of discrimination and Justice or Judge Blah-de-blah is using a comparative account."

The latter half of the Article provides the payoff of this conceptual untangling. Consider first the purported conflict between disparate impact and equal protection. Part III argues that the claim that they are at odds rests on an unfortunate conflation of the two distinct accounts of discrimination. As I explain in Part I, the doctrine's focus on intent rests on the comparative account. As I explain in Part II, the doctrine's

[10] Professors Raleigh Hannah Levine and Russell Panier argue that the Cruel and Unusual Punishment Clause captures both comparative and noncomparative justice principles: "To deem a punishment for a crime 'unusual' would require comparing it to other punishments for the same or other crimes, while a punishment could be deemed 'cruel' without regard to whether it is imposed on others for the same or other crimes." Raleigh Hannah Levine & Russell Pannier, Comparative and Noncomparative Justice: Some Guidelines for Constitutional Adjudication, 14 Wm. & Mary Bill Rts. J. 141, 188 n.152 (2005).

[11] I will sometimes use the term "independent" rather than "noncomparative" to describe this view in order to avoid describing it by what it is not.

prohibition on racial classification rests on the noncomparative account. But neither account prohibits the intention to classify on the basis of race. When we pry apart the premises of the argument for the unconstitutionality of disparate impact and return them to the arguments from which they came, it no longer makes sense to argue that equal protection prohibits the awareness of racial impact that disparate impact requires. Part III presents this argument.

Second, consider the confusion about whether state action really must be rational. The presence of a level of scrutiny called "rationality review" suggests that laws must meet some minimum threshold of reason. Yet the fact that this sort of review is notoriously deferential suggests the opposite claim is true. Part IV argues that this doctrinal ambivalence is explained by the fact that the independent conception of discrimination supports a requirement of rationality while the comparative account rejects it.

Finally, Part V considers the increasingly common intermingling of equal protection and due process analyses. This Part provides an explanation of why it occurs and when it should be welcomed. Using this analysis, Part V also provides a detailed analysis of the section of *Obergefell* in which both clauses are brought together—an analysis that allows us to see the contribution that case makes to the jurisprudence of discrimination.

I. THE COMPARATIVE CONCEPTION OF DISCRIMINATION

According to the comparative conception of discrimination, we determine whether *X* has suffered wrongful discrimination by looking at the treatment *X* has received (*X* received treatment *A*) and comparing it to the treatment accorded to at least one other individual (*Y* received treatment *B*; or *Y* received treatment *B*, and *Z* received treatment *C*, and so on). Discrimination inheres in this comparison. It is because *X* received *A when Y* received *B*,[12] that discrimination has occurred.

The comparative conception of the wrong of discrimination is surely the more intuitive and familiar. This is perhaps because claims of discrimination are generally framed as comparisons. A plaintiff complains that African Americans are denied entry at a state law school while white applicants with comparable qualifications are admitted,[13]

[12] These comparisons can be hypothetical as well, as I will discuss infra.
[13] Sweatt v. Painter, 339 U.S. 629, 631 (1950).

that female service members are required to prove their spouses are dependent in order to get benefits for them while male service members are presumed to have dependent spouses,[14] that women are considered ineligible for admission at an elite public military college while men are considered eligible,[15] that group homes for the disabled are required to secure special zoning approval while other group homes are not,[16] and so on. According to the comparative approach, the juxtaposition of the treatment of two individuals or groups picks out a morally salient feature of the law or policy under review.

The fact that discrimination involves comparison does not, however, require comparison to an actual person who is relevantly similar in some respect. If the wrong of discrimination inheres in giving *X* treatment *A* when *Y* gets treatment *B*, this wrong can occur even in cases where the comparison is hypothetical. Suppose a government employer refuses to hire or promote Smith because she is a woman. The comparative conception of discrimination would analyze this case by saying that the state discriminates because it refuses to hire Smith (who is otherwise qualified) when it hired *or would have* hired a comparable male candidate.[17]

We compare the treatment accorded to *X* and the treatment accorded to a real or hypothetical *Y* to determine if discrimination has occurred. But once we're comparing, what are we looking for? Simply noting the formal structure of comparative right doesn't yet tell us this. The formal structure must be supplemented by some substantive standard. As we will see below, the same is true for the noncomparative approach. I propose that we fill in this formal structure with the *substantive* value of equality. What this means is that when we look at the treatment

[14] Frontiero v. Richardson, 411 U.S. 677, 678–79 (1973).

[15] United States v. Virginia, 518 U.S. 515, 519 (1996).

[16] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 437 (1985).

[17] Some commentators critique the emphasis on comparators in litigation under antidiscrimination law. See, e.g., Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728, 731 (2011). Professor Suzanne Goldberg's view is only partially a rejection of what I am terming the comparative approach to what makes discrimination wrong. In part, she criticizes courts for requiring actual comparators and recommends consideration of hypothetical comparators. Id. at 805–07. Furthermore, she is simply tackling a different question. She is asking how best to operationalize a prohibition on discrimination rather than analyzing the moral foundation of the prohibition on discrimination itself. Id. at 735.

accorded to *X* and to *Y*, we ask: Does giving *X* treatment *A*, and *Y* treatment *B*, treat *X* and *Y as equals*?[18]

It is important to emphasize that this approach does not require that *X* and *Y* be treated the same. Sometimes treating people as equals requires treating them the same and sometimes it does not. When they are different in certain respects, perhaps the law should treat them differently. Consider the grading context again. If *X* and *Y* have written exams of different quality, they should be given different grades. Yet if they have written exams with different strengths, perhaps they should receive the same grade.

The comparative conception of discrimination also does not require, or devolve into, the requirement that likes be treated alike. As others have argued,[19] this formulation requires one specify criteria for relevant likeness and unlikeness. But once we have done that, we are left with standards of how each person ought to be treated and so comparison will cease to do any real work.

The comparative account of discrimination asks instead a more amorphous yet more substantive question. It asks: Does giving *X* treatment *A*, when *Y* gets treatment *B*, treat *X* and *Y* as equals? This mandate to treat people as equals is a substantive requirement that necessitates further elaboration. What does treating people as equals require? When do laws that differentiate fail to treat people as equals? Alternatively, when does treating people the same (when they are different) fail to treat them as equals? Familiar equal protection doctrines can be seen as providing answers to these questions. For example, the law may fail to treat people as equals because the people who adopt the law or policy intend to harm those affected. Alternatively, a law may fail to treat people as equals because the legislative process

[18] Both the comparative and independent accounts of discrimination only provide a formal framework and must be supplemented with a substantive value of some sort. In the case of discrimination, I believe the substantive value of equality fills out the comparative account and the substantive value of liberty fills out the independent account, as I explain infra in Part II. That said, there will be disputes about how to interpret the demands of these substantive standards. What does treating people *as equals* require? What are the liberties that people have an independent right to enjoy? The doctrines I emphasize provide our law's answers to these questions.

[19] See, e.g., Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 547 (1982) (arguing that because "'likes should be treated alike' means that people for whom a certain treatment is prescribed by a standard should be given the treatment prescribed by the standard," the formulation is empty); Kenneth I. Winston, On Treating Like Cases Alike, 62 Calif. L. Rev. 1, 5 (1974) (noting that the treat-likes-alike principle is "incomplete").

by which the law is adopted is flawed and so the interests of some people are weighed more heavily than the interests of others. These are two prominent answers, familiar to students of equal protection doctrine, that focus on the inputs that went into the adoption of a law or policy. Alternatively, a law or policy might fail to treat people as equals because of its effect (though admittedly this approach is no longer in favor within equal protection doctrine[20]) or because of what it expresses.[21] Each of these doctrines provides an account of what it means to treat people as equals, and so each doctrine is grounded in the comparative account of discrimination.

A. Intending to Harm

One way to fail to treat someone as an equal is to intend to harm him—to adopt a policy that burdens him not merely in spite of this burden but deliberately because of it. The focus on intention that is a staple of equal protection analysis thus belongs to a comparative understanding of discrimination. The statement from *U.S. Department of Agriculture v. Moreno* regarding intention—"if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest"[22]—has become a canonical equal protection principle.[23] Animus toward those who are negatively affected by a law creates an equal protection problem. Why? Because it is a way to fail to treat them, hippies in the case of *Moreno*, as equals.

Laws routinely draw distinctions between people. Households of *X*-type are entitled to receive food stamps but not households of *Y*-type, etc. Equal protection does not and cannot require that all people be treated the same. It therefore must find a way to analyze when differential treatment is permissible. According to the comparative

[20] Washington v. Davis, 426 U.S. 229, 239 (1976).

[21] See Deborah Hellman, The Expressive Dimension of Equal Protection, 85 Minn. L. Rev. 1, 2 (2000).

[22] 413 U.S. 528, 534 (1973) (emphasis omitted). *Washington*, 426 U.S. 229, provides another good example of this conception of what makes discrimination wrong. According to Justice White, writing for the Court, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Id. at 240.

[23] See, e.g., Romer v. Evans, 517 U.S. 620, 634 (1996); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 204 (4th Cir. 2000); Stemler v. City of Florence, 126 F.3d 856, 873 (6th Cir. 1997).

approach to discrimination, differential treatment is permissible so long as the state treats *X* and *Y* as equals. When does a law that differentiates between *X* and *Y* fail to treat them as equals? One answer to that question is provided by the doctrinal focus on intention. A law that differentiates between *X* and *Y* fails to treat *X* and *Y* as equals when those who adopted it did so with the aim to harm either *X* or *Y*.

Our equal protection doctrine further refines this focus on intention. It distinguishes intended from unintended (though foreseen) negative impacts, finding that only the first is the hallmark of an equal protection violation.[24] The doctrine also often emphasizes that this purpose must be the actual purpose of the legislators, not a hypothesized purpose adopted after the fact.[25] These refinements constitute further elaboration of the doctrine's answer to the question: When does a law which gives *X* treatment *A*, and *Y* treatment *B*, fail to treat *X* and *Y* as equals? According to our equal protection doctrine, only when the differential treatment is specifically intended rather than merely foreseen and, at least sometimes, only when it is the actual purpose of the decision maker.

These may or may not be the normatively best answers to the question posed. Perhaps we fail to treat people as equals when we fail to minimize negative foreseen consequences. Perhaps intention isn't relevant at all. I am not arguing that failing to treat people as equals requires focusing on intention. There are other possible accounts, as we shall see. What I am claiming is that the focus on intention grows out of the comparative conception of the wrong of discrimination. The comparative approach is, in that sense, a family of views joined by their common goal of answering the question: When does a law that differentiates between people fail to treat those whom it affects as equals?

[24] As the Court emphasized in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), "'[d]iscriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences," rather it "implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

[25] See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (rejecting a number of conceivable asserted purposes, refusing to hypothesize what might have influenced the government defendant, and finding that the actual purpose of a zoning permit denial was to impermissibly discriminate against the mentally retarded).

B. Neglecting or Refusing to Represent

Equal protection doctrine often focuses on the legislative process that produced a law or policy. This focus on process also grows out of the comparative approach to equal protection. Why do such process defects matter? Suppose a law provides that *X* should get treatment *A* and *Y* should get treatment *B*. If the interests of *X* have not been given full consideration, perhaps because people like *X* have not been able to join with others who share their concerns, then the differentiation that results may fail to treat *X* as an equal. Thus, a second way that a law which differentiates between *X* and *Y* may fail to treat *X* as an equal is for the political process that produced the law to disregard the interests of *X* altogether or weigh them less seriously.

Professor John Hart Ely provides an eloquent defense of why both policies motivated by animus, and those adopted with insufficient attention to how a law might affect certain groups, can create an equal protection violation precisely because they fail to treat those whom the law affects as equals.[26] For Ely, equal protection is tied to the idea of representation so that a person is denied equal protection if his interests are not truly represented in the political process. Laws sometimes burden minorities among the population "[n]aturally," he writes, but equal protection "preclude[s] a refusal to *represent* them, the denial to minorities of what Professor Ronald Dworkin has called 'equal concern and respect in the design and administration of the political institutions that govern them.'"[27] For Ely, both the intent to harm and differential sympathy constitute paradigm equal protection violations precisely because they are failures to treat others with equal concern.[28] Ely's account of why process defects violate equal protection has been very influential. Both Ely's account and equal protection doctrine's attention to laws that affect discrete and insular minorities are grounded in the comparative conception of the wrong of discrimination.

C. Expressing Denigration

The view that a law or policy that expresses denigration violates equal protection rests on a comparative conception of the wrong of

[26] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 82 (1980).

[27] Id. (footnote omitted) (emphasizing that "[t]he Fourteenth Amendment's Equal Protection Clause is obviously our Constitution's most dramatic embodiment of this ideal").

[28] Id.

discrimination. The problem with segregation or affirmative action, for example, is that these policies express that blacks are inferior to whites. Why is that problematic? It is problematic because one way to fail to treat people as equals is to express that they are not, in fact, equals.

