January 2010

Contingent Equal Protection: Reaching for Equality After Ricci and PICS

Jennifer S. Hendricks
University of Tennessee College of Law, jennysusan@gmail.com

CONTINGENT EQUAL PROTECTION: REACHING FOR EQUALITY AFTER *RICCI* AND *PICS*

JENNIFER S. HENDRICKS†

†Associate Professor, University of Tennessee College of Law.

Introduction

The Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District #1*[1] has been extensively analyzed as the latest step in the Court's long struggle with the desegregation of public schools. Because the trend in recent years has been to emphasize the importance of context in equal protection cases, and because school desegregation has tremendous social and historical importance, reaction to *Parents Involved* has been focused largely on its impact on desegregation efforts.[2] Context, however, while important, is not everything. Just as "[t]here is only one Equal Protection Clause,"[3] there is really only one doctrinal structure for equal protection cases. Doctrinal shifts and innovations in one context carry over into others.[4]

---

[1] 551 U.S. 701 (2007). *Parents Involved* struck down voluntary plans for racial integration in school districts in Seattle and Louisville. In Louisville, the voluntary plan was a continuation of court-ordered desegregation plans that had been in effect from 1975 until 2000. *Id.* at 715-16. Seattle had never been subjected to a desegregation order but had begun voluntary measures in 1963 and expanded on them in part to settle desegregation lawsuits. *Id.* at 712; *id.* at 807-13 (Breyer, J., dissenting).

[2] *See, e.g.*, Ronald Turner, *The Voluntary School Integration Cases and the Contextual Equal Protection Clause*, 51 HOW. L.J. 251, 252 (2008) (quoting Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.")); Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. ANN. SURV. AMER. L. 385 (2008); Michael J. Kaufman, *PICS in Focus: A Majority of the Supreme Court Reaffirms the Constitutionality of Race-Conscious School Integration Strategies*, 35 HASTINGS CONST. L.Q. 1 (2007); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007); *but see* Pamela S. Karlan, *The Law of Small Numbers:* Gonzales v. Carhart, Parents Involved in Community Schools, *and Some Themes from the First Full Term of the Roberts Court*, 86 N.C. L. REV. 1369, 1387 (2008) ("Justice Kennedy in concurrence seemed to be moving the doctrine governing race-conscious efforts at integrating educational institutions towards other bodies of equal protection law.").

[3] Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

[4] *See generally* Serena Mayeri, *Reconstructing the Race-Sex Analogy*, 49 WM. & MARY L. REV. 1789 (2008) (describing the ways in which race and sex cases have influenced each other).

The *Parents Involved* decision was an important battle in a larger war over interpretation of the Equal Protection Clause. At stake is not just whether states may strive to integrate their schools but whether states may strive for racial equality at all, or whether the Constitution effectively enacts the status quo of racial hierarchy, protected from any conscious governmental effort to change it. The outcome of that struggle also necessarily affects whether the government can properly seek to ameliorate gender hierarchy as well.

This Article uses the term *contingent equal protection* to describe the constitutional analysis that applies to a range of government efforts to ameliorate those hierarchies. "Contingent" refers to the fact that the equal protection analysis is contingent upon the existence of structural, *de facto* inequality. Contingent equal protection cases include those that involve explicit race and sex classifications; facially neutral efforts to reduce inequality; and accommodation of sex differences to promote equality. Uniting all three kinds of cases under a single conceptual umbrella reveals the implications that developments in one area can have for the other two.

Despite the state action doctrine, which prevents courts from insisting that states redress inequality, [5] the Supreme Court has allowed states to redress structural inequality if they choose to do so. The term *structural inequality* is broad and is in a rough sense the inverse of the state action doctrine. That is, *structural inequality* refers to existing conditions of inequality that are not directly attributable to a specific past act of governmental discrimination that would give rise to a right to race-conscious relief under the Equal Protection Clause. It includes "the institutional defaults, established

[5] The Supreme Court tried to synthesize the state action doctrine in *Edmonson v. Leesville Concrete Co., Inc.*, 514 U.S. 615 (1991). According to that opinion, state action exists when (1) the claimed deprivation results from the exercise of a right or privilege having its source in state authority and (2) the defendant can be described in all fairness as a state actor. *Id.* at 620. Relevant to the latter question are the extent of reliance on governmental assistance, performance of traditional governmental functions, and any unique aggravation of the injury by the incidents of governmental authority. *Id.* at 621-22.

structures, and social or political norms that may appear to be … neutral, non-individual focused, and otherwise rational, but that taken together create and reinforce" segregation and inequality.[7]

Whether the government has a compelling interest in eliminating structural inequality was the key issue that divided the Court in *Parents Involved*.[8] In contingent equal protection cases, the state interest in equality can suspend otherwise-applicable doctrine that would condemn race- or sex-conscious policies. The modifier "contingent" reflects the fact that the suspension of otherwise-applicable rules lasts only so long as the Court acknowledges the continuing existence of inequality. Contingent equal protection is thus the last vestige of the anti-subordination interpretation of the Equal Protection Clause, an interpretation the Supreme Court has largely declined to enforce but has at least permitted Congress and the states to pursue.[9] Because contingent equal protection is still possible, the Court has not (yet) constitutionalized the status quo by forbidding race-conscious or sex-conscious state action intended to promote equality.

The "yet" is important. Contingent equal protection is under attack—and with it, the state's ability to pursue the Fourteenth Amendment's anti-subordination agenda. In *Parents Involved*, the Court came within one vote of holding that there is no compelling

---

[7] Erica Frankenberg and Chinh Q. Le, The Post-*Parents Involved* Challenge: Confronting Extralegal Obstacles to Integration, 69 OHIO ST. L.J. 1015, 1016 (2008) (defining the "now well-accepted phenomenon of 'structural inequality' or 'structural racism' as theorized by Andrew Grant-Thomas & john a. powell, *Structural Racism and Color Lines in The United States*, in TWENTY-FIRST CENTURY COLOR LINES: MULTIRACIAL CHANGE IN CONTEMPORARY AMERICA (Andrew Grant-Thomas & Gary Orfield eds., Temple University Press) (2008), and Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994).

[8] *See* Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 505 U.S. 701, 725-33 (plurality opinion) (discussing the state interests); *id*. at 787-90 (Kennedy, J., concurring in part and concurring in the judgment) (explaining why he did not join the plurality's discussion of the state interests).

[9] *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (setting out the now-classic distinction between the anti-classification and anti-subordination interpretations of the Equal Protection Clause).

state interest in ameliorating *de facto* racial segregation. Such a holding, combined with aggressive application of disparate impact doctrine, would effectively forbid states or the federal government from adopting policies designed to reduce segregation and structural race inequality. For example, in *Ricci v. DeStefano*,[10] Justice Scalia wrote a concurrence to present the case—based on this line of reasoning—that the disparate impact provisions of Title VII of the Civil Rights Act of 1964[11] are unconstitutional.[12] Furthermore, because contingent equal protection also flourishes in sex classification cases, its elimination would threaten measures such as the Pregnancy Discrimination Act[13] and Family and Medical Leave Act[14] designed to promote sex equality.