Sometimes laws violate equal protection because they express that some people are not full members of the political community. Justice Harlan's dissenting opinion in *Plessy v. Ferguson* adopts this view.[29] He argues that segregated rail cars violated equal protection because "as all will admit, . . . the real meaning of . . . [the legislation]" was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[30] Professor Charles Black also relies on the expressive character of segregation to justify the Court's opinion in *Brown v. Board of Education*.[31] Professor Black argues that the "plain fact about the society of the United States—the fact that the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority" was crucial to justifying *Brown*'s holding that segregation violated equal protection.[32] More recently, Justice Thomas argues at times that racial classifications violate equal protection because of what they express about African-Americans. For example, in his concurring opinion in *Adarand Constructors v. Pena*, Justice Thomas argues that "[s]o-called 'benign' discrimination teaches . . . that because of chronic and apparently immutable handicaps, minorities cannot compete with . . . [others] without their patronizing indulgence" and that affirmative action programs therefore "stamp minorities with a badge of inferiority."[33]

D. Tiers of Scrutiny Function as Heuristics

Laws and policies that differentiate on the basis of some traits warrant heightened review, whether "strict" or "intermediate" scrutiny. But what does this heightened review entail? We can cite the canonical formulations of these standards of review but these formulations are only somewhat helpful in understanding how heightened review operates. In particular, does heightened review have an epistemic

[29] 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting).
[30] Id. at 560.
[31] 347 U.S. 483, 495 (1954).
[32] Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 427 (1960).
[33] 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

function, identifying laws that differentiate in a way that is usually impermissible? Or, do we employ heightened review because there is some feature of the law that is inherently wrong? This wrong-making feature can be outweighed, to be sure, but its presence calls for a particularly weighty reason on the other side. Below I argue that the comparative conception of discrimination supports the first interpretation and in Part II, I argue that the noncomparative conception of discrimination supports the second.

On the comparative account, heightened review functions as a heuristic or rule of thumb.[34] It is because racial classification is very likely to be wrongful—not because there is something inherently wrong about racial classification—that race-based classifications warrant heightened review. The tiers of scrutiny thus have an epistemic or evidentiary rather than a substantive function, according to the comparative conception of discrimination.

One caveat before I get into the details. In a case where strict scrutiny is called for, the law in question may still be constitutional if there is a compelling reason for it. Some commentators have focused on this feature of the way heightened review operates in order to investigate whether constitutional doctrine identifies genuine "rights" and if so, how we should understand what rights are.[35] The fact that heightened review can be overcome is not my focus. Rather I want to more carefully identify why laws that distinguish on the basis of certain traits warrant heightened review in the first place.

According to the comparative conception, discrimination is wrong when a law or policy fails to treat those whom it affects as equals. In order to fill out this view, one needs to say more about when a law or policy fails to treat *X* as the equal of *Y*. The possibilities we have so far discussed and which are prominent in the doctrine include: aiming to harm or burden *X*, failing to represent *X* in the political process, and demeaning or stigmatizing *X*. What makes the law impermissible is that it does these things. As a result, the comparative approach doesn't single out laws that classify on the basis of race or sex (or other suspect traits)

[34] See, e.g., Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (explaining that "[c]lassifying persons according to their race is more likely to reflect prejudice than legitimate public concerns").

[35] See Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343, 344 (1993); Frederick Schauer, A Comment on the Structure of Rights, 27 Ga. L. Rev. 415, 416 (1993).

because they are wrong in themselves. Rather, they are subject to heightened review because such laws *usually* derive from bad intentions or result from differential sympathy or express denigration. Heightened scrutiny identifies those instances in which it is likely that the law or policy differentiates in a way that fails to treat others as equals. It is because "race, alienage, or national origin . . . are so seldom relevant to the achievement of any legitimate state interest,"[36] that strict scrutiny is called for.

Justice Ginsburg, dissenting in *Gratz v. Bollinger*,[37] articulates especially clearly this understanding of how strict scrutiny ought to operate. Arguing against the majority's holding that the university may not give a specified number of points to racial minorities in the admission process, Justice Ginsburg explained that "[o]ur jurisprudence ranks race a 'suspect' category, 'not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.'"[38] In her view, "where race is considered 'for the purpose of achieving equality,' no automatic proscription is in order."[39]

One might also argue that, in practice, if not explicitly, the Court applies a less demanding form of strict scrutiny in affirmative action cases. If this is descriptively accurate, then in these cases strict scrutiny operates as a heuristic, as the comparative conception of discrimination would suggest. While equal protection doctrine surely pays lip service to a commitment to applying the same level of scrutiny to laws that burden or benefit racial minorities,[40] the strict scrutiny that we see actually applied to instances of affirmative action may well be less demanding, reflecting a lack of symmetry between so-called "invidious" and "benign" instances of race-based classification. If strict scrutiny has only an epistemic function, then it is not surprising that after closely

[36] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining further that "laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others").

[37] 539 U.S. 244, 275 (2003) (invalidating a race-based preference in undergraduate admissions at the University of Michigan).

[38] Id. at 301 (Ginsburg, J., dissenting) (quoting Norwalk C.O.R.E. v. Norwalk Redevelopment Agency, 395 F.2d 921, 931–32 (2d Cir. 1968)).

[39] Id. (citation omitted).

[40] See, e.g., Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) ("[J]udicial review must begin from the position that 'any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.'" (quoting Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting))).

scrutinizing, we sometimes find that the classification is not motived by animus or the result of differential sympathy and neither does it express denigration.

To recap: According to the comparative conception, we assess whether *X* has suffered discrimination by comparing the treatment *X* has received to the treatment accorded to others. Discrimination inheres in this comparison. It is because *X* got treatment *A*, when *Y* got *B*, that discrimination has occurred. When comparing the treatment accorded to *X* and to *Y*, we ask "are *X* and *Y* treated as equals?" Yet, the mandate to treat *X* and *Y* as equals is underspecified. There are many different ways one could flesh out its contours. Our equal protection doctrine provides a few possibilities. Perhaps we fail to treat *X* as the equal of *Y* if we aim to harm *X*. Perhaps we fail to treat *X* as the equal of *Y* if we don't fully consider *X*'s interests. Perhaps we fail to treat *X* as the equal of *Y* if we adopt a law or policy that demeans or denigrates *X*. Because each of these familiar equal protection themes provides an answer to the question of what treating *X* as the equal of *Y* entails, each is grounded in the comparative conception of discrimination.

In addition, the comparative conception of discrimination justifies strict scrutiny in a particular way. Because we identify discrimination by comparing the treatment of *X* to the treatment of *Y* to see if *X* and *Y* are treated as equals, strict scrutiny is called for in those cases in which there is reason to believe that *X* and *Y* may not be treated as equals. The level of scrutiny functions as a rule of thumb. Laws and policies that distinguish on the basis of race, sex, and other suspect traits are closely examined because they are often used in ways that fail to treat people as equals.

II. THE NONCOMPARATIVE CONCEPTION OF DISCRIMINATION

The noncomparative, or independent, conception of discrimination sees claims of "discrimination" as raising claims of noncomparative justice. On this view, we can assess whether *X* has been discriminated against by looking at the treatment she has received and comparing it with some standard of what she ought to receive. But we need not compare her treatment to the treatment accorded to others. Comparing *X*'s treatment to the treatment accorded to others may make salient a deficiency in how *X* has been treated but it does not make that treatment wrong. For this reason, the independent conception of discrimination makes the term "discrimination" lose its moral resonance. It isn't the

differentiation that matters morally. Calling these cases instances of "discrimination" is, then, conceptually confusing. They are simply violations of rights or other entitlements.

The view that discrimination may rest on a claim of noncomparative justice may seem counterintuitive.[41] For that reason, I will do more to sketch it out.[42] Professor Sophia Moreau offers a noncomparative account of discrimination that will provide an illustration.[43] For Moreau, the interest that is injured by discrimination is the interest each person has in what she calls "deliberative freedoms" which are "freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender."[44] She elaborates this view, specifying that these freedoms are similar in important ways to other freedoms that each person is entitled to enjoy:

> The core idea underlying my account is this. In a liberal society, each person is entitled to decide for herself what she values and how she is going to live in light of these values. This means that, in addition to certain freedoms of action, we are each entitled to a set of "deliberative freedoms," freedoms to deliberate about and decide how to live in a way that is insulated from pressures stemming from extraneous traits of ours. Many of us already have these deliberative freedoms. I shall argue that anti-discrimination law attempts to give

[41] See, e.g., Kenneth W. Simons, Equality as a Comparative Right, 65 B.U. L. Rev. 387, 461 (1985) [hereinafter Simons, Comparative Right] (analyzing the distinction between comparative and noncomparative rights, treating discrimination claims as examples of comparative rights and assuming that the fact that some decisions by courts—especially the treatment of race as suspect even in affirmative action contexts—may seem to create noncomparative rights as a "puzzle" to be solved and which he argues he does solve).

[42] In so doing, I don't intend to convey that I favor it. I do not. My view is explained in detail in Deborah Hellman, When is Discrimination Wrong? (2008).

[43] Sophia Moreau, What is Discrimination?, 38 Phil. & Pub. Aff. 143 (2010). Professor Tarunabh Khaitan provides a new and important account of the wrong of discrimination as grounded in the noncomparative right of each person to freedom. See Tarunabh Khaitan, A Theory of Discrimination Law (2015). According to Khaitan, discrimination is wrong because it exacerbates substantial and pervasive relative group disadvantage "but only because we cannot truly be free if our groups suffer certain egregious forms of relative disadvantage. The general justifying aim of discrimination law, in my view, is to secure an aspect of freedom rather than equality." Id. at 92.

[44] Khaitan, supra note 43, at 147.

> them to all of us, because each of us has an independent entitlement to them.[45]

According to Moreau, laws and actions discriminate when they infringe upon the independent entitlement that each person has to a set of deliberative freedoms.[46] The entitlement to these deliberative freedoms is similar in form to other freedoms to which people are entitled, like the freedoms of speech, assembly, procreative liberty, etc. In addition, the deliberative freedoms protected by laws prohibiting discrimination derive from a similar source—an interest in autonomy, in being able to decide what one values and how to live.[47]

Earlier I noted that claims of discrimination are typically framed as comparisons. A black person asserts he was treated differently than a white person. A woman claims she was treated differently than a man. It was this comparative framing that made the comparative conception of discrimination intuitive and appealing. According to the independent approach, the comparison isn't doing any real work. Rather, it is merely what makes salient a failure to give *X* her due, as measured by independent metrics. To a defender of the noncomparative approach, the familiar comparative framing of many discrimination claims is superfluous.

The argument proceeds as follows. Laws and policies routinely treat one person (or group) better or worse than another. This cannot be what distinguishes discrimination claims or picks out their wrong-making feature. Admissions policies at universities treat applicants with high grades better than applicants with mediocre grades, spousal benefits may be offered to dependent spouses but not to nondependent spouses, public high schools give admissions preferences to those in particular geographic locations (their catchment areas), group homes may be subject to restrictions that single family homes are not, etc. Moreover,

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[45] Id.

[46] Other scholars have argued for a noncomparative account of the wrong of discrimination. See, e.g., Timothy Macklem, Beyond Comparison (2003); Denise Reaume, Dignity, Equality, and Comparison, *in* The Philosophical Foundations of Discrimination Law 7, 7–27 (D. Hellman & S. Moreau eds., 2013).

[47] Professor Yizhak Benbaji grounds his account of the wrong of discrimination in disrespect rather than freedom or autonomy. This account could be seen as either independent or comparative. See Yizhak Benbaji, Equality as a Paradoxical Ideal or Respectful Treatment Versus Equal Treatment, *in* Paradoxes and Inconsistences in the Law 205, 224 (Oren Perez & Gunther Teubner eds., 2006) (arguing that sex discrimination is wrong "because it is disrespectful").

we can't figure out which differentiations are morally problematic and which are not by appealing to the principle that only like cases need to be treated alike. The noncomparativist emphasizes that this reply is unsatisfactory because it is incomplete. We must go on to specify criteria for relevant likeness and unlikeness.[48] The black applicant denied entry at the University of Texas Law School in *Sweatt v. Painter*[49] is relevantly like many admitted white applicants but the applicant with mediocre grades isn't relevantly like the applicant with high grades if the goal of the admissions criteria is to admit those who will perform best.[50] But, once we spell out what the criteria of relevant likeness or unlikeness *are*, then the comparison ceases to do any real work.

For the noncomparativist, the problem isn't that the black applicant is treated *worse* than the white applicant. After all, the applicant with mediocre grades is treated worse than the applicant with high grades. Rather the problem in *Sweatt*, for example, is that the applicant's race plays a role in the admissions decision affecting him, when it ought not to.[51] Sometimes we may be unsure what rights people have or what the correct criteria of relevance are, but once we figure these out, then the comparative framing of the claim adds nothing.

Eisenstadt v. Baird provides an illustrative example.[52] There, the claim is framed in terms of a comparison between the treatment of married and unmarried people, but the wrong identified is noncomparative. In *Eisenstadt*, the Supreme Court struck down, on equal protection grounds, a Massachusetts law that allowed only married couples to buy contraceptives. In doing so, the Court claimed that the right of privacy involved "is the right of the *individual*, married or single, to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[53] The constitutional problem lay in the fact that

[48] See supra note 41.

[49] 339 U.S. 629 (1950).

[50] Of course, determining what the goal of university admissions criteria should be depends on what one takes the purpose of a university or a public university to be. The fact that the purpose of a university (or other institution) is itself controversial is, in my view, what makes the idea of merit unhelpful in resolving questions about when discrimination is wrong. I discuss this argument in detail in Hellman, supra note 42, at 93–113.

[51] See *Sweatt*, 339 U.S. at 631.

[52] 405 U.S. 438, 440–43 (1972).

[53] Id. at 453.

individuals, whether married or single, were denied this liberty, rather than in the fact that unmarried people were treated differently than married people.

It might seem odd to lump together *Sweatt* and *Eisenstadt*—as the first case may seem to be a real discrimination case while the second is not. But for the defender of the independent view, they *are* similar. In both cases, the differentiation may alert us to the wrong at issue (the failure to treat Sweatt or Eisenstadt in the manner each is independently entitled to be treated). But in neither case does the comparison to how others are treated really matter. What does matter is that a person is independently entitled to use contraception or to be free from race-based classification.[54]

We can now identify two ways in which the noncomparative conception and the comparative conception of discrimination differ. First, they differ in their formal structure. On the noncomparative conception, assessing whether an action or policy wrongfully discriminates only requires attention to the particular case under discussion. It can be assessed in isolation. On the comparative conception of discrimination, assessing whether an action wrongfully discriminates requires that we also look at how others are treated.

Second, each account of discrimination looks to a substantive standard of some kind, but the independent view and the comparative view look to different substantive standards. For the independent view, the substantive standard can be an account of the rights that people have *qua* people (rights like the right to procreative liberty, as in *Eisenstadt*). Or the independent view can refer to a standard determined by contract, statutory law, or some other source that determines what a person is entitled to in the particular context. But as an account of the wrong of discrimination, the substantive standards can also encompass rights or entitlements that seem unique to the discrimination context—like the right that a person's race not play a role in decisions that affect her, as in *Sweatt*. Perhaps these are special rights or entitlements that crop up only in cases where "discrimination" is alleged. I suspect, however, that these "special" rights have a deeper source. One promising candidate is that

[54] It might be tempting to say that, given his grades, test scores, and other qualifications, Sweatt is entitled to be admitted. However, given the discretionary nature of university admissions and the fact that there are often many more qualified candidates with roughly equal objective qualifications than there are available places in the class, no one is entitled to admission.

they rest on the claim that each person has an independent, non-comparative right to (some degree of) freedom or autonomy.

The comparative conception of discrimination also needs a substantive standard to flesh out the formal framework. For the comparative conception of discrimination, it is the substantive value of equality, the idea that each person matters equally and is entitled to be treated as an equal. The noncomparative conception of discrimination thus depends on a specification of the rights or entitlements people have. The comparative view, by contrast, depends on a specification of what is required in order to treat people as equals (or, alternatively, of what actions or policies fail to treat people as equals).

But might these approaches not ultimately arrive at the same place? When we figure out what treating people as equals requires, we may know what rights they are entitled to as people. And if we find out what rights people have as people, we will inevitably be treating all people as equals. Perhaps. To this challenge, I have two replies. First, the independent view seems committed to the idea that there are certain rights that people are entitled to by virtue of being people and we just have to figure out what they are. The comparative view, in contrast, by virtue of its formal structure, entails no such commitment. The structure of the comparative right dictates that *X* is not entitled to any particular thing unless or until we know what treatment *Y* has received. It is in virtue of what *Y* (or *Y* and *Z*, etc.) has received that *X* is entitled to some treatment. We are asking the question: Given that *Y* got *A*, what should *X* get in order to treat *X* as the equal of *Y*? This view does not depend on there being anything that *X is* entitled to independently at all.

Second, even if the two inquiries would ultimately arrive at the same set of rights if we could answer the question each poses to our satisfaction, they may yield different answers given our uncertainty about the right answer to each. In the real world, where we individually and collectively struggle to determine what rights people have and to ascertain when laws, policies, and actions fail to treat people as equals, posing these questions in different ways may well yield different answers.

A. The Right to Be Free from Race-Based Classification

The so-called "anticlassification" strand of equal protection jurisprudence is rooted in the noncomparative account of discrimination. On this view, one has a right to be free from race-based classification.

When a state law or policy that affects a person employs a racial classification, that person's independent right to be free from racial classification is violated.

A notable feature of modern equal protection doctrine is its endorsement of the view that racial classification warrants strict scrutiny, whether that classification benefits or disadvantages a racial minority.[55] Professor Reva Siegal terms this approach "anticlassification" because it forbids classification on the basis of race, rather than forbidding racial subordination.[56] However, the term "anticlassification" is somewhat of a misnomer, as the view does not prohibit all classifications. Indeed, how could it? Rather, the view, as described by Siegal and employed by courts, asserts that the state may not classify persons on the basis of race. It thus rests on a right or entitlement that a person's race play no role in governmental decisions or actions that affect him or her—unless justified by a compelling governmental interest. Justice Thomas captures this understanding of the equal protection guarantee when he describes the violation the Court recognized in *Brown v. Board of Education* in the following way: "Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race."[57]

[55] See Adarand Constructors v. Pena, 515 U.S. 200, 224 (1995) (endorsing the principle of "consistency," which the Court defines as the principle that laws that benefit and burden previously disadvantaged groups should be treated the same); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (holding that the "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

[56] Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over *Brown*, 117 Harv. L. Rev. 1470, 1472–75 (2004). Siegel identifies "anticlassification" and "antisubordination" as the two competing understandings of the Equal Protection Clause. In her view, early cases were overdetermined, and unconstitutional on either account. Id. But beginning in the 1970s, the Court was forced to choose between them, and increasingly chose anticlassification—the view that any racial classification would be subject to strict scrutiny precisely because it classified on the basis of race. On this view, racial classification is itself presumptively problematic.

[57] Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring). In *Jenkins*, the Court invalidated a district court order requiring the State to raise staff and teacher salaries and pay for enrichment programs in the Kansas City Metropolitan School District on the ground that aiming to attract nonminority students from suburban areas by these measures was outside of the district court's remedial authority as no intradistrict violation had been found. Id. at 91–93 (majority opinion).In his concurrence, Justice Thomas emphasized that the only constitutional violation is explicit racial classification and that predominantly black schools do not offend the Constitution. Id. (Thomas, J., concurring).

If each person has an independent right that her race play no role in governmental decision-making affecting her, then it is easy to see why affirmative action policies should raise the same constitutional concerns as does race-based state action that is motivated by animus. As Justice Powell explained in his influential, because dispositive, opinion in *Regents of the University of California v. Bakke*, "[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights . . . [and thus] constitutional standards may be applied consistently."[58] This symmetry or "consistency" as the Court terms it in the treatment of affirmative action and invidious racial discrimination has its roots in the noncomparative conception of wrongful discrimination.

Professor Kenneth Simons nevertheless thinks that the doctrine's prohibition on the use of race rests on a claim of comparative injustice.[59] He argues that if an employer rejects a black applicant for a job solely because he is black but hires no one else, we would have no difficulty saying that this is because the employer treats this applicant worse than he would have treated a similarly qualified white applicant. If this is right, he argues, then the comparative account must include the possibility of hypothetical comparisons. From this observation, Simons claims, we can account for the general prohibition on the use of racial traits (the anticlassification approach) using hypothetical comparisons too—and so he finds that this part of the doctrine also relies on a comparative conception of the wrong at issue.[60]

While I agree with Simons that the comparative account should be understood to encompass hypothetical as well as actual comparisons, I don't think this point disposes of the issue. Both Simons and I agree that a view counts as comparative if one must look at how either actual or hypothetical others are treated in order to determine if the person before

[58] 438 U.S. 265, 299 (1978).

[59] Simons, Comparative Right, supra note 41, at 460–61 (considering and rejecting the argument that "[i]f a nondiscrimination right forbidding the use of a trait in distributional decisions is comprehensive, a problem arises: the right no longer seems comparative. To decide whether the right has been violated, one need not determine how *others* are treated, but only whether the decisionmaker relied upon the impermissible trait in treating the individual claimant.").

[60] Id. See also Kenneth W. Simons, The Logic of Egalitarian Norms, 80 B.U. L. Rev. 693, 737–41 (2000) [hereinafter Simons, Egalitarian Norms] (rejecting an account of discrimination as a prohibition on irrelevant criteria).

you has suffered discrimination. For this reason, Simons is correct that one *could* explain the anticlassification doctrine in comparative terms. However, I don't think this is the best way to do so. Here I am making an interpretive claim about the best way to understand the philosophical commitments underlying the doctrine. In my view, the noncomparative account explains the anticlassification approach most straightforwardly and coheres best with the manner in which the Justices describe their concerns. The anticlassification approach isn't focused on the comparison between two cases—on the fact that *X*, a white applicant, is rejected while *Y*, a comparable black applicant, is accepted. Rather the focus of the anticlassification approach is on the single case and the fact that race was a factor that affected its outcome. In these cases, we assess whether this one person has been discriminated against without looking at the treatment of any others—actual or hypothetical.

One way to distinguish between claims of comparative and noncomparative injustice is to ask whether the asserted injury can be cured by leveling down. If the injury asserted is noncomparative, one can only remedy it by leveling up—giving each person that to which she is entitled. If the injury asserted is comparative, one can cure it either by leveling up or by leveling down.[61] Comments by Justice Thomas in his dissenting opinion in *Grutter v. Bollinger* suggest that such a leveling down approach would not cure the constitutional problem of racial classification, as understood by those who support this doctrine.[62] He captures this intuition when he charges that "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[63] In Justice Thomas's view, each person is harmed by the government focusing on his race. Doing so diminishes his humanity whether or not others are similarly so treated—in fact if all others are so treated then the wrong of discrimination has been perpetrated on all. This manner of describing the wrong shows that Thomas sees it as a noncomparative wrong.

[61] When interpreting what counts as leveling down, we must remember that we are using a criterion of substantive, not formal, equality. What matters is whether each person is treated as an equal, not whether each is treated the same. For a critique of leveling down as a formal remedy and endorsement of the substantive approach, see Deborah L. Brake, When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law, 46 Wm. & Mary L. Rev. 513 (2004).

[62] 539 U.S. 306, 353 (2003) (Thomas, J., dissenting).

[63] Id.

B. The Right to Be Free from Gender Stereotyping

The noncomparative account of the wrong of discrimination also grounds an equal protection doctrine with a very different political valence. In the Court's sex discrimination cases, we find a right to be free from gender stereotyping. This right is an independent, liberty-based right to define one's gender identity for oneself. When a law or policy limits this liberty, it discriminates.

A prohibition against stereotyping is a familiar theme of sex discrimination cases.[64] But what exactly does the Court mean by "stereotyping" and what makes stereotyping constitutionally problematic? Consider a few possibilities. Perhaps a stereotype is problematic because it is inaccurate. But of course, many stereotypes are accurate in the sense that people who have trait *A* are more likely than people without trait *A* to also have trait *B*.[65] "Italians love babies" is a stereotype, but it is an accurate stereotype if more Italians love babies than do people of other nationalities. Alternatively, laws based on stereotypes might be problematic simply because they rely on generalizations, which by their nature do not attend to the particularities of each individual.[66] Of course not all Italians love babies, and if making policy on the basis of this generalization is problematic even if the generalization is accurate, then perhaps the problem has something to do with relying on generalizations which, while accurate as generalizations, do not correctly describe each individual. Some parts of our equal protection jurisprudence suggest that generalizations that are too loose—where the fit between the proxy trait and the target trait is not tight enough—raise equal protection problems for precisely this reason.[67]

[64] See United States v. Virginia, 518 U.S. 515, 533 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982); Orr v. Orr, 440 U.S. 268, 283 (1979).

[65] In an influential article Professors Joseph Tussman and Jacobus tenBroek described the violations of equal protection largely in terms of the degree of over- or under-inclusiveness of a proxy trait to its intended target. See Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 343–53 (1949). Frederick Schauer provides a comprehensive analysis of the moral and legal issues raised by generalization and overgeneralization in Schauer, supra note 7.

[66] Schauer shows why it is a mistake to see the problem of stereotypes to be a problem with generalization. Schauer, supra note 7, at 299–300. Rather he thinks, and I agree, that stereotypes, when problematic, are problematic because they are particular kinds of generalizations rather than because they *are* generalizations.