This threat to remedial legislation like Title VII and the Pregnancy Discrimination Act exploits a point of confusion in equal protection doctrine. Part I of this Article introduces the framework of contingent equal protection and shows how it has operated in cases involving racial classifications. It shows that the Supreme Court has implicitly recognized the compelling state interest in counteracting structural inequality. Cases that appear to suggest the contrary are in fact based on the Court's aversion to government-sponsored racial classifications of individuals. Part II extends the concept of contingent equal protection to encompass sex equality cases, including the cases known as the "real differences" cases, in which the Court sees not inequality but natural sex differences. In this context, the Court is not averse to classifications *per se*. The sex cases thus demonstrate that the problem in equal protection doctrine is not whether structural inequality is a compelling state interest—it is—but the means that states can use to pursue that interest. The attempts by the *Parents Involved* plurality and by Justice Scalia in *Ricci* to deny the state interest in structural inequality are thus contrary to precedent as well as to the anti-subordination function of the Fourteenth Amendment itself.

---

[10] 129 S.Ct. 2658 (2009).
[11] 42 U.S.C. § 2000e-2(k).
[12] *See Ricci*, 129 S.Ct. at 2681-83 (Scalia, J., concurring).
[13] 42 U.S.C. § 2500e(k).
[14] 29 U.S.C. §§ 2601-54.

Part III extends some of the insights generated by analyzing the race and sex cases together through the framework of contingent equal protection. Part III.A sketches the implications that the *Parents Involved* plurality opinion would have for the range of cases that fall under the rubric of contingent equal protection, starkly limiting the state's ability even to choose amelioration of inequality and effectively constitutionalizing the status quo. Part III.B suggests the possibilities of the alternative path, using contingent equal protection to define the scope of Congress's power to enforce the Fourteenth Amendment and to support a positive right to substantive equality in some contexts.

I. Contingent Equal Protection and Racial Inequality

In *Parents Involved*, five members of the Supreme Court recognized, in separate opinions, that the amelioration of structural inequality is a compelling state interest in at least some contexts.[15] The four Justices in the plurality concluded the opposite.[16] The plurality's view would effectively constitutionalize the status quo of inequality by prohibiting the state from acting with a conscious purpose to redress it.[17]

---

[15] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 505 U.S. 701, 803 (2007) (Breyer, J., dissenting); *id.* at 787-88, 797-98 (Kennedy, J., concurring in part and concurring in the judgment).

[16] *See infra*, notes 35-37 and accompanying text (discussing the plurality opinion).

[17] A legal rule "constitutionalizes" the status quo when it treats existing circumstances as both natural and constitutionally immune from legislative modification. This idea derives from the perception that the early twentieth-century Supreme Court constitutionalized "Mr. Herbert Spencer's *Social Statics*." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *see* Jeffrey M. Shaman ("By constitutionalizing common law categories and natural law concepts, the Court froze the status quo, blocking the way for legislation that altered the orthodox relationship of employer and employee."). When the Court treats existing hierarchies based on race and gender as natural and attempts to alter them as unconstitutional race or sex classifications, it constitutionalizes those hierarchies. *See* Girardeau A. Spann, *Affirmative Inaction*, 50 HOW. L.J. 611, 636 (2007 ("[B]y reading the Constitution to require prospective neutrality in the vast majority of future allocation programs, the Court precludes political actors from adopting strategies that might eventually equalize the allocation of resources. In short, the Supreme Court has constitutionalized existing racial inequalities, and it has done so in the name of promoting equality."); Martha Minow, *Justice Engendered*, 101

Perhaps surprisingly, the latter view follows fairly naturally from the Court's recent precedent on racial classifications. Justice Kennedy, despite having joined the majority opinions in most of those prior cases, balked at the next step in *Parents Involved*.[18] His separate concurrence indicated how he would create a stopping point in the Court's march away from contingent equal protection, towards absolute constitutional colorblindness that would prevent government from even aspiring to racial equality.

This Part explains how equal protection doctrine arrived at a point where a plurality of the Supreme Court could plausibly repudiate the compelling state interest in equality. It also evaluates Justice Kennedy's stopping point. Part I.A describes the corner the Court has painted itself into between contingent equal protection and disparate impact doctrine. Disparate impact doctrine generally forbids even race-neutral government action intended to have a racially disparate effect.[19] To survive equal protection review, therefore, such action needs to be supported by a compelling state interest.[20] Justice Kennedy and others have suggested that race-neutral policies meant to promote racial equality could somehow avoid strict scrutiny entirely.[21] Part I.A concludes that such a strategy is neither a plausible doctrinal development nor necessarily desirable. The better route is to recognize the state's compelling interest in reducing structural inequality and to evaluate it using the developing form of strict scrutiny that is not fatal in fact.

HARV. L. REV. 10, 54-55 (explaining the implicit assumption that the status quo is neutral, so that governmental actions to change it "have a different status than omissions," and quoting Aviam Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383, 409 (1981) ("To settle for the constitutionalization of the status quo is to bequeath a petrified forest.")).

[18] *See Parents Involved*, 505 U.S. at 787-90 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting this aspect of the majority opinion).

[19] See Wash. v. Davis, 426 U.S. 229, 245 (1976), discussed *infra*, notes ___ and accompanying text.

[20] *See infra*, note 34.

[21] *See Parents Involved*, 505 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 837 (Breyer, J., dissenting); *see also* Kathleen Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1048-49, 1054 (1998).

Part I.B discusses the implicit prerequisite for that strict scrutiny analysis: the compelling state interest in eliminating structural inequality. Affirmative action cases have traditionally rejected a state interest in remedies for "societal discrimination."[22] Part I.B argues, however, that the Supreme Court has implicitly recognized an interest in promoting equality, although pursuit of that interest is limited by the Court's aversion to racial classifications of individuals.

A. Structural Inequality and Facially Neutral State Action

When the Supreme Court strikes down benign or remedial racial classifications such as an affirmative action program, it often holds out the alternative of race-neutral strategies for meeting the state's goals.[23] Facially neutral polices that are designed to increase racial diversity are sometimes called *race-neutral affirmative action* or *alternative action*.[24] These strategies raise their own set of constitutional questions. Kim Forde-Mazrui first pointed out that alternative action plans would be vulnerable under the Court's disparate impact doctrine,[25] which prohibits facially neutral state action that is merely a mask for a racial classification or motive.[26] The equal protection landscape has changed somewhat since Forde-

---

[22] *See* Bakke v. Regents of the Univ. of Calif., 438 U.S. 265, 307 (Powell, J., announcing judgment); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); *see also infra*, Part I.B.1.

[23] *See Parents Involved*, 505 U.S. at 789 (Kennedy, J., concurring in part and concurring in the judgment) (proposing site selection, design of attendance zones, resource allocation, and recruitment of faculty and students). Race-neutral methods are not necessarily available or effective to integrate many school districts. *See* Ryan, *supra* note 2 at 138-39, 144-49 (assessing impact and remaining alternatives after *Parents Involved* and noting, for example, the much existing segregation is between rather than within school districts).

[24] *See* Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEORGETOWN L.J. 2331, 2332, 2335 (2001).

[25] Forde-Mazrui, *supra* note 24.

[26] *See* Wash. v. Davis, 426 U.S. 229 (1976) (establishing that disparate impact in the absence of discriminatory motive does not violate the Equal Protection Clause); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (clarifying the high standard for intent under the doctrine); Village of Arlington Heights v. Metro. Housing Develop. Corp., 429 U.S. 252 (1977) (setting out framework for disparate impact claims, discussed *infra*).