[67] See generally Deborah Hellman, Two Types of Discrimination: The Familiar and the Forgotten, 86 Calif. L. Rev. 315, 315–16 (1998) (arguing that equal protection doctrine is focused on the degree of fit between a trait used in a law or policy and its intended target and

While inaccurate and loose generalizations do raise equal protection issues, our sex discrimination jurisprudence identifies another way in which stereotyping can be constitutionally problematic. The problem with gender stereotyping resides in the content of the generalization rather than merely the fact of (or looseness of) the generalization. When courts emphasize that a gender-based generalization relies on "archaic"[68] ideas about women or "fixed notions concerning the roles and abilities of males and females,"[69] or "the pervasive sex-role stereotype that caring for family members is women's work,"[70] the Court finds fault with the fact that women and men are channeled into particular gender roles. For example, in *Mississippi University for Women v. Hogan*, the fact that the male plaintiff sought entrance into a nursing school was key to the Court's decision to invalidate the policy excluding men: "[Mississippi University for Women's] policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[71] The exclusion of men from a nursing school was problematic, for the Court, precisely because it reinforced gender norms that women will make better nurses because they are more caring.

This focus on the content of the generalization (as contrasted with the looseness of the fit) is especially evident in *United States v. Virginia*.[72] In this case, we have an exclusion of women from a military academy and particularly from one that employs a rough and adversarial educational environment. This policy rests on the generalization that women, on average, will not thrive in this atmosphere.[73] As gender classifications are subject to intermediate scrutiny, one might expect that some looseness of the fit between the proxy (male) and the target (likely to thrive at the Virginia Military Institute) might be tolerated. It is not: Justice Ginsburg explains the Court's decision striking down the male-only admissions policy at the Virginia Military Institute, despite evidence that most women would neither be qualified for nor benefit

for that reason is doctrinally ill equipped to handle laws that discriminate without using proxies).

[68] Califano v. Goldfarb, 430 U.S. 199, 207 (1977) (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[69] *Miss. Univ. for Women*, 458 U.S. at 725.

[70] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003).

[71] 458 U.S. at 729.

[72] 518 U.S. 515 (1996).

[73] Id. at 541–42.

from the educational program, by saying that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[74]

So far I have argued that the prohibition on gender stereotyping that is a familiar part of equal protection jurisprudence is not simply a prohibition on laws that generalize. Nor is it explained fully by the fact that equal protection doctrine rejects loose generalizations. Rather, the cases also focus on the content of the generalization. Where laws use gender stereotypes that confine individuals to particular gender roles, the Court rejects them. The view that a person has a right not to be limited by gender roles has its roots in the noncomparative conception of discrimination. The antistereotyping principle found in sex discrimination cases rests on the view that each person (male or female) has an independent, noncomparative right to define his or her gender identity for him or herself.[75]

Sex discrimination cases also include a strand in which the Court draws a line between sex stereotypes and real differences between men and women. The drawing of this line further coheres with the noncomparative conception of discrimination. For example, the Court upheld the sex-based classification in *Tuan Anh Nguyen v. INS*, which made it easier for nonmarried, citizen mothers than nonmarried, citizen fathers to obtain citizenship for children born outside the United States, because the law was based on "our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be."[76] This effort to separate stereotypes from "real differences" between men and women makes sense if each person has a right to define her or his own gender identity. If ought implies can, then we cannot say that each person has the right to define what being a woman

[74] Id. at 550.

[75] Professor Cary Franklin traces the intellectual development of Justice Ginsburg's commitment to the view that both men and women should have the freedom to define their own gender roles to John Stuart Mill and to the Swedish equality movement in Cary Franklin, The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law, 85 N.Y.U. L. Rev. 83, 88–89 (2010). Professor Adam Hosein makes a related argument about how best to understand the prohibition on sex-role stereotyping. He argues that this prohibition is best explained and justified by a Millian-based argument that we ought to protect people who are experimenting with different modes of living in order to support the ability of society to make social change. See Adam Hosein, Freedom, Sex Roles, and Anti-Discrimination Law, 34 Law & Phil. 485, 485–86 (2015).

[76] 533 U.S. 53, 73 (2001).

or man entails when "basic biological differences" are in play. Rather it is only when socially constructed gender roles limit freedom or opportunity that a rights violation has occurred.[77]

C. Tiers of Scrutiny Identify Strength of Reasons

The independent approach sees the tiers of scrutiny as identifying genuine reasons to find a law impermissible. According to the noncomparative conception of discrimination, differentiation is impermissible when the state denies someone something to which she is independently entitled. These entitlements can include things like the right to be free from race-based classification or the right to be free from gender stereotyping—as well as more familiar rights like the right to procreative liberty as in *Eisenstadt*. If these are rights or entitlements that people have, the fact that a law impinges on these rights by classifying on the basis of race, by gender stereotyping, or by limiting procreative liberty, provides a reason to invalidate the law. The law may not be wrong or unconstitutional, all things considered—as this wrong-making feature can be outweighed by an important or compelling interest—but the feature that calls for such review provides a genuine reason weighing against the constitutionality of the state action.

The term "strict scrutiny" is thus a misnomer, on this view. If a law limits a person's use of contraception, or makes her race relevant to governmental decision-making, or imposes archaic gender norms on her, these facts count against it. Heightened review captures a substantive judgment about a feature of the law or policy at issue. That being the case, "strict" or "intermediate" scrutiny doesn't indicate how closely a court should examine the governmental action to ascertain if a wrong has occurred. Rather, strict and intermediate scrutiny function to indicate the presence of a genuine reason for finding the law impermissible and tell the court how weighty that reason is and thus how significant the countervailing interest must be to outweigh it.

[77] When I claim that the Court's delineation of stereotypes from real differences makes sense from the perspective of the noncomparative conception of wrongful discrimination, I do not intend to endorse the particular line the Court draws. Perhaps some of what the Court finds to be real differences are socially constructed. Moreover, society can always decide how to respond to real, biological differences. Rather, I am arguing only that the felt need to draw a line between "stereotypes" and "real differences" is understandable if this doctrine's implicit aim is to protect the freedom to define one's own gender role.

This view is clearly articulated in Justice O'Connor's opinion for the Court in *Adarand Constructors v. Pena*.[78] There the Court finds that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."[79] In the Court's view, the use of a racial classification is already unequal treatment (something not yet determined under the comparative approach until after strict scrutiny is employed). As such, the individual affected is entitled to a justification from the state. After weighing the strength of that justification (which is what strict scrutiny consists of), the Court will determine whether the law violates the Constitution.

To recap: According to the noncomparative account of discrimination, a law or policy impermissibly discriminates when it infringes on a right that each person is entitled to enjoy. The problem is not that *X* is being treated worse than *Y*. Rather the problem is that *X* is being denied a right to which she is entitled. Period. Discrimination claims often seem comparative but this appearance is deceptive. We may point to the fact that *Y* enjoys a particular benefit while *X* does not, but doing so only serves to make clear that everyone is entitled to that right. *X*'s claim to the right depends on the strength of her claim, not on a right to treatment equal to what *Y* enjoys.

These independent rights include familiar rights like the right to procreative liberty vindicated in *Eisenstadt*, as well as other rights that the discrimination context gives rise to. These include a right to be free from race-based classification and a right to define one's gender identity for oneself (and perhaps other rights as well). The resistance to racial classification and to gender stereotyping that are familiar themes in our equal protection doctrine thus derives from the noncomparative conception of discrimination. Moreover, because racial classification and gender stereotyping impinge on an individual's rights, their presence provides a reason to find laws unconstitutional. Heightened review operates, according to the independent approach, by identifying this imposition and demanding a significantly weighty justification to permit it.

[78] 515 U.S. 200, 223–25 (1995).
[79] Id. at 224.

III. WHY DISPARATE IMPACT AND EQUAL PROTECTION ARE NOT AT ODDS

So far, I have described the two different ways of understanding the wrong of discrimination and explained which facets of equal protection doctrine are animated by each account. I turn now to the practical payoff of this analysis. Because courts have not recognized that they are using two concepts of discrimination, the doctrine often unhelpfully intermingles these two approaches, producing at best confusion and at worst a form of argument that takes parts of one analysis and parts of the other to form an incoherent whole.

Scholars and at least one Supreme Court Justice have begun to wonder "[w]hether, or to what extent, . . . the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 [are] consistent with the Constitution's guarantee of equal protection."[80] The argument goes as follows. Disparate impact provisions direct actors (private or public) to avoid policies that adversely affect racial minorities where they can do so without compromising legitimate needs. For example, if an employer uses a standardized test to screen job applicants that significantly fewer racial minorities pass than do whites and the test is not an accurate predictor of job performance, the employer can be liable for disparate impact discrimination.[81] These provisions instruct actors to be aware of the racial impact of their policies. Disparate impact prohibitions encourage an actor to choose policy *A* over policy *B* if it will have less adverse effect on racial minorities, and direct actors to avoid policies with adverse impacts on disadvantaged groups when they are unsupported by important countervailing reasons. These laws could raise equal protection problems in two different ways. If a state actor chooses policy *A* because of its impact understood in racial terms (because it minimizes racial disparities, produces integration, etc.), this intent to produce a racialized pattern of results might violate equal protection. In addition, one might argue, as Professor Richard Primus has most influentially,[82] that because Congress's adoption of disparate impact liability[83] is motivated by the intention to undo racial (or other) hierarchies, this provision violates equal protection.

[80] Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). See, e.g., Primus, supra note 1.

[81] Civil Rights Act of 1991, 42 U.S.C. § 2000e-2 (2012).

[82] Primus, supra note 1, at 495.

[83] 42 U.S.C. § 2000e-2 (2012).

This analysis focuses on two features of our equal protection doctrine—its insistence that intentions matter and its prohibition on racial classification. The analysis brings these two elements together to construct an argument that disparate impact liability violates equal protection. Equal protection doctrine tells us to look at the intentions of the state actor who enacts a law or adopts a policy. In the case of the amendments to Title VII that codify disparate impact liability, this intention is—let us suppose—to undo or ameliorate racial disparities in employment (and elsewhere). But why *racial* disparities in particular? This intention is infused with racial classification, which the prohibition on racial classification makes problematic. As Primus explained, Title VII's disparate impact prong is "a law with a racially allocative motive and therefore subject to strict scrutiny."[84]

And this analysis isn't limited to a disparate impact claim. Its logic suggests that anytime a state actor adopts a facially neutral policy at least in part because of its impact, understood in racial terms, it may violate equal protection. For example, suppose a state chooses to provide universal pre-kindergarten for all four-year-olds in the state at least in part because providing early childhood education to those who can't afford it is likely to help shrink the racial achievement gap in education. If the intention of lawmakers is to shrink the racial achievement gap (rather than simply to improve educational opportunity for all), the argument about the constitutional infirmity of disparate impact liability suggests that this program would also be at risk. Now of course savvy lawmakers could be careful about rhetoric, making this sort of claim difficult to prove. But that is not really the point. The question is: Does an intent to shrink racial disparities in education, housing, healthcare, etc. make such policies constitutionally problematic?

In what follows, I very briefly sketch the cases that suggest that this is a live and serious question, as well as the scholarly support for this view. I then argue that the claim that awareness of racial impact violates equal protection derives from a flawed conflation of the two conceptions of the wrongful discrimination. It takes the prohibition on racial categories from the noncomparative view and the focus on intention from the comparative view and grafts them together to form a hybrid argument that, though full of sound and fury, signifies nothing.

[84] Primus, supra note 1, at 538.

The intention of the state actor is important to equal protection analysis. When a law or policy is adopted specifically in order to harm an individual or group, this intention constitutes an illegitimate aim. But other than an intent to harm, equal protection doctrine is unclear about what intentions are legitimate or illegitimate. The relevant question for the constitutionality of our pre-K program and for the permissibility of disparate impact liability is whether an intent to reduce racial disparities is also illegitimate and especially whether this intention, when operationalized in a facially neutral form, calls for strict scrutiny. The first strong hint that this may be so is found in Chief Justice Roberts's opinion in *Parents Involved in Community Schools v. Seattle School District*.[85] There Chief Justice Roberts, albeit writing for only himself and three other Justices, suggests that the intention to achieve integration is an illegitimate goal.[86] However, these remarks arose in the context of a case in which explicit racial categories were employed. So while he says that the intention to achieve a diverse student body is illegitimate, Roberts is also careful to avoid saying that facially neutral policies adopted with this intention would also be unconstitutional: "These other means—*e.g.*, where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity . . . ."[87]

In 2009, two years after *Parents Involved*, the Court in *Ricci v. DeStefano* cast even more doubt on the constitutionality of facially neutral state action adopted because of its impact, understood in racial

[85] 551 U.S. 701, 732–33 (2007).

[86] Id. at 732 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.' While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance."). Justice Kennedy, who joined the Court's opinion in part (but not in this part) disagreed:

> To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken. . . . [I]t is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.

Id. at 788 (Kennedy, J., concurring in part).

[87] Id. at 745.

terms.[88] In *Ricci*, firefighters in New Haven, Connecticut challenged the city's decision to ignore the results of a test it had designed and offered as a basis for promotion. If promotions had been based on the test results, no African Americans would have been eligible for the fifteen available positions. Looking at these results, the city civil service board deadlocked over whether to certify the test results, effectively halting the promotions. Based on these facts, the Court held that the city's failure to certify the results was a race-based decision in violation of the disparate treatment prong of Title VII of the Civil Rights Act.[89]

Justice Kennedy, writing for the Court, saw the city as caught between a rock and a hard place. The rock was the disparate treatment prong of Title VII, which forbids employers from basing hiring or promotion decisions on race. The hard place was the disparate impact prong of Title VII, which requires employers to make sure that facially neutral methods that have a disparate impact on minorities or women, like written tests or height requirements, actually test for knowledge and abilities important for the job.[90] This part of the law requires an employer to be conscious of the racial makeup of its workforce in order to root out unnecessary practices that block women and minorities.

The Court's decision in *Ricci* suggests that if awareness of the racial impact is the reason for a state's decision, then the policy adopted for this reason is tainted by an illegitimate motive. Of course, *Ricci* was decided on statutory grounds—the intention to avoid disparate impact was held to violate Title VII's prohibition on disparate treatment[91] but is nevertheless suggestive of how a Court might address the question of the constitutionality of facially neutral actions adopted at least in part because of their welcome effect on racial disparities.[92] Indeed, Justice

[88] 557 U.S. 557, 561–63 (2009).
[89] Id. at 574, 593.
[90] Id. at 585, 592–93.
[91] Id. at 584–85.
[92] There are facts about this case that make it differ from an ordinary disparate impact case, however. In particular, the presence of identifiable people who would be affected by abandoning the test results makes this case different. Richard Primus emphasized this factor when arguing that there are several ways to read *Ricci*, and thus that it does not clearly show that disparate impact violates equal protection. See Richard Primus, The Future of Disparate Impact, 108 Mich. L. Rev. 1341, 1354 (2010) (arguing that one can read *Ricci* to say that "disparate impact doctrine *would* collide with the prohibition on disparate treatment, were it not ordained by Title VII's own authority," but that this is not the only way to read the case).

Scalia, concurring in *Ricci*, wonders aloud whether Title VII's disparate impact prong itself is unconstitutional.[93]

Primus wonders, or worries, about this too, arguing that *Ricci* can be read to suggest that "[i]f administering the disparate impact doctrine would be a disparate treatment problem but for the statutory carve-out, it is also an equal protection problem."[94] Many others have agreed. Scholars have questioned whether "the government's voluntary attempt to integrate races, *even in the absence of a racial-classification scheme*, is action taken 'because of' race and therefore is presumptively unconstitutional"[95] and argued that "*Ricci* means that disparate-impact liability is vulnerable to constitutional attack"—"triggered as it is by the race of successful candidates, [it] is a type of racial classification subject to strict scrutiny."[96]

The argument that an intent to reduce racial disparities in education, employment, housing, healthcare, etc. renders a facially neutral governmental policy suspect is flawed. Its initial plausibility comes from the fact that our equal protection doctrine does focus on intention and does prohibit racial categories. Taking these two premises together seems to yield the conclusion that an intention to classify on the basis of race must raise equal protection problems as well. And it is but a short step from this claim to the conclusion that the intent to produce an

[93] *Ricci*, 557 U.S. at 594 (Scalia, J., concurring) (observing that the Court's decision "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?").

[94] Primus, supra note 92, at 1355.

[95] Michelle Adams, Is Integration a Discriminatory Purpose?, 96 Iowa L. Rev. 837, 839 (2011).

[96] Lawrence Rosenthal, Saving Disparate Impact, 34 Cardozo L. Rev. 2157, 2163 (2013). See also Lino A. Graglia, *Ricci v. Destefano*: Even Whites Are a Protected Class in the Roberts Court, 16 Lewis & Clark L. Rev. 573, 585 (2012) (explaining that such actions seem to raise "the question of the disparate impact provision's constitutionality . . . [and] answer it in the negative, for it cannot, it would seem, authorize or require unconstitutional ('express race-based') discrimination without being unconstitutional itself"); Kenneth L. Marcus, The War Between Disparate Impact and Equal Protection, 2009 Cato Sup. Ct. Rev. 53, 61–62 (recognizing that "[d]isparate impact may entail suspect racial classifications in two respects: first, in the legislation itself, which would subject the congressional enactment to strict scrutiny; second, in actions taken by public employers to comply with the legislation"); Helen Norton, The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality, 52 Wm. & Mary L. Rev. 197, 229–35 (2010) (arguing that "[w]hat *Ricci*'s redefinition of culpable mental state for antidiscrimination purposes destabilizes . . . is the long-standing assumption that the Court does not view government's attention to race to achieve antisubordination ends as itself suspicious").

outcome that is seen in racial terms (reducing racial disparities in [blank]) is an instance of an intention to classify on the basis of race. However, as the analysis of Parts I and II makes clear, these two facets of our doctrine (the focus on intention and the prohibition on racial classification) derive from different, competing accounts of what makes discrimination wrong. They cannot be fruitfully combined.

To draw a simple analogy, consider two competing views about how one ought to decide what to eat. To some people, decisions about what to eat are governed by a concern with weight. To others, eating should be governed by pleasure. These approaches provide alternative accounts of how to decide what to eat. They are competing in the sense that they appeal to different values. They can at times arrive at the same answer but they do so for different reasons. For example, on both accounts of good eating, one ought to eat fresh berries. But the fact that they can converge on a food choice doesn't mean anything about the ability to take reasons from one account and insert them into an argument based on the other. To see the error of doing so, consider the case of chocolate cake. For the person watching her weight, the fact that chocolate cake is fattening is a reason not to eat it. For the gourmand, the fact that chocolate cake is delicious is a reason to eat it. But can the dieter say to the gourmand you shouldn't eat the chocolate cake because the fact that it is fattening will make it impossible to enjoy? If the gourmand is governed by pleasure only and doesn't care about her weight, the fact that the cake is fattening will not detract from her pleasure and this insertion of a reason that works in one framework into a framework governed by different values simply doesn't work. Yet this is precisely the structure of the argument against disparate impact that has been so convincing to scholars.

The prohibition on racial classification rests on the noncomparative account of the wrong of discrimination. It is because people have an independent right that their race play no role in how the state treats them (assuming they do have such a right) that state policies that make a person's race relevant to her treatment call for strict scrutiny. Intentions have no role to play in this account. It doesn't matter why the state uses a person's race when determining her treatment; what matters is that it does. In fact, it is the irrelevance of intentions to the wrong of race-based classification that explains why affirmative action and invidious race-based classification are both subject to strict scrutiny. People have a

right to a certain kind of freedom and therefore the intentions (good or bad) of the actor denying that freedom are irrelevant.

The intentions of state actors are relevant to a very different sort of argument for when and why laws and policies violate equal protection. On the comparative account of discrimination, a law or policy wrongfully discriminates when it fails to treat people as equals. One plausible way to fail to treat people as equals is to intend to harm or disadvantage them. On this account, intentions are crucial.[97] Intending to harm or disadvantage a person is one way to fail to treat the person affected as someone who matters equally.

But what of intending to classify on the basis of race? There is simply nothing obviously wrong with intending to classify on the basis of race. From the perspective of the comparative account, intending to classify on the basis of race is no different from intending to classify on the basis of any other trait (the letter that begins one's last name, for example). It is not problematic without an intent to harm. It's like saying to the gourmand you shouldn't eat the cake because the fact that it's fattening will ruin your enjoyment of it. Just as the gourmand doesn't care about weight, the comparativist doesn't care about classification. And while the gourmand does care about enjoyment, there is no reason for her to think that the cake's caloric count will affect her enjoyment. So too, the comparativist may well care about intentions, but there is no reason for her to think that an intent to classify on the basis of race (without more) is problematic.

The fact that so many people have thought that an intent to produce an effect understood in racial terms *is* problematic results from our failure to distinguish between the two conceptions of discrimination at war in our equal protection doctrine.

In addition, the confusion has been able to take root because decided cases have not required the Court to be more precise about what sorts of intentions are problematic and why. For example, consider *Washington v. Davis*[98] and *Personnel Administrator of Massachusetts v. Feeney*.[99] These are the canonical cases identifying intent, rather than effect, as the

[97] Not all comparative views see intentions as crucial. The focus of intentions is surely grounded in a comparative conception of the wrong of discrimination. However, there are other ways to analyze what treating people as equals requires. Some of these may also make intentions irrelevant.

[98] 426 U.S. 229 (1976).

[99] 442 U.S. 256 (1979).

"touchstone" of an equal protection violation.[100] In both cases, the laws at issue produced a disparate impact on a disadvantaged group (blacks and women, respectively) that, alone, was insufficient to give rise to an equal protection claim. The Court insisted that a law must have been adopted "because of" and "not merely 'in spite of,'" its effect.[101] Yet in so saying, the Court did not need to be more specific about whether the prohibited intent was an intent to harm the group or merely an intent to classify.

I suspect that if push came to shove, the Court would not specifically hold that an intent to reduce racial disparities in education, healthcare, employment, etc. is illegitimate. I have so far argued that the Court *ought* not to so conclude. I close this Part by noting that the doctrine already contains strands that reject the conclusion advanced by disparate impact skeptics. In affirmative action cases, the Court repeatedly looks to see whether the state could have achieved its aims using race-neutral means.[102] If the intent to increase racial diversity in higher education by admitting the top ten percent of high school graduates, for example, is a permissible, even desired, alternative to an explicit use of race in admissions, it must be the case that the intent to produce an effect understood in racial terms via facially neutral means is meaningfully different from race-based classification.

This example shows that some aspects of our doctrine already reject the argument that this Article systematically dismantles. Those parts are grounded on an intuition. This Part has provided the argument in support of that intuition.

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[100] For example, as the Court says in *Washington*:

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida*, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

426 U.S. at 242.

[101] *Feeney*, 442 U.S. at 279.

[102] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013); *Parents Involved*, 551 U.S. at 735; Grutter v. Bollinger, 539 U.S. 306, 339 (2003), superseded by state constitutional amendment, Mich. Const. art. I, § 26; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

IV. WHY WE ARE SO CONFUSED ABOUT RATIONALITY REVIEW

Equal protection doctrine includes "rationality review," thereby suggesting that laws that distinguish among people must do so in a way that is at least rational. However, where the law differentiates on the basis of a trait that is neither suspect nor quasi-suspect, it is unclear whether this rationality requirement is meaningful or toothless. Where a law draws a distinction on the basis of a trait that has some of the indicia of suspectness (traits like mental disability or sexual orientation, for example), commentators call the more searching form of rationality review employed "rationality review with bite," suggesting that without a reason for more searching review, ordinary rationality review has no bite. Does it? Should it?

Equal protection doctrine's response to these two questions is: sometimes yes, sometimes no, and maybe yes, maybe no. Both views—that irrational governmental action violates equal protection and that it does not—are present in our case law.[103] In other words, our doctrine is deeply ambivalent about whether irrationality itself is an equal protection problem. The analysis presented in this Article explains why. In this Part, I argue that the noncomparative conception of wrongful discrimination leads to the conclusion that the Equal Protection Clause protects individuals from irrational governmental action and the comparative conception of wrongful discrimination leads to the conclusion that genuine arbitrariness is no concern of equal protection.

[103] The Court consistently insists that laws and policies that draw distinctions between people must do so for a reason. See, e.g., Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602 (2008) (emphasizing that "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.' Thus, when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a 'rational basis for the difference in treatment.'" (quoting Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000))); James v. Strange, 407 U.S. 128, 140 (1972) (arguing that "the Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out'" (quoting Rinaldi v. Yeager, 384 U.S. 305, 308–09 (1966))). On the other hand, rationality review is extremely easy to pass, suggesting that the Court does not really find irrationality to be an equal protection problem. See, e.g., FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (asserting that "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data"); Schilb v. Kuebel, 404 U.S. 357, 367–68 (1971) (noting that the reason for a statutory distinction was "tenuous . . . but we cannot conclude that it is constitutionally vulnerable").

What do I mean by irrational governmental action? Here I have in mind the sort of case in which the law does not serve its intended end. Suppose a state draws a distinction among people on the basis of trait *A* in order to achieve some end but doing so does not serve that end—perhaps because people with trait *A* are not more likely to have the quality to be avoided than are other people. If so, then the state acts irrationally. People are burdened by this law for no reason, as the law uses an irrational means of pursuing its end.