Mazrui first identified this problem, but if the "reactionary colorblindness"[27] of the *Parents Involved* plurality prevails, even alternative action could be found unconstitutional.

1. Race-Neutral Affirmative Action

As the federal courts and many states have restricted the use of traditional affirmative action, institutions have developed alternative, race-neutral means for increasing diversity and providing equal opportunities. Perhaps the most well-known is the Texas Ten Percent Plan, which guarantees admission to any public college for students in the top ten percent of any Texas high school's graduating class.[28] At the K-12 level, school districts have experimented with income-based instead of race-based busing.[29] Schools, employers, and governments bidding out contracts have expanded recruitment efforts to target minority applicants.[30] These programs seek to ameliorate racial inequality and *de facto* segregation without facially classifying individuals by race.[31]

---

[27] *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985 (2007) (describing and analyzing the development of the ideology that the author terms reactionary colorblindness).

[28] TEX. EDUC. CODE ANN. § 51.803(a) (Vernon 2007). The Texas plan was adopted in response to the Fifth Circuit's pre-*Grutter* decision that affirmative action was unconstitutional. Hopwood v. Tx., 78 F.3d 932, 962 (1996).

[29] *See* Evan Osnos, *Schools Find New Route to Diversity; New Integration Plans Use Income to Place Pupils*, CHI. TRIB. Jan. 28, 2002, § N, at 7.

[30] *See* David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 929-32 (1996) (describing self-study, outreach, and counseling as methods for increasing diversity in schools and workplaces); Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WISC. L. REV. 1395, 1401-07 (describing a range of facially neutral but race-conscious measures to increase diversity in government programs, businesses, and schools).

[31] Whether the plans are effective for this purpose or are unacceptable for other reasons remains open. *See, e.g.*, Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312 (2006) (finding that Texas plan facilitated some minority enrollment in selective institutions but failed to sustain minority admissions rates at the flagship schools); *see also* Gratz v. Bollinger, 539 U.S. 244, 303 n. 10 (2003) (Ginsburg, J., dissenting) (noting that percentage plans depend on continued segregation in K-12 schools and encourage students to stay in low-

The purpose of race-neutral affirmative action is to ameliorate *de facto* segregation and structural inequality. Although these measures are facially race-neutral, they are adopted with the hope that they will lead to greater racial diversity within institutions and equality across society. The purpose is thus to counteract structural inequality.

2. Disparate Impact Doctrine and the Challenge to Race-Neutral Affirmative Action

To describe a state policy as designed to eliminate structural inequality is to suggest that it is manifestly consistent with the Fourteenth Amendment. Race-neutral affirmative action, however, can also be characterized as a facially neutral policy that has been adopted because of its racial impact.[33] The latter characterization suggests that the policy is vulnerable under the *Washington v. Davis*[34] line of cases that established disparate impact doctrine under the Equal Protection Clause.

In *Washington v. Davis,* African American applicants to the District of Columbia police department challenged "Test 21," the employment-qualifications exam used by the police department to rank applicants. They demonstrated that the test had a racially disparate impact: white applicants scored better than black applicants at a statistically significant rate.[35] The test had not been shown to predict job performance.[36] The Supreme Court announced that the state's indifference to this disparate impact did not constitute a

---

performing schools and take easy courses). *See also* Robert J. Delahunty, *"Constitutional Justice" or "Constitutional Peace"? The Supreme Court and Affirmative Action*, 65 WASH. & LEE L. REV. 11, 37-41 (2008) (arguing that affirmative action is itself a conservative, privilege-preserving response to racial inequality).

[33] *See, e.g.*, Ricci v. DeStefano, 129 S.Ct. 2658, 2682 (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.").

[34] 426 U.S. 229 (1976).

[35] *Wash. v. Davis*, 426 U.S. 229, 235 (1976).

[36] *Id.*

violation of the Equal Protection Clause.[37] Instead, the plaintiffs could prevail only by showing that the police department had a discriminatory racial purpose when it adopted Test 21.[38]

As the doctrine later developed in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[39] even proof of a discriminatory purpose is not necessarily enough to invalidate the state action. The plaintiff's proof that a discriminatory purpose was a "motivating factor" in the adoption of Test 21 would merely shift the burden of proof to the state.[40] The police department could still prevail if it could prove that it would have adopted Test 21 anyway, for legitimate reasons, regardless of any discriminatory motive that was also present.[41] In other words, the state can prevail by refuting causation. Finally, once a racial motive and causation are established, the state's action is subjected to strict scrutiny.[42]

---

[37] *Id.* at 241-42 (discussing the required showing of discriminatory purpose); *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (explaining that "discriminatory purpose" under *Washington v. Davis* "implies more than intent as volition or intent as awareness of consequences").

[38] *Wash. v. Davis*, 426 U.S. at 245.

[39] 429 U.S. 252 (1977).

[40] *Id.* at 270 and n. 21. The weight of this burden is demonstrated by *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979), which rejected a sex discrimination challenge to a veterans' preference in state hiring. The state had obviously known that the preference would benefit a class that was overwhelmingly male. Moreover, the state had taken that disparity into account by creating an exception for jobs that particularly "call for" a woman. *Id.* at 270 n. 22 But because the state did not adopt the statute *in order* to harm women, there was no violation of the Equal Protection Clause. *Id.* at 279 ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

[41] *Arlington Heights*, 429 U.S. at 270 n. 21.

[42] If the state fails to justify its policy under the *Arlington Heights* analysis, the Court's precedents are unclear about what happens next. Does the policy fail equal protection analysis automatically, or is it subject to strict scrutiny? This point remains unclear because in most cases, either there is no explicitly racial motive or it is one that obviously would not pass strict scrutiny. At times, the Court has suggested that the disparate impact analysis is wholly separate from strict scrutiny review. *See* Wash. v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484-85 and n. 28

For example, suppose that, having proven its point that it was not guilty of intentional race discrimination, the D.C. police department nonetheless regrets that its hiring practices result in a disproportionately white police force. It hires a consultant to design a "Test 22," which must meet two requirements: first, the test must identify applicants likely to be good police officers as well as or better than Test 21; second, results on Test 22 must not have the disparate racial impact. The latter requirement means that African American applicants must do comparatively better, and white applicants comparatively worse, on Test 22 than on Test 21. The consultant succeeds in producing a Test 22, and the department adopts it.

The department is now vulnerable to an equal protection claim by disappointed white applicants, using the doctrine of *Washington v. Davis* and *Arlington Heights*. Its action—replacing Test 21 with Test 22—will have a negative, disparate impact on white applicants, as compared to the status quo ante. The fact that the claim is one of "reverse" discrimination does not alter the analysis under the Equal

---

(referring to strict scrutiny as the standard applicable to "explicit racial classifications" and as distinct from disparate impact analysis). However, in the voting rights and redistricting context, where the government frequently has a benign, remedial racial motive, the Court applies strict scrutiny. *See* Shaw v. Reno, 509 U.S. 630, 658 (1993) (holding that strict scrutiny applies to redistricting plan that intentional assigns voters to voting districts on the basis of race). The ambiguity in other contexts should be resolved by clearly incorporating strict scrutiny as the last step of the disparate impact analysis. Otherwise, proof of a racial motive will doom state policy even where the motive is benign, compelling, and consistent with the anti-subordination goals of the Fourteenth Amendment. Instead of stopping with the *Arlington Heights* analysis, the Court should at least give race-neutral alternative action plans the opportunity to satisfy strict scrutiny. Prior cases dealing with facially neutral state action, as in *Washington v. Davis*, assumed that if there was an underlying racial motive, that motive was necessarily pernicious. The disparate impact doctrine was designed to screen out cases where there was no underlying racial intent. But the Court has never re-visited its disparate impact doctrine in a case involving an effort to eliminate rather than perpetuate subordination. Where the government is not *hiding* its racial motive, it should at least be given the opportunity to satisfy strict scrutiny. Strict scrutiny analysis should be added as a fourth step in the *Davis/Arlington Heights* analysis in all cases, as has already been done in the redistricting cases.