In the real world, one would expect these sorts of situations to be rare. After all, they would seem to result from incompetence or stupidity. In reality, however, the claim of irrationality may arise more frequently than one would think because it is sometimes raised in cases where the more likely explanation for the law is not stupidity, but instead the desire to protect some economic interests over others. But ever since the rejection of the *Lochner* era,[104] courts have been reluctant to closely scrutinize the legislative purposes to insure that they are truly public oriented,[105] thus leaving rationality review to focus on means. For example, opticians in Oklahoma challenged a state law that permitted only optometrists and ophthalmologists to fit and duplicate lenses unless others did so with a written prescription from one of these practitioners.[106] The law was challenged under both the Due Process and Equal Protection Clauses as irrational on the grounds that as to some functions—making new lenses by copying the prescription from old lenses and refitting old lenses into new frames—opticians are as competent as optometrists or ophthalmologists and therefore the law draws an irrational distinction. The question raised by such cases is whether such irrationality, standing alone, is constitutionally impermissible.

[104] Lochner v. New York, 198 U.S. 45 (1905).

[105] For example, the Court in *United States v. Windsor* noted that,

> As a result, in rational-basis cases, where the court does not view the classification at issue as "inherently suspect" "the courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued."

133 S. Ct. 2675, 2717 (2013) (citations omitted) (first quoting *Adarand Constructors v. Pena*, 515 U.S. 200, 218 (1995) and then quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985)).

[106] Williamson v. Lee Optical, 348 U.S. 483, 484–86 (1955).

A. The Noncomparative Right to Rational Governmental Action

Equal protection doctrine pays lip service to the idea that laws, policies, and state actions raise equal protection problems when they differentiate between people in an irrational way. While we might quibble about whether this is a real part of the doctrine or mere rhetorical flourish, the claim that purely irrational differentiation violates equal protection is grounded in the noncomparative conception of wrongful discrimination. Where a law or policy irrationally differentiates, and nothing more (not poorly motivated or the result of differential sympathy,[107] etc.), then the people burdened are burdened for no reason. If this is a constitutional problem, it is a problem because people have an independent, noncomparative right that state action that burdens their liberty does so for a reason.

Why think people have such a right? I think the idea starts with liberty. People have liberty-based rights, but the scope of these rights is often unclear. Where deprivations of liberty are relatively uncontroversial—like a law that says a person cannot hit another—this is because the liberty that is restrained by the law would interfere with a liberty of others (to be free from this physical assault). Where there is no harm to others and no good reason at all for a law (as it will not achieve its end), then people's liberty is restrained for no reason. One might think that people have a liberty-based right to be free from these sorts of laws. This is the way that the U.S. District Court for the Western District of Oklahoma had put the problem in *Williamson v. Lee Optical*.[108] The District Court found that the Oklahoma law violated the Constitution "by arbitrarily interfering with the optician's right to do business."[109]

If the root of the claim to a right to be free from irrational laws rests on a right not to have one's liberty curtailed for no reason, it is unsurprising that this claim can be articulated as either a violation of due process or of equal protection. Indeed, the opticians claimed both.[110]

[107] In *New York City Transit Authority v. Beazer*, Justice White was unconvinced by "the Court's easy conclusion that the challenged rule was '[q]uite plainly' not motivated 'by any special animus against a specific group of persons.'" 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting) (quoting the majority opinion, 440 U.S. at 593 n.40).

[108] 348 U.S. 483.

[109] Id. at 486 (citing Lee Optical v. Williamson, 120 F. Supp. 128 (W.D. Okla. 1954)).

[110] They claimed that the guarantee of due process required that laws limiting their liberty be rational and that treating them worse than other professionals and worse than makers of ready-to-wear glasses (who could make and sell glasses without obtaining a prescription) violated equal protection. Id. at 488.

While the equal protection claim framed its objection in comparative terms—we opticians are treated worse than makers of ready-to-wear glasses for no good reason—the wrong it identified is independent, not comparative. A policy that rationally distinguishes between people also treats some people worse than others. Only optometrists and ophthalmologists can write prescriptions for lenses because only they have the necessary training to do that sufficiently well, or so I imagine. What makes the worse treatment a violation of equal protection, when it is (and similarly of due process), is that the distinction lacks a reason. In other words, one has an independent (noncomparative) right to be free from irrational laws and this right is protected via the Equal Protection Clause's demand that laws that draw distinctions between people do so rationally.[111]

B. Irrationality as No Comparative Wrong

Rationality review is notoriously deferential.[112] In the last Section, I argued that the view that mere irrationality should be a concern of equal protection has its roots in the independent conception of wrongful discrimination. The fact that rationality review exists at least in name

[111] In *Lee Optical*, the Court found that the distinction was sufficiently rational because "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it," id. at 488 (rejecting the due process challenge), and because "the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch," id. at 489 (rejecting the equal protection challenge). These formulations are highly deferential and thus arguably constitute rationality review without any bite.

[112] See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding a New Orleans ordinance forbidding all push cart vendors from the French Quarter but exempting two vendors who had been operating for at least eight years). The "grandfather clause" was challenged as irrational because there was no reason to think that the vendors who had operated more than eight years would do a better job of maintaining the charm of the historic district than more recent additions. In overturning the appeals court's decision that this distinction was thus irrational, the Supreme Court was extremely deferential and explained rationality review as essentially toothless when no fundamental right or suspect classification is at issue: "[T]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ." Id. at 303. See also *Lee Optical*, 348 U.S. at 486–89 (upholding an Oklahoma statute that forbade opticians to fit and duplicate lenses without a prescription from ophthalmologists or optometrists against challenges under both the Due Process and Equal Protection Clauses and employing an extremely deferential standard of review as to both).

owes its place (even if it is mostly a place-holder) to the independent conception of discrimination. The fact that this form of review is mostly toothless[113] rests, in contrast, on the comparative account.

For the comparative account, the relevant question is this: When a law burdens *X* but not *Y* and does so irrationally, does this law fail to treat *X* and *Y* as equals? In answering this question, keep in mind that a rational policy will also treat some people worse than others. Therefore this fact isn't enough to conclude that the policy fails to treat *X* and *Y* as equals. In addition, the noncomparative complaint that a person's liberty ought not to be restricted without a reason cannot be the source of our objection, as that concern asserts a noncomparative right. Thirdly, we are not dealing with a case in which the irrationality is the result of animus or differential sympathy or expresses denigration of those negatively affected. What we have is mere irrationality, pure stupidity. In my view, this sort of case is relevantly like a lottery—where parties have an equal chance of picking the short stick and so bearing whatever burden must be borne. Of course a lottery is often seen as the paradigmatic example of fairly distributed burdens or benefits, a mechanism that treats those whom it affects as equals. While stupid, irrational state action isn't actually distributed via a lottery; when there is no reason to suspect animus or differential sympathy, bearing the burden of this irrationality is fairly close to simple bad luck. As such, laws and policies that distinguish among people for no good reason do not constitute discrimination on the comparative account.[114]

Professor Ken Simons disagrees. He identifies what he calls an "'implicit' equality right[]," which is "a right not to be treated differently except for a sufficient reason"[115] or what he terms a

[113] Sometimes rationality review is applied with "bite." In these cases though, it is not really the irrationality of the law that is the problem; rather, it is the inferred animus that the irrationality leads the court to presume. See, e.g., Romer v. Evans, 517 U.S. 620, 632 (1996) ("[T]he amendment seems inexplicable by anything but animus toward the class it affects . . . ."); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449–450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . . .").

[114] I explain this view in depth in Hellman, supra note 42, at 114–37.

[115] Simons, Comparative Right, supra note 41, at 416.

"demand-for-reasons equality claim."[116] In other words, Simons sees the commitment to rationality review that is present in equal protection doctrine as grounded in the comparative right to be treated as an equal. I disagree. In my view, a "demand for reasons" is not an equality claim at all. To see why, consider the following example.

Suppose a public university adopts a policy of giving a preference in admissions to students who wear glasses. When asked about the policy, the admissions official replies that everybody knows that people who wear glasses are smarter than people who do not. Further suppose both that this is the actual reason for the school's policy and that the generalization that the admissions policy relies on is false: People who wear glasses are not, on average, smarter than those who do not. If the university acts properly in trying to identify smart applicants (after all, that's ostensibly what SAT scores are meant to do), then it acts with a legitimate purpose. If university officials do not have animus toward, nor differential sympathy for, people who need no vision correction, then there is no reason to suspect a process defect of the kind previously discussed.[117] It's a dumb policy and one that will harm the interests of some applicants—those who are well-qualified but with good vision.

Now compare the glasses preference to two other policies the public university might employ. The university might favor applicants with high grades or it might favor prospective students from states that produce few applicants. Each of these policies disadvantages some students as compared with others. Suppose that "sufficient reason" supports these latter two policies, while no such sufficient reason supports the preference for students who wear glasses. The students with high grades are more likely to succeed at college than students with low grades and students from states that send few applicants bring an interesting perspective that enhances the classroom more, on average, than would another student from an already-represented area, let's

[116] Simons, Egalitarian Norms, supra note 60, at 727–28 (identifying an ambiguity in the treat likes alike principle such that it is comprised of what he terms the "demand-for-reasons" equality claim, which he sees as genuinely egalitarian, and "the derivative idea that a rule should be applied according to its terms," which he, like Westen, sees as empty, see supra note 19).

[117] In addition, it would be hard to argue that the policy denigrates either those who don't wear glasses or those who do.

suppose. While the first two policies are thus rational and the glasses preference is not, all three policies treat some students differently than others and burden some students as compared to others.

In that sense, all three policies treat some applicants worse than other applicants—two for a good reason and one without a good reason. Why might the irrationality of the glasses policy matter? The view that you ought not to have your liberty restricted without a good reason to do so certainly makes sense. On that account, it doesn't matter how you are treated as compared to others. What matters is that your liberty is limited for no good reason. It is for this reason that I argued that this rationale rests on the noncomparative account of discrimination. On the comparative conception of discrimination, by contrast, the irrational policy must distinguish among people in a manner that fails to treat those affected as equals. However, there is no reason to think that the glasses policy does so. Sure, it burdens those with good vision, but so do the rational policies like the preference for applicants with good grades. Sure, it limits the liberty or harms the interest of some applicants without any reason to do, but that's not a comparative concern. That's the noncomparative right or entitlement not to have ones liberty curtailed without a reason to do so. So what's left? The fact that the irrational action harms some applicants is unfortunate, but in no way does the adoption of this policy fail to treat the people whom it affects as equals. It is simply bad luck for the folks with good vision that the silly admissions officials happened to adopt this crazy policy. While they suffer the consequences in this case, if there is no reason to suspect animus or differential sympathy, then such bad luck should be randomly distributed—much like other sorts of bad luck that befalls us. The comparative account of discrimination therefore yields the conclusion that mere irrationality is of no concern.

Let me close this discussion of the roots of equal protection doctrine's ambivalence about rationality review in a somewhat esoteric place. There is a debate about whether so-called "class of one" cases of discrimination raise genuine equal protection claims. In these cases, there is no suspect or quasi-suspect class (thus the "class of one") yet the plaintiff alleges that the state actor treated her differently than others. The question then arises, must the plaintiff show that the state actor

acted with animus or ill will to raise an equal protection claim or is the mere irrationality of the differential treatment sufficient? This issue poses in miniature the broader debate about whether pure irrationality is an equal protection concern. And in the two answers to that question given by the Justices, we see the noncomparative and comparative account of discrimination, again, in action.

For example, in *Village of Willowbrook v. Olech*, the Court considered the claim of husband and wife landowners who alleged that the Village demanded a larger easement from them as a condition of connecting their home to the municipal water supply than was required of others.[118] In addition, they alleged that this demand was both irrational and motivated by animus. In a per curium opinion, the Court held that an allegation of animus or ill will was not necessary and that the irrationality of the action alone was sufficient to state a claim, so long as the Village intentionally, rather than inadvertently, treated the homeowner differently without reason.[119] This result exemplifies the view that irrational governmental action is a genuine equal protection violation. As the "class-of-one" feature of the example makes clear, the view that irrationality itself violates equal protection rests on the noncomparative view. The homeowners are treated impermissibly because the different treatment they receive is irrational.

Justice Breyer, concurring in *Olech*, disagreed with the Court about whether irrationality alone could be the basis of an equal protection complaint.[120] He concurred in the result because the court of appeals found that the Village acted with vindictiveness and animus.[121] In the aftermath of *Olech*, some lower courts have resisted the majority approach and continued to follow Justice Breyer's formulation and require a showing of animus or ill will.[122] The view that irrationality

[118] 528 U.S. 562, 563 (2000).
[119] Id. at 565.
[120] Id. at 565–66 (Breyer, J., concurring in the result).
[121] Id.
[122] See, e.g., Cordi-Allen v. Conlon, No. 05-10370-PBS, 2006 WL 2033897, at *6 (D. Mass. July 19, 2006) (citing Tapalian v. Tusino, 377 F.3d 1, 6 (1st Cir. 2004)) (requiring plaintiff to show that the defendant's actions constituted a "gross abuse of power"); DDA Family Ltd. P'ship v. City of Moab, No. 2:04CV00392 PGC, 2006 WL 1409124, at *9 (D. Utah May 19, 2006) (requiring a class-of-one claim to show that the action in question was

alone is not enough to state an equal protection claim and instead that something more (like animus) is needed exemplifies the comparative approach. The homeowners have been discriminated against not because they are treated worse than other landowners without adequate reason (that's the irrationality claim). Rather, this differential treatment fails to treat them as equals because it is motivated by ill will.

Fourteenth Amendment doctrine writ large and in miniature exemplifies a deep ambivalence about the significance of irrationality. The fact that we have something called "rationality review" suggests that state action that distinguishes between people must, at least, be rational. The fact that such review is generally extremely deferential suggests that irrational differentiation is not a constitutional concern. This ambivalence is explained by the fact that two distinct accounts of discrimination animate our jurisprudence. One supports the view that irrationality violates rights; the other suggests it does not. Now that we see this fact, we can better understand what is at stake in the choice between the two.

V. WHY EQUAL PROTECTION AND DUE PROCESS SHOULD ONLY SOMETIMES BE COMBINED

A striking feature of Fourteenth Amendment doctrine is the intermingling of equal protection and due process. There are cases decided under one clause that seem to really belong under the other (like *Eisenstadt v. Baird*[123]), there is a separate branch of equal protection doctrine which explicitly fuses these clauses (so-called "fundamental interests equal protection"[124]), and there are cases in which the Court appeals to values of both liberty and equality, even if it rests the decision explicitly on only one clause (like *Lawrence v. Texas*[125]). This tendency to intermingle the clauses has been met with increasing enthusiasm

motivated by a "totally illegitimate animus" (quoting Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001) (internal quotation marks omitted)).

[123] 405 U.S. 438 (1972).

[124] See infra.

[125] 539 U.S. 558 (2003).

among scholars[126] who argue for viewing issues "stereoscopically,"[127] with each clause providing a unique and important lens which, when brought together, produce a more complete depiction of constitutional wrongs than either could provide alone. The claim is both normative and descriptive, asserting that "stereoscopic" vision is best, as Professor Pamela Karlan argues, and that constitutional law is, in the words of Professor Laurence Tribe, "a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix."[128] Some scholars even suggest that the Due Process Clause is the more fertile, even for addressing claims of discrimination or exclusion.[129]

[126] See, e.g., Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law (2010) (arguing that the Constitution protects the right of same-sex couples to marry by appealing to both the Due Process and Equal Protection Clauses); Rebecca L. Brown, Liberty, The New Equality, 77 N.Y.U. L. Rev. 1491, 1491–92 (2002) (arguing that "a key feature of American constitutional structure" is "the interdependence of equality and liberty"); Pamela S. Karlan, Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment, 33 McGeorge L. Rev. 473, 474 (2002) (arguing that using both the Equal Protection and Due Process Clauses together "can have synergistic effects, producing results that neither clause might reach by itself"); Kenneth L. Karst, The Liberties of Equal Citizens: Groups and the Due Process Clause, 55 UCLA L. Rev. 99, 102 (2007) (describing the ways in which *Lawrence* is not unique among substantive due process cases in the way that it emphasizes equality concerns and arguing that "for a century, concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process"); Laurence H. Tribe, *Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name, 117 Harv. L. Rev. 1893, 1898 (2004) (describing *Lawrence* as rightly fusing liberty and equality analysis drawn from both clauses of the Fourteenth Amendment); Kenji Yoshino, The New Equal Protection, 124 Harv. L. Rev. 747, 748 (2011) (claiming that an anxiety about the diversity of the population is responsible for the Supreme Court's reluctance to recognize new groups to which heightened scrutiny should apply, with the result that the Equal Protection Clause is becoming less important, and discrimination is increasingly addressed through the Due Process Clause). This view is not without its detractors. See, e.g., Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1163 (1988) (arguing that "[t]he two clauses [due process and equal protection] therefore operate along different tracks").

[127] Karlan, supra note 126.

[128] Tribe, supra note 126, at 1898.

[129] See, e.g., Yoshino, supra note 126, at 748 (arguing that the outline of recent cases under the Equal Protection Clause "signal[s] the end of equality doctrine as we have known it," but that this doesn't mean the end of civil rights protection. Rather, the "Court's commitment to civil rights has not been pressed out, but rather over to collateral doctrines. Most notably, the Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of

Alternatively, some commentators have offered the value of "dignity" as appropriately expressing this fused liberty-equality concern[130] and have pointed to the Supreme Court's increased use of this term[131] as evidence that the Court recognizes that liberty and equality values are intimately interrelated.[132]

Despite the enthusiasm with which the fusion of the Fourteenth Amendment's clauses has been greeted, it isn't entirely clear what it produces and when it should be brought to bear. Should we always combine the clauses, or only sometimes? Are there reasons not to? And when they are combined, as they are in Justice Kennedy's opinion in *Obergefell v. Hodges*,[133] what does it mean? As I argue below, the answers to these questions depend on whether discrimination is a comparative or noncomparative wrong. For those who see discrimination as a comparative wrong, due process and equal protection rest on distinct values. And while both can be brought to bear in a particular case, courts should avoid the sort of fusion that obscures their distinctness. For those who see discrimination as a noncomparative wrong, due process and equal protection address structurally similar claims. Each is concerned with the rights that people are independently entitled to enjoy and so it is predictable that similar issues can be raised using either clause, and welcome to see the barriers between them eroded. With this schema in hand, we are able to better understand what the fusion of the clauses achieves in the somewhat oblique language in *Obergefell*. As I argue below, Justice Kennedy's opinion sees equality

the Fifth and Fourteenth Amendments." (footnotes omitted)); Brown, supra note 126, at 1492 (suggesting that "[a]s equality was to the last century, so should liberty be to the next").

[130] See, e.g., Nussbaum, supra note 126, at 150 (offering the following argument in favor of same-sex marriage: "[I]f two people want to make a commitment of the marital sort, they should be permitted to do so, and excluding one class of citizens from the benefits and dignity of that commitment demeans them and insults their dignity"); Reva B. Siegel, Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*, 117 Yale L.J. 1694, 1702 (2008) (describing dignity as a "bridge" that "connects decisions concerned with liberty to decisions concerned with equality").

[131] Leslie Meltzer Henry documents the increasing use of the term "dignity" in Supreme Court cases and develops a typology of conceptions of dignity reflected in the case law in Leslie Meltzer Henry, The Jurisprudence of Dignity, 160 U. Pa. L. Rev. 169 (2011). Two of her conceptions of dignity are "liberty as dignity" and "equality as dignity." Id. at 169.

[132] See, e.g., Siegel, supra note 130, at 1739–40 (lauding Justice Kennedy's reliance on dignity as encompassing "*both* decisional autonomy and social standing—dignity as liberty and dignity as equality—in his prominent decisions regarding sexual autonomy").

[133] 135 S. Ct. 2584 (2015).

and comparison as tools that make salient the rights deprivation at stake. This opinion thus clearly adopts the noncomparative view.

A. Distinct Claims

The comparative conception of wrongful discrimination identifies a comparative wrong (the wrong of failing to treat two or more people as equals) and distinguishes it from the wrong of denying someone something to which she is entitled. The first is a failure to treat people as equals; the second is a denial of independent rights. In this way, the comparative conception of wrongful discrimination makes way for two distinct claims to be captured by the doctrines of equal protection and due process.

Because the clauses appeal to different values and rest on different conceptions of justice, fusing them often leads to confusion. The discussion of "dignity" in *Lawrence* provides a good illustration. In *Lawrence*, the Court invalidated a Texas law that criminalized same-sex noncoital sexual relations. The opinion, written by Justice Kennedy, abjures standard due process analysis, striking down the law without ever saying outright that people have a fundamental right to engage in this form of sex.[134] In addition, the opinion uses language that refers to the value that underlies the comparative conception of equal protection, in particular its prohibition on laws that brand some people as inferior,[135] but at the same time rejects the adequacy of an equal protection-based analysis.[136] The opinion thus rejects the tools that both due process and equal protection doctrine already provide and instead relies on the value of dignity. The holding of the case is captured by the Court's statement that "[i]t suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own

[134] Instead, Kennedy resolved the case by determining that the "petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Lawrence*, 539 U.S. at 564. This analysis resulted in a decision that stopped short of declaring that people have a fundamental right to engage in noncoital sex, but nonetheless protected this sex when it occurs within the confines of a close personal relationship.

[135] Id. at 575 (emphasizing that laws criminalizing same-sex sexual relations "demean[ ] the lives of homosexual persons").

[136] Id. ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."). See also supra note 134 (analyzing the issue as an exercise of individual liberty rather than on a comparative basis).

private lives and still retain their dignity as free persons."[137] But it only suffices if we have a better sense of what "dignity" is and how or why the Constitution protects it.

In Justice Kennedy's opinion in *Lawrence*, "dignity" has two distinct meanings: dignity as respect and dignity as control. Justice Kennedy asserts that "[t]he petitioners are entitled to respect for their private lives," which the statute denied them.[138] Of course, as many people—those that enacted the law as well as others—believe that homosexuality is morally wrong, it is unlikely that Justice Kennedy is claiming that these folks must change their views and see homosexuality as a way of living that they admire. The sort of respect that Justice Kennedy is arguing that gays and lesbians are entitled to is not the respect we accord to those whom we especially esteem.[139] Rather, they are entitled to what Professor Steven Darwall terms "recognition respect,"[140] respect as persons of equal worth. As Justice Kennedy goes on to explain, "The State cannot demean their existence . . . by making their private sexual conduct a crime."[141] Dignity thus requires that the state not demean gays and lesbians. Criminalizing noncoital sex fails to treat gays and lesbians as equals by failing to accord them recognition respect.[142] This aspect of what treating another with "dignity" requires refers to the comparative conception of wrongful discrimination, which requires that laws treat those whom they affect as equals.[143]

Dignity, for Justice Kennedy, also includes the idea of dignity as control of one's private, intimate choices: "[T]he state cannot demean their existence *or control their destiny* by making their private sexual conduct a crime."[144] As Justice Kennedy explains, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression,

[137] *Lawrence*, 539 U.S. at 567.
[138] Id. at 578–79.
[139] Cf. Stephen L. Darwall, Two Kinds of Respect, 88 Ethics 36 (1977).
[140] Id. at 38.
[141] *Lawrence*, 539 U.S. at 578.
[142] Justice Kennedy describes the "stigma this criminal statute imposes" and what that "imports for the dignity of the persons charged," id. at 575, using language from that strand of the comparative conception of wrongful discrimination that emphasizes that the meaning or message of the law must not denigrate any person or group.
[143] A law criminalizing noncoital sex wrongfully discriminates against gays and lesbians by failing to treat them as equals even though such a law could be facially neutral (apply to opposite-sex couples too) because of its disparate impact on gays and lesbians.
[144] *Lawrence*, 539 U.S. at 578 (emphasis added).

and certain intimate conduct."[145] The dignity that proscribes the state from controlling the destiny of gays and lesbians by making their private sexual conduct a crime is thus the familiar autonomy-based right to be free from state interference in this sort of decision-making. It is a right usually protected by the Due Process Clause of the Fourteenth Amendment.

The "dignity" Justice Kennedy refers to thus has two distinct meanings. Fusing the two distinct interests into a single term does not advance our analysis, rather it confuses it. The reader must untangle what Justice Kennedy has in mind by "dignity" in order to determine on what basis the decision rests. The problem is not that the two interests cannot fruitfully be brought to bear in a single case. Rather, the comparative conception of discrimination encourages us to remember that they are distinct interests and thus not to confuse them by obscuring their differences under an umbrella term like "dignity."

In contrast, the fundamental interests-equal protection line of cases offers an example of how comparative and noncomparative claims can be fruitfully combined—in a manner that is clear about the distinct values that are in play. Even the label that has come to describe these cases acknowledges their basis in two distinct values.

These cases recognize a new and different way that laws may fail to treat people as equals. If *X* and *Y* are treated differently with respect to a particular good or interest, this fact alone may constitute a failure to treat *X* and *Y* as equals. The good or interest may be important enough that its differential allocation constitutes a violation of comparative justice. This can occur even when no one has a noncomparative right at stake—or so the cases suggest. For example, in *Skinner v. Oklahoma*, the Court struck down as a violation of equal protection an Oklahoma law that required sterilization of criminals convicted of three crimes "involving moral turpitude"[146] with the result that the law dictated "[s]terilization of those who have thrice committed grand larceny with immunity for those who are embezzlers," a result the Court found to be "a clear, pointed, unmistakable discrimination."[147] Justice Douglas, writing for the Court, emphasizes that the law would deprive those whom it affected of a "basic liberty," but stressed that "[w]e mention these matters not to

[145] Id. at 562.
[146] 316 U.S. 535, 536 (1942) (quoting Okla. Stat. Ann. tit. 57, § 173 (West 1935)).
[147] Id. at 541.

reexamine the scope of the police power of the States"[148]—the Court was not holding procreative liberty to be an independent right protected by the Due Process Clause. Instead, the Court

> advert[s] to [these matters] merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[149]

In other words, procreative capacity is so important that any law that distinguishes between who will be sterilized and who will not deserves close attention as it may fail to treat those affected as equals.