Protection Clause.[43] The plaintiffs can easily prove that the racial effect was a motivating factor.[44] Indeed, it was *the* motive for developing the new test; for that reason the police department will not be able to make out the affirmative defense that it would have adopted Test 22 for reasons other than changing the racial makeup of its force.[45] To preserve Test 22, the police department must show that it had a compelling state interest in a test designed to produce racial parity in results.

The Supreme Court nearly confronted this scenario in *Ricci v. DeStefano*, in which the city of New Haven had rejected the results of a promotion exam because of a racially disparate impact.[46] Two differences prevented *Ricci* from presenting a head-on conflict between the city's effort to reduce structural inequality[47] and the Court's adherence to colorblindness as the dominant theory of equal protection: First, the Court was able to decide *Ricci* under Title VII, avoiding constitutional questions.[48] Second, New Haven had thrown out its own "Test 21" *after* administering it to candidates and was sued before it had a chance to develop a "Test 22."[49] The majority opinion—writing by Justice Kennedy and joined by the *Parents Involved* plurality—concluded that this sequence of events made the city's actions tantamount to an express racial classification of the individual test-takers.[50] The city's action was prompted by the known races of the particular people who passed and failed the test.[51]

---

[43] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (applying strict scrutiny to affirmative action program in higher education); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (applying strict scrutiny to minority set-aside program for federal contracting).

[44] *See Arlington Heights*, 429 U.S. at 263-66 (discussing the "motivating factor" requirement).

[45] *See id.* at 270 n. 21 (setting out the affirmative defense).

[46] *See* Ricci v. DeStefano, 129 S.Ct. 2658, 2664 (2009).

[47] The dissent in *Ricci* described several reasons why the test results could reasonably be viewed as a manifestation of structural inequality. *See id.* at 2690-91, 2693-94 (Ginsburg, J., dissenting).

[48] *See id.* at 2664-65.

[49] *See id.* at 2664.

[50] *See id.* at 2673-74.

[51] *See id.*

Justice Kennedy, acting on the same aversion to such classifications that he expressed in *Parents Involved*,[52] interpreted Title VII to forbid the city to act on that basis.[53]

Because of the unusual timing in *Ricci*, the decision does not preclude New Haven from finding a Test 22 for future use. The opinion, however, offers scant assurance that such action would be upheld. The majority offered bland assurance that employers have an unquestioned ability to "ensure that all groups have a fair opportunity to apply for promotions."[54] Conspicuously absent is any indication that an employer may treat a disparate impact as presumptive evidence of unfairness. The majority also expressly reserved the question whether the disparate impact rules in Title VII violate the Equal Protection Clause by requiring employers to take race into account.[55]

In a concurring opinion, Justice Scalia sent up a trial balloon on striking down the disparate impact rules.[56] Unlike the Equal Protection Clause, Title VII prohibits facially neutral policies that have unintentional but also unnecessary disparate impacts on the basis of sex or race.[57] While diplomatically calling the question "not an easy one," Justice Scalia laid out the case for striking down that part of Title VII.[58] He characterized race-neutral affirmative action as "[i]ntentinal discrimination …, just one step up the chain."[59]

---

[52] *See infra*, notes ___ and accompanying text.
[53] The Court held that, under Title VII, an employer may use a racial classification as a remedy for a racially disparate impact only if there is a "strong basis in evidence" for believing that the employer could be found liable under Title VII's disparate impact provision. *See Ricci*, 129 S.Ct. at 2664. For such a basis to exist, there must be not only a statistically significant disparate impact but also an evidentiary basis for believing that the employer could not succeed in a "business necessity" defense. *See id.* at 2678.
[54] *Id.* at 2676
[55] *See id.* at 2676
[56] *See id.* at 2681-83 (Scalia, J., concurring).
[57] *See* 42 U.S.C. 2000e-2(k).
[58] *See Ricci*, 129 S.Ct. at 2681-83 (Scalia, J., concurring).
[59] *Id*. at 2682.

The same reasoning can be applied in the context of higher education. For example, Justice Thomas's dissent in *Grutter v. Bollinger* argued that the University of Michigan Law School should have pursued other means for achieving diversity, rather than classifying its applicants on the basis of race.[60] He ridiculed the state interest in affirmative action as an interest in retaining admissions criteria that have a disparate impact on minority applicants.[61] If the school was unhappy that its admissions criteria produced a racially homogenous class, argued Justice Thomas, it could use different criteria.[62] If the law school followed Justice Thomas's advice, however, it would adopt new admissions criteria consciously chosen because of their ability to produce a class with different racial makeup than the current system achieves. The new admissions system would be another Test 22, and the law school would be in the same position: vulnerable to an equal protection challenge from disappointed white applicants.[63] The evidence from *Parents Involved* and *Ricci* is that a plurality of the current Court, including Justice Thomas, would deem that challenge well-founded.

---

[60] *See Grutter*, 539 U.S. at 368-69 (Thomas, J., dissenting) (referring to current percentage plans in Texas, California, and Florida and their similarity to nineteenth century certification systems).

[61] *Id.* at 369-70 ("The Law School's continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court."). In this regard, Justice Thomas's dissent is more radical and would require a deeper commitment to equality than the majority's approach. *Cf.* Delahunty, *supra* note 17, at 37,41 (arguing that affirmative action is a conservative, elite-protecting response to inequality and noting that it was promoted by the Nixon Administration as the minimal available response to demands for racial justice).

[62] *See Grutter*, 539 U.S. at 370 (Thomas, J., dissenting) ("An infinite variety of admissions methods are available to the Law School.").

[63] This challenge has already been set out in Brian T. Fitzpatrick, *Can't Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. OF RACE & L. 277 (2007); Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001). As indicated in both these articles, the argument that alternative action is invalid may have particular force in states that have adopted statutory bans on racial preferences, if those statutes are construed not to leave any leeway for measures that satisfy strict scrutiny.

If the Court were to rule against Test 22, it would effectively constitutionalize the status quo of racial inequality against conscious state action. Possibly, in some contexts, the government could convincingly argue that it would have adopted the remedial measure regardless of the racial effect. For example, schools using economic integration could truthfully argue that the public controversy over racial integration and affirmative action brought their attention to the need for greater economic integration. Although they hoped that greater racial diversity would also result from economic diversity, the latter alone was sufficient reason for action. If so, the policy would be saved under the third step of the *Arlington Heights* doctrine, which allows a law to stand despite its racial motive if there was an adequate, race-independent reason for the policy.[64] But race-neutral policies adopted predominantly out of a desire for racial integration would be subject to strict scrutiny.

3. The State Interest in Race-Neutral Affirmative Action

In order to pass strict scrutiny, an alternative action program needs a compelling state interest. That state interest will usually be the desire to reduce segregation and structural inequality.[65] The potential extension of *Washington v. Davis* to strike down race-neutral affirmative action came within one vote of becoming law, with the plurality insisting that integration and equality were not

---

[64] Like the school districts in *Parents Involved*, some commentators have tried to re-state the state interest at the core of affirmative action and integration plans so that it does not look like a racial classification. *See, e.g.*, Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 13 MICH. J. OF RACE & L. 1 (2007) (arguing that schools could replace traditional affirmative action plans with admissions criteria that, for example, favor applicants who have been the victims of race discrimination); Michael J. Kaufman, *(Still) Constitutional De-Segregation Strategies: Teaching Racial Literacy to Secondary Students and Preferencing Racially-Literate Applicants to Higher Education*, 13 MICH. J. OF RACE & L. 137 (2007) (arguing that race-based school assignments could be justified by the need to teach racial literacy, and that universities could prefer applicants who are racially literate). These efforts seem unlikely to survive the intent inquiry in the disparate impact analysis unless the Court embraces a state interest in equality.

[65] The diversity rationale recognized in *Grutter* is insufficient because it does not allow the government to focus particularly on race.

compelling, and perhaps not even legitimate, state interests.[66] Providing the fifth vote to decide the case, Justice Kennedy focused on the means the school districts had employed. Justice Kennedy did, however, express his clear desire to uphold race-neutral policies for promoting equal opportunity.[67] Because the constraints of disparate impact doctrine apply to race-neutral policies, that outcome depends on recognizing a compelling state interest in the elimination of structural inequality.

The plurality opinion analyzed the school districts' integration plans under the usual two-step strict scrutiny framework.[68] The first step is to identify the state interests and determine whether they are compelling.[69] The second step is to ask whether the means chosen are narrowly tailored to serve those compelling state interests.[70] The plurality concluded that the school districts had no compelling state interest in racially integrated schools.[71] Unlike universities, grade schools do not generally choose their student bodies. They do not make conscious efforts to achieve the holistic, multi-faceted diversity that was extolled in *Grutter v. Bollinger*, which upheld affirmative action in admissions to the University of Michigan law school. Because in truth only racial diversity was at stake in *Parents Involved*, the plurality had an easy time using *Grutter* to condemn the state interest.[72] If the plurality had prevailed in condemning the integration plans at the first, state-interest phase of the analysis, it would have set the stage for constitutional challenges to all race-neutral efforts to achieve racial integration or ameliorate racial inequality.

---

[66] *See* Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725-33 (2007) (equating all of the school district's claimed interests with "racial balancing" for its own sake).
[67] *See id.* at 788-89 (Kennedy, J., concurring).
[68] *See id.* at 720.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 2755-59; *id.* at 2770 (Thomas, J., concurring) ("[T]he school districts lack an interest in preventing resegregation.").
[72] *Id.* at 2757.

The import of the plurality's analysis was clear—and its adoption by four members of the Court surprising—in light of the attention this issue received at oral argument. Several justices asked the parties' lawyers and the Solicitor General about the status of facially neutral policies adopted out of a desire for racial diversity in the schools.[73] Justice Kennedy posed the hypothetical of a school district deciding where to build a new school.[74] In light of existing segregation in housing, one location would result in a racially diverse school, while the other would contribute to the *de facto* segregation of the schools. Could the school district choose the former, because it wants racial diversity?[75] Counsel for the plaintiffs said that it could not, because any race-related motive for state action is forbidden.[76] But even the Solicitor General, who appeared in support of the plaintiffs, distanced himself from that position.[77] Justice Scalia, too, was at pains to demonstrate that the legitimacy of a race-conscious goal was distinct from the permissibility of racial classifications as the means to reach that goal.[78] Nonetheless, Justice Scalia joined the plurality opinion that would have struck down the districts' integration plans on the grounds that racial integration was not a compelling state interest.[79] Justice Scalia went even further in his *Ricci* concurrence, making the case that attempting to rectify disparate impacts generally is unconstitutional. Both of those opinions contradict what appeared to be Justice Scalia's position at

---

[73] E.g., Oral Argument, Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 2006 WL 3486958, *4-5 (Justice Kennedy, site selection); 6 (Justice Scalia, magnet schools); 18 (Chief Justice Roberts, sites and magnet schools); 19 (Justice Kennedy, site selection).

[74] *Id.* at *4-5.

[75] *Id.*.

[76] *Id*. at *5, 7.

[77] *Id*. at *18 (indicating that *Washington v. Davis* and *Arlington Heights* would apply); 21 (stating that there is nothing unconstitutional about "desiring a mingling of the races and establishing policies which achieve that result but which do not single out individuals and disqualify them for certain things because of their race"); 23.

[78] *Id.* at *22, 27-29.

[79] *See* Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 725-33 (2007)

oral argument in *Parents Involved*.[80] They also contradict Justice Thomas's *Grutter* dissent, which proposed exactly the kind of race-neutral but race-conscious strategies that the *Parents Involved* plurality would reject.[81]

Justice Kennedy's separate concurrence served mostly to explain his disagreement with the majority on this point. His concurrence not only endorsed the state interest in integration but also suggested that race-neutral integration strategies might be exempt from strict scrutiny.[82] Some commentators have also suggested that benign racial policies that are facially neutral should receive a lower level of review.[83] While consistent with the Fourteenth Amendment's anti-subordination goals, adoption of this approach would have to surmount several hurdles. The Court struggled a long time before settling on strict scrutiny for benign racial classifications.[84] Consistency would seem to require either overruling that result or applying the same rule in disparate impact cases.[85] Indeed, because the racial effects of a facially neutral policy might not be immediately apparent, heightened review might be particularly warranted. Moreover, *Grutter* showed that strict scrutiny need not be fatal. Insofar as the Court appears to be moving away from, or at least compressing, its rigid tiers of scrutiny, the most

---

[80] *Compare* Oral Argument, Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 2006 WL 3486958, *22, 27-29 (Justice Scalia distinguishing face-conscious goals from racial classification as a means) *with Parents Involved*, 505 U.S. at 725-33 (rejecting race-conscious goals as non-compelling).

[81] *See supra*, notes 29-31 and accompanying text (discussing Justice Thomas's *Grutter* dissent).

[82] *See* Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

[83] *See, e.g.*, Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1048-49 (1998).

[84] *See Parents Involved*, 505 U.S. at 741-42 (describing the history of the Court's consideration of this issue).

[85] *See* Karlan, *supra* note 2, at 1387-90 (noting that Kennedy's proposal on this point "would completely transform existing equal protection doctrine" and "simply cannot be right"); *see also* Forde-Mazrui, *supra* note __, at 2337 ("Only arguments that take existing doctrine seriously can provide public universities and other state actors with a good-faith basis for adopting race-neutral affirmative action policies and the courts with a judicially principled basis upon which to uphold them.").

natural development for disparate impact doctrine would be to apply *Grutter*'s moderated strict scrutiny while recognizing the state's compelling interest in eliminating structural inequality.[86]

Equal protection doctrine ordinarily requires the government to treat similarly situated individuals alike. Contingent equal protection recognizes that groups of people may not be similarly situated, not because of anything inherent in the individuals themselves but because of existing conditions of group-based, structural inequality. Recognizing this inequality—and the state's compelling interest in combating it—allows the government to pursue a race-conscious goal without running afoul of the Equal Protection Clause as long as the means used are narrowly tailored.