Today of course we see procreative liberty as an independent right that ought to be protected via the Due Process Clause but the approach *Skinner* adopts remains current. There are *some* interests that are so important that while they do not ground independent rights that people have, they make differential allocation constitutionally problematic. In *Douglas v. California*, for example, the Court held that while there is no federal constitutional right to appeal state court convictions, the state may not provide some defendants with a meaningful appeal and not others.[150] Justice Douglas, writing for the Court, stresses that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[151] Similarly, in *Harper v. Virginia*, the Court abjured deciding whether there is a fundamental right to vote in state elections and rested its invalidation of Virginia's poll tax on the premise that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[152]

These cases and others draw on both the independent interests that people enjoy and on the comparative command to treat people as equals. In that sense they are stereoscopic. But they do so in a helpful manner by keeping the distinct claims analytically separate. The comparative conception of discrimination counsels that when both comparative and

[148] Id.
[149] Id.
[150] 372 U.S. 353, 358 (1963).
[151] Id. at 357.
[152] 383 U.S. 663, 665 (1966).

noncomparative principles are at play, they should be carefully delineated so the argument for the relationship is made clear.

B. Parallel Claims

According to the independent conception of discrimination, laws that distinguish among people are wrong because they deny someone something to which she is entitled. If this is the right way to understand what makes discrimination wrong, then one would expect the line between due process and equal protection to be blurry. Due process protects us from laws that abridge rights or liberties. Equal protection, on the independent conception, does the same thing. It too protects us from laws that abridge rights or liberties to which we are entitled. The rights themselves are different, to be sure, but the structure is the same.

This structural similarity between equal protection and due process presents opportunities to use either clause, as the occasion arises. While the two clauses may well protect different substantive rights, each can, without much deformation, be used to protect rights that might really belong under the other clause. *Eisenstadt*, discussed earlier, is one example of this phenomenon. Given the structural similarity, we should also expect to see an issue treated in the same way whether it appears in a due process case or an equal protection case. The example below of *Moore v. City of East Cleveland*[153] and Justice Douglas's concurring opinion in *U.S. Department of Agriculture v. Moreno*,[154] illustrate this overlap. In this example, we see the same issue framed using the Due Process and Equal Protection Clauses.

In *Moore*, a housing ordinance that restricted the number of unrelated people who could live together was challenged as a violation of the Due Process Clause. The Court in *Moore*, in an opinion written by Justice Powell, found that the housing law violated due process because each person had a right to live with other relatives in a common dwelling.[155] As a result, a grandmother had a right to live with her son and two grandsons, who were cousins, but not brothers. The law at issue in *Moore*, which distinguished between closely related and not-so-closely related living groups, "selects certain categories of relatives who may

[153] 431 U.S. 494 (1977).
[154] 413 U.S. 528 (1973).
[155] *Moore*, 431 U.S. at 505–06.

live together and declares that others may not."[156] On the noncomparative conception of discrimination, this fact may make the underlying rights deprivation salient but it isn't what makes it wrong. What matters is that each person has the right to live with the relatives of her choosing, a right that was violated by the ordinance at issue in *Moore*. The problem, according to the Court, lies in the fact that "the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. . . . [T]he Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live within certain narrowly defined family patterns."[157]

Justice Douglas, concurring in *Moreno*, relies on the same noncomparative conception of wrongful discrimination in a similar context, in a case decided under the Equal Protection Clause. In *Moreno*, the Court struck down an amendment to the Food Stamp Act that restricted eligibility to households of related individuals.[158] The case was decided on equal protection grounds, with which Justice Douglas concurred.[159] He differed from the majority, however, with respect to the locus of the violation of equal protection. For Douglas, the law's problem lay in the fact that "[t]his banding together is an expression of the right of freedom of association."[160] Thus, Justice Douglas, like the majority in *Moore*, found the regulations at issue unconstitutional because each person has a right—grounded in freedom of association—to live with whomever she wants. The law violates that right, and thus violates equal protection, because it denies that right to some people (by denying food stamps to households of unrelated individuals). In both *Moore* and *Moreno*, this issue arises in a context of differential treatment—related households are treated differently than less-closely related or unrelated households—but this differential treatment isn't what makes the state action unconstitutional. Rather in both the due process case and the equal protection case (according to Justice Douglas's view), the violation inheres in the denial of something to which a person is independently entitled.

If all that matters are the independent entitlements that people have, the fundamental interests-equal protection line of cases would seem to

[156] Id. at 498–99.
[157] Id. at 505–06.
[158] *Moreno*, 413 U.S. at 438.
[159] Id. (Douglas, J., concurring).
[160] Id. at 541.

be a mistake. People may have the rights there asserted but if they do, it is because they have an independent right to procreative liberty, meaningful appeal of state criminal convictions, or a right to vote in state elections. The constitutional violation would not reside in the differential treatment with regard to an important interest (as these cases suggest). Justice Harlan's dissenting opinions in the fundamental interests-equal protection cases exemplify this view. In these dissents, he repeatedly stresses that the "Equal Protection Clause is not apposite."[161] What matters for him is not whether people are treated as equals;[162] rather, what matters is whether the laws at issue deny rights that people are entitled to enjoy (irrespective of how others are treated). In *Griffin v. Illinois*, where the Court invalidated an Illinois law that required the payment of a fee to get the trial transcript needed, at least in some cases, to prepare an adequate petition for appellate review, Justice Harlan insists that the question at issue was: "Is an indigent defendant who 'needs' a transcript in order to appeal constitutionally entitled, regardless of the nature of the circumstances producing that need, to have the State either furnish a free transcript or take some other action to assure that he does in fact obtain full appellate review?"[163] Similarly, when considering the constitutionality of the California law at issue in *Douglas*, which provided counsel for indigents pursuing appeals only to those who the state judged would benefit from counsel, Justice Harlan argues that "the real question in this case, . . . and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure."[164] His eye is firmly fixed on assessing what rights people are independently entitled to enjoy.

C. Obergefell*'s Commitments Revealed*

Justice Kennedy, writing for the Court in *Obergefell*, holds that "the right to marry is fundamental under the Due Process Clause"[165] and that

[161] *Douglas*, 372 U.S. at 361 (Harlan, J., dissenting).

[162] In *Harper*, Justice Harlan closes his dissenting opinion by stating that just as the Due Process Clause does not contain a laissez-faire economic theory, "neither does the Equal Protection Clause of that Amendment rigidly impose upon America an ideology of unrestrained egalitarianism." 383 U.S. at 686 (Harlan. J., dissenting).

[163] 351 U.S. 12, 33–34 (1956) (Harlan, J., dissenting).

[164] *Douglas,* 372 U.S. at 363 (Harlan, J., dissenting).

[165] 135 S. Ct. at 2598.

"the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[166] Yet he goes on to say "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[167] Moreover, he imagines the two clauses working together in some way. For example:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other.[168]
>
> This interrelation of the two principles furthers our understanding of what freedom is and must become.[169]
>
> Each concept—liberty and equal protection—leads to a stronger understanding of the other.[170]

The analysis presented in this Article allows us to unpack what all this might be about.

According to the comparative conception of discrimination, the two clauses protect distinct values. The Due Process Clause protects noncomparative rights and the Equal Protection Clause protects comparative rights. The comparative view thus counsels us to remember that these interests and values are different. They can both be brought to bear in a particular case (as they are fruitfully in fundamental interests-equal protection cases) but when they are, we should recognize and acknowledge the different values in play (as that doctrine explicitly does). What we should avoid is the ambiguous conflation that we see in terms like "dignity."

According to the noncomparative conception of discrimination, both clauses protect rights or other entitlements that people have. While each clause may have come to protect somewhat different rights, this difference is less significant than their underlying similarity. As a result,

[166] Id. at 2599.
[167] Id. at 2602.
[168] Id. at 2602–03.
[169] Id. at 2603.
[170] Id.

the noncomparative conception of discrimination welcomes the intermingling of the clauses that is increasingly common. What matters in any analysis is what rights people have. While equality and comparison do no real work, they can, at times, be useful. Comparison can alert us to a rights deprivation and make it salient.

With this framework in mind, we can better understand the somewhat opaque statements in *Obergefell* about how equal protection analysis relates to the claim of fundamental right. The dominant theme threading through the part of the opinion in which equal protection is discussed is that equal protection analysis is useful because it shows us deprivations of liberty. Notwithstanding a few comments to the contrary, equality's work is only to teach us or make clear when liberty deprivations have occurred. The right at issue is an independent, noncomparative right to liberty and the addition of equal protection analysis serves only to make that plain.

Consider the following passages. What does the addition of equal protection analysis do, according to the Court? It "furthers our understanding of what freedom is and must become."[171] The freedom that each person has an independent right to enjoy thus doesn't derive from a comparison with how others are treated, rather "[t]he reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions."[172] It is the hurt that makes the rights deprivation salient. The "Equal Protection Clause can help to identify and correct inequalities in the institution of marriage."[173] The inequality at issue is simply that which results from giving some people but not others the rights to which each is independently entitled: "It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality."[174] The analysis presented in this Article allows us to unpack all this talk and see that *Obergefell* adopts a noncomparative account of discrimination.

A recurring question for judges, scholars, and students of constitutional law is what to make of the intermingling of due process and equal protection analyses. Why does it happen? Should it be

[171] Id.
[172] Id. (discussing *Loving v. Virginia*, 388 U.S. 1 (1967)).
[173] Id. at 2604.
[174] Id.

welcomed or regretted? The analysis presented in this Article helps us to answer these questions. For judges or readers who believe that discrimination is a comparative wrong, equal protection and due process appeal to different values. Recognizing this fact, one should strive to keep them separate in one's mind. While they can be brought together, courts should only do so consciously, clearly, and carefully. For judges or readers who believe that discrimination is a noncomparative wrong, equal protection and due process both protect rights that people are independently entitled to enjoy. While each clause has come to protect somewhat different rights, that hardly matters. As a result, the promiscuous intermingling of the clauses that we see in *Obergefell* is the result of their common underlying source.

CONCLUSION

This Article uncovers a deep philosophical battle that lies at the heart of our equal protection jurisprudence. Discrimination is either a comparative injustice or a noncomparative injustice. If discrimination is a comparative wrong, we must compare how *X* and *Y* are treated and ask: Have they been treated as equals? If discrimination is a noncomparative wrong, we look only at *X* and ask: Has *X* been treated in the way she is entitled to be treated? Because these accounts differ so fundamentally, they justify and animate different pieces of equal protection doctrine. Yet, this conflict has, thus far, been undetected.

Now that it is visible, we can understand the doctrine much better and evaluate arguments for its development with a keener eye. This Article does just that. First, it unmasks the highly influential argument that disparate impact conflicts with equal protection and shows that it rests on a conflation of claims from unrelated arguments. Just as we can eat our cake and enjoy it too, we can mandate awareness of racial impact and prohibit policies adopted with bad intent. Perhaps we should pause here. The purported problem with disparate impact was actually about much more than that statute. The logic of the argument would extend to any facially neutral policy adopted, at least in part, because it would reduce racial disparities. The idea that the adoption of a universal pre-kindergarten program would be unconstitutional if it were motivated by a desire to close the racial achievement gap in education used to seem crazy. Yet opinions do change and arguments can be persuasive. Professor Richard Primus's argument was highly so. But the initial intuition was correct and this Article demonstrates why.

Second, this Article reveals why we are so conflicted about irrationality. The doctrine's contradictory impulses are explained by the fact that irrational laws violate rights on the noncomparative approach and produce outcomes that should be seen as merely bad luck on the comparative approach. Third, this Article explains why there are reasons to welcome the fusion of equal protection and due process, and also reasons to be wary.

We are now at a crossroads. The presence of two distinct accounts of discrimination in equal protection jurisprudence has already done some harm. It has made a flawed argument seem plausible. In addition, it has produced several deep and abiding conflicts. Strict scrutiny is either really scrutiny (comparative view) or indicates a reason to reject a policy (noncomparative view). Rationality review is a sham (comparative) or is genuine (noncomparative). Fusing equal protection and due process is valuable when courts clearly recognize that the clauses function differently (comparative) or predictable and unimportant (noncomparative). These conflicts are not amenable to compromise. To avoid more errors and move forward productively, we must resolve whether discrimination is, in fact, a comparative or noncomparative wrong.