B. Structural Inequality and Racial Classifications

In affirmative action cases, the Supreme Court has rejected the state's interest in providing a remedy for mere "societal discrimination" as not sufficiently compelling to satisfy strict scrutiny.[87] That rejection, however, should not be allowed to obscure the important role that the state interest in racial equality has played in more recent decisions.

This Article refers to the state interest in reducing *structural inequality* rather than the interest in giving a remedy for *societal discrimination*. This change in vocabulary implies not an entirely different set of social facts but a different perspective and more precise understanding of those facts. In the 1970s, when the Court first considered this sort of justification for racial classifications, societal discrimination seemed too amorphous a concept on which to

---

[86] For discussion of this apparent trend in equal protection doctrine, see Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 FORDHAM L. REV. 2339 (2006); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (focusing particularly on *Grutter* and *Gratz*); Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and* Bush v. Gore, 4 U. PA. J. CONST. L. 372 (2002).

[87] *See infra*, part I.B.1.

build an equal protection analysis.[88] Moreover, the interest was characterized as a way to mete out compensation to victims of discrimination, rather than a way to eliminate racial hierarchy.[89] Thirty years later, the legal community has a more sophisticated understanding of how racial inequality is perpetuated by social structures, the reproduction of unconscious racism, and failure fully to redress private acts of discrimination.[90]

To the extent that the concept of structural inequality overlaps with the concept of societal discrimination, the Court's rejection of the latter must be understood in the context in which it occurred: affirmative action cases in which benefits were distributed based on racial classifications of individuals. Individual classification by race, which Andrew Carlon has termed *racial adjudication*, is particularly troubling to the Court.[93] In other contexts that do not require racial adjudication, reducing inequality should be considered a compelling state interest under either ordinary equal protection analysis or disparate impact analysis. To hold otherwise would be to allow disparate impact doctrine to complete the transformation of the Fourteenth Amendment from a promise of equality to a tool for maintaining the status quo.[94]

---

[88] *See* Bakke v. Regents of the Univ. of Calif., 438 U.S. 265, 307 (Powell, J., announcing judgment).

[89] *See id.* at 306 and n. 43 (characterizing the state's purpose as compensatory, and expressly reserving the possibility that a racial preference could be justified if it were designed to compensate for unconscious bias).

[90] *See, e.g.*, Kimberlé Crenshaw, *Framing Affirmative Action*, MICH. L. REV. FIRST IMPRESSIONS 123, 131-32 (2006) (describing structural inequality with a track metaphor: "the problem affirmative action seeks to address is not damaged runners, but damaged lanes that make the race more difficult for some competitors to run than others"); Karlan, *supra* note 2, at 1374-77 (noting that in *Parents Involved*, "the concurrence and the dissent saw racial separation as a persistent, and persistently constitutionally troubling, aspect of American society, while the majority saw the same facts on the ground as something beyond the reach of government").

[93] Andrew M. Carlon, *Racial Adjudication*, 2007 B.Y.U. L. REV. 1151.

[94] *See generally* Bodensteiner, *The Supreme Court as the Major Barrier to Racial Equality, supra* note _; Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race":The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 UNIV. ILL. L. REV.615 (2003); Haney López,

1. Inequality in the Affirmative Action Cases

The Supreme Court's rejection of "societal discrimination" as a justification for racial classifications must be understood in context. In his foundational opinion in *Regents of the University of California v. Bakke*,[95] Justice Powell said that responding to societal discrimination, for which the University's medical school was not specifically responsible, could not justify affirmative action in the school's admissions program.[96] The Court has generally adhered to Justice Powell's position with respect to affirmative action programs and has held that generalized societal discrimination could not justify minority set-asides in government contracting.[97] Nonetheless, the Court's most recent cases indicate that structural inequality has a role to play in evaluating the constitutionality of affirmative action.

The Court's most recent foray into this area at last produced majority opinions that settled several questions about affirmative action in higher education. *Grutter v. Bollinger*[98] and *Gratz v. Bollinger*[99] challenged admissions programs at the University of Michigan. *Gratz* involved the undergraduate program and *Grutter* the law school. The Supreme Court held that the university had a compelling state interest in the educational benefits of a diverse student body.[100] The law school's admissions program passed strict scrutiny because it evaluated each applicant holistically, without placing dispositive weight on race in any particular case.[101] The undergraduate program, however, was unconstitutional because it assigned specified points based on race and made race dispositive in some cases.[102] At the end of the *Grutter* opinion, the Court announced an apparent sunset provision, stating that it did not expect

---

supra note 14; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, *supra* note _.

[95] 438 U.S. 265 (1978).

[96] *Id.* at 307-09 (Powell, J., announcing the judgment).

[97] *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

[98] 539 U.S. 306 (2003).

[99] 539 U.S. 244 (2003).

[100] *Id.* at 325, 382-33.

[101] *Id.* at 334.

[102] *Id.* at 269.

the law school's affirmative action program to be necessary for more than another generation, about twenty-five years.[103]

In both *Grutter* and *Gratz*, the University of Michigan was careful not to propound societal discrimination as its justification for affirmative action, relying instead on its interest in having a diverse student body for educational purposes. This strategy reflected the fact that Justice Powell's *Bakke* opinion had become the "touchstone for constitutional analysis of race-conscious admissions policies."[104] Accordingly, a defense based on societal discrimination would have been doomed.

Nonetheless, *Grutter*'s sunset clause indicates that existing inequality played a role in the Court's analysis. The university's primary interest was in having a diverse student body. Existing conditions of inequality made that goal difficult to achieve using its traditional admissions criteria. The Court acknowledged the existence of social inequality *and* the fact that this inequality had an adverse effect on the educational interest in diversity.[105] In the absence of affirmative action, the university would have not only reflected but perpetuated the unequal status quo. Inequality thus served as a second-order justification for affirmative action. The sunset clause expressed the hope that this background inequality, and thus the need for affirmative action, would be eliminated within a generation. (After all, the law school's educational interest in a diverse student body would not become more or less compelling with the passage of time.) The sunset clause was thus an implicit

---

[103] *Id.* at 342-43. For analysis of this aspect of the opinion, see, e.g., Joel K. Goldstein, *Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in* Grutter, 67 OHIO ST. L.J. 83 (2006); Mark W. Cordes, *Affirmative Action After* Grutter *and* Gratz, 24 N. ILL. U. L.R. 691, 747-50 (2004).

[104] Grutter v. Bollinger, 539 U.S. 306, 323 (2003).

[105] *See id.* at 328 (recognizing the law school's compelling interest in a diverse student body), 338 (stating that minority applicants are "less likely to be admitted in meaningful numbers on criteria that ignore [their] experiences" attributable to "our Nation's struggle with racial inequality").

acknowledgement that the Court's application of the Equal Protection Clause was contingent on existing structural inequality.[106]

In addition, the state interest in diversity itself contained an implicit equality component. Although the law school emphasized the educational benefits of diversity, the Court spoke also of the social benefits of diversity in the professions.[107] The law school needed a diverse student body not only because students would learn better but also because it was necessary, for society's sake, "that the path to leadership be visibly open."[108] The law school's affirmative action program was permissible, in part, because it would help remedy the stratification produced by the mechanisms of structural inequality.[109]

In *Grutter*, then, structural inequality played a background role, somewhat obscured by the educational interest in diversity. *Bakke* and its progeny mean at most that eliminating inequality, *by itself*, is not a compelling state interest *sufficient to justify traditional affirmative action programs*. That is not the same as saying that eliminating inequality is never a compelling state interest.[110] The two steps of strict scrutiny are not so isolated from each other that the acceptability of the means cannot affect whether a particular interest is deemed compelling.[111] The Court's fundamental objection to affirmative action is not to the goal—whether that be diversity or

---

[106] *See* Kevin R. Johnson, *The Last Twenty-Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 173 (2004) (noting that the sunset clause implies a remedial or equality-seeking rationale in tension with the diversity rationale highlighted by the Court).

[107] *See Grutter*, 539 U.S. at 332.

[108] *Id.*

[109] *Cf.* Johnson, *supra* note __, at 173 .

[110] It also does not rule out the possibility that even traditional affirmative action programs would be permissible for this purpose on a showing that other means were ineffective.

[111] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (both arguing that the Court in truth applies a multi-factored sliding scale analysis when analyzing equal protection claims); *see also supra*, note 47 (citing literature on Supreme Court's apparent drift away from rigid tiers of scrutiny).

equality, both of which the Court invoked in *Grutter*—but to the means.

2. Holistic Evaluation and the Problem of Racial Adjudication

Traditional affirmative action programs promote equal opportunity by classifying individuals on the basis of race and using those classifications to distribute benefits. It is primarily this act of classification, not the state interest in equality, to which the Supreme Court has usually objected. [112]

The term *racial adjudication*, coined by Andrew Carlon, refers to a governmental practice of defining racial categories and placing individuals into one category or another for the purpose of distributing benefits or burdens.[113] Racial adjudication is only one kind of *racial classification*, since government can use race in other ways—record-keeping or general policy decisions—that do not involve distributing benefits or burdens to individuals.[114] Racial adjudications, such as affirmative action programs, are more troubling to the Supreme Court than other racial classifications.[115]

The Court's discomfort with racial categorization was apparent even as it upheld the University of Michigan's law school admissions program. One of the more frustrating aspects of the *Grutter* and *Gratz* decisions was the Court's apparent preference for obscurity in the decision-making process of an affirmative action program. The Court preferred the law school's "holistic" approach that did not assign numerical values to race or other elements of diversity, rather than the undergraduate point system.[116] As Justice Ginsburg argued,

---

[112] *See* Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 796-97 (2007) (Kennedy, J., concurring in part and concurring in the judgment)

[113] Carlon, *supra* note 52, at 1159-60 (defining *racial adjudication*).

[114] *See id.* at 1158-59.

[115] *See Parents Involved*, 505 U.S. at 796-97 (Kennedy, J., concurring in part and concurring the judgment).

[116] *See* Grutter v. Bollinger, 539 U.S. 306, 334-39 (2003) (favorably describing law school's program and concluding it was narrowly tailored); *Gratz v. Bollinger*, 539

"If honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."[117]

Two factors are likely to have driven the Court's preference for the opaque rather than the transparent process. First is a preference for suppressing controversy and conflict.[118] If there are to be racial preferences in admissions, better that they be obscured so that no one can say for sure what effect they had, and fewer feelings will be hurt.

Second is the Court's discomfort with the mere act of classifying individuals by race. To classify individuals by race, the government must have a definition of race, something the Supreme Court has not had to confront since it rejected Homer Plessy's claim that he was white.[119] Slavery, Jim Crow, and legal segregation all required an official system for stamping each person with a racial label, often using the infamous "one drop of blood" rule.[120] A point

---

U.S. 244, 270-74 (2003) (concluding that the undergraduate point system was not narrowly tailored).

[117] *See* 539 U.S. 244, 305 (2003) (Ginsberg, J., dissenting).

[118] *See* Delahunty, *supra* note 17, at 69 (arguing that the Court's strategy has been to pursue a brokered peace of allowing limited affirmative action rather than to choose between competing visions of racial justice) ("The opacity of the law school's race-conscious admissions process was its virtue, the transparency of the college's admissions process was its vice. Opacity in this context mutes racial envy and antagonism, transparency breeds them."); *cf.* Laurence H. Tribe, *Erog v. Shub and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 287-88 (2001) (discussing the Court's reaction to the perceived chaos of post-2000 election Florida and concluding, "To judge from what this Court does, not what it says, high on [its] list of values is the preservation of a stable order and of an appearance of regularity. Low on that list is an energized, politicized, unruly electorate struggling to find its way toward concrete outcomes …."); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 866-69 (1992) (arguing that vociferous popular protest against Roe v. Wade, 410 U.S. 113 (1973), was all the more reason to re-affirm rather than overrule it) (discussed in Tribe, *supra*, at 289-90).

[119] *See* Plessy v. Ferguson, 163 U.S. 537, 541-42, 549, 552 (1896) (holding that the state could choose how to define race for purposes of its Jim Crow laws).

[120] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 5 n. 4 (1967) (quoting Virginia statutes defining *white persons* as those with "no trace whatever of any blood other

system for affirmative action admissions requires each person to be classified, even if not necessarily under the same rule.[121] Under a holistic system, the classification can be fudged. The increasing proportion of the population who check "other" when asked their race on census forms can, in fact, be treated as individuals rather than forced into one of a few categories. A holistic system avoids the potential for litigation in which a court is asked to decide whether the government has applied the wrong racial label to a modern-day Homer Plessy.

The *Parents Involved* opinions highlighted the evils of racial adjudication. The plurality framed its holding as concerned with the distribution of "burdens or benefits on the basis of individual racial classifications."[122] Justice Kennedy criticized the Seattle school district's "blunt distinction between 'white' and 'nonwhite,'" which tells "each student he or she is to be defined by race."[123] The weight this concern should receive is certainly open to debate.[124] It is,

---

than Caucasian," with a minor exception designed to "honor[] the descendants of John Rolfe and Pocahontes").

[121] Most affirmative action programs rely on self-identification, a system which has generated surprisingly little controversy (at least to the point of inspiring litigation) over the correctness of those self-designations. *See* Carlon, *supra* note 52, at 1164-65 (noting that there are few documented instances of "abuse" of affirmative action by non-minorities). Slightly more common are disputes over "close cases," such as whether a person of Arab descent is "white." *See id.*; Al-Khazraji v. St. Francis College, 784 F.2d 505, 514-18 (1986) (invoking congressional intent to hold that Arab plaintiff could proceed with race discrimination claim under 42 U.S.C. § 1981, regardless of whether Arabs were "taxonomically Caucasian"). For an example of what the Supreme Court presumably wants to avoid, see Edward C. Thomas, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten "Critical Mass" Justification in Higher Education*, 2007 B.Y.U. L. REV. 813 (2007) (arguing that universities that fail to establish and enforce precise racial definitions have failed to narrowly tailor their affirmative action programs to their interest in diverse student bodies).

[122] Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[123] *Id*. at 787.

[124] *See, e.g.*, *id.* at 867 (Breyer, J., dissenting) ("This is not to deny that there is a cost in applying 'a state-mandated racial label.' But that cost does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80

however, a legitimate concern that is important to the Court's swing vote. It is therefore worth isolating the effect of the racial adjudication problem, in order to avoid over-generalizing the Court's existing precedents. That is, the Court's hostility to racial adjudication should not be allowed to taint the state interest in equality. In the interplay of state interests with narrow tailoring that is strict scrutiny, equality may be a compelling state interest even if it is not always strong enough for the Court to allow racial adjudication as the means to achieve it.

The Court's aversion to racial adjudication makes it inappropriate to allow the affirmative action cases to stand for the general proposition that equality is not a compelling state interest. The Court's rejection of societal discrimination as a compelling interest should be understood in context. The affirmative action programs struck down in *Gratz* and *Bakke* required classification of individuals into fixed racial categories. In contrast, the Court's acknowledgement of existing inequality played at least some role in upholding the law school's program in *Grutter*, which avoided strict racial adjudication.[125] *Grutter* and *Gratz*, then, should be understood as leaving open the possibility of structural inequality as a compelling state interest.

3. Structural Inequality as a Compelling State Interest

Parents Involved required the Court to confront whether the equality interest it had seemed to reject in affirmative action cases could be compelling in the K-12 context. No kind of diversity other than racial diversity was at stake, so the "holistic evaluation" approach proved a dead end.[126] Although the Court struck down the Seattle and Louisville integration plans, the dissent and Justice Kennedy's concurrence both recognized the state interest in racial

---

years of legal racial segregation.") (quoting *id.* at 797 (Kennedy, J., concurring in part and concurring in the judgment)).

[125] *See supra*, text accompanying notes 76-89.

[126] All that Louisville obtained by trying to present its assignment plan as flexible and holistic was Justice Kennedy's criticism that the plan was too confusing. *See Parents Involved*, 551 U.S. at 784-86 (Kennedy, J., concurring in part and concurring in the judgment).

equality.[127] They thus preserved for the moment the viability of an equal protection analysis contingent on existing conditions of structural inequality. The plurality, however, strongly suggested that it would have struck down the plans because there was no compelling, or perhaps even legitimate, interest in racial integration.[128]

The plurality opinion dealt with both the Seattle and the Louisville integration plans. Although the plurality concluded that the plans were not narrowly tailored, it went even further to reject the claimed state interest in integration. The plurality argued that the focus on race alone belied a generalized interest in student body diversity.[129] That left the school districts to rely on an interest that was variously characterized as "reduc[ing] racial concentration" or "ensur[ing] that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools."[130] The stated rationales carefully avoided the term "racial balancing," which the Court had vilified in *Grutter*.[131] In truth, however, the asserted state interest boiled down to undoing *de facto* segregation and structural inequality.[132] The plurality would have

---

[127] *See Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment) (rejecting the implication of the plurality opinion that states "must accept the status quo of racial isolation in schools"), 797-98 (recognizing a compelling interest in "avoiding racial isolation"); *id.* at 838-45 (Breyer, J., dissenting) (describing a compelling interest in diversity or integration with three elements: historical/ remedial, educational, and democratic).

[128] *See id.* at 725-33 (plurality opinioin) (no compelling interest); *id.* at 751 (Thomas, J., concurring) (no interest at all in "preventing resegregation").

[129] *See Parents Involved*, 551 U.S. at 723 (plurality opinion) ("[T]he plans here employ only a limited notion of diversity."; "[R]ace is not simply one factor weighed with others in reaching a decision as in *Grutter*; it is *the* factor.").

[130] *Id.* at 725-26 (summarizing the claimed state interests).

[131] Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

[132] This article accepts the premise that a purpose and at least possible effect of integration is to help reduce structural racial inequality, while acknowledging that people of good faith disagree about whether integration plans are the best strategy from either an equality or an educational perspective. There are good reasons for viewing so-called *de facto* segregation as both a symptom and a mechanism of structural inequality, as opposed to a mere reflection of personal choices. With respect to education, *Parents Involved* suggests two ways in which the school

district might see integration as a response to inequality. First, the racially identifiable schools in Seattle were separate but not equal, as the district acknowledged by arguing that its integration plan was necessary "to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools." *Parents Involved*, 551 U.S. at 786-87 (Kennedy, J., concurring in part and concurring in the judgment). This pattern is so entrenched that it is often invisible, as was reflected in one of Justice Scalia's hypotheticals in the oral argument of the Lousiville case. In the course of asking about how to distinguish benign from invidious racial motives, Justice Scalia posited schools that were equal in all respects except racial makeup while simultaneously stipulating that the white schools were the good schools. *See* Oral Argument, Meredith v. Jefferson Cnty. Bd. of Educ., 2006 WL 3486966. Second, if the purpose of education is not merely to increase scores on standardized math and reading tests but to produce citizens who have absorbed democratic values, integrated schooling is likely preferable. *See Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all."); Ryan, *supra* note 2, at 132, 142-44 (arguing that *Parents Involved* will have little effect on the ground because, *inter alia*, today's focus is test scores, not citizenship) ("The idea that schools should also teach students from diverse backgrounds how to cooperate in preparation for citizenship, like the idea of integration, has been pushed into the background."); J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 182 (2007) (equating education with training to master specific skills); *see also Grutter*, 539 U.S. at 347 (Scalia, J., dissenting) (mocking the suggestion that law schools, as opposed to kindergartens, should teach citizenship); *but see* Jennifer S. Hendricks, *"We reserve the right to refuse service to anyone,"* 76 TENN. L. REV. 417 (2009) (reflecting on teaching constitutional law as citizenship for lawyers).

The values and cross-racial understanding that integrated schooling may produce can be viewed through a race-as-ethnicity lens or as breaking down one of the mechanisms of structural inequality. *See* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 116 (2007) (arguing that Justice Kennedy's opinion in *Parents Involved* reflects concern for the schools' ability to teach civic morality) ("[Even a judge committed to the colorblind ideal might worry … that the value of colorblindness cannot be learned in a racially segregated school."). The possibility that integration serves these ends is at least strong enough that a state actor should be allowed the chance to show that it has narrowly tailored its own integration efforts to achieve them.

struck down both plans on the grounds that these interests were not compelling—or, at least in Justice Thomas's view, even legitimate—because they took race into account.[133]

Although Justice Kennedy agreed with the plurality on the outcome, he sided with the dissent on the question of the state interest: he accepted that the claimed state interest in avoiding racial isolation was compelling.[134] His objection to the schools' plans came at the second step of the strict scrutiny analysis, the requirement of narrow tailoring. The substance of that objection was to the state's classification of individuals by race: "[O]fficial labels proclaiming the race of all persons in a broad class of citizens … are unconstitutional as the cases now come to us."[135]

Justice Kennedy's point of disagreement with the plurality thus made explicit what had been implicit in prior affirmative action cases. The Court's seeming protestations to the contrary notwithstanding, the state *has* a compelling interest in combating the racial status quo. In crafting policy to serve that interest, however, some means are more acceptable than others, and racial adjudication must be kept as a last resort.[136]

Interestingly, Justice Kennedy's opinion progressed from a *Grutter*-like diversity rationale to equality concerns as he discussed different kinds of state action. When discussing acceptable state interests for individual classifications, he spoke in terms of diversity,

---

[133] *Parents Involved*, 551 U.S. at 729-33 (plurality opinion) (concluding that an interest in racial integration, which "cannot be the goal," is equivalent to racial balancing); see also *id.* at 751 (Thomas, J., concurring) ("[T]he school districts lack an interest in preventing resegregation.").

[134] *See also id.* at 783-84, 797-98 (Kennedy, J., concurring in part and concurring in the judgment) (summarizing disagreement with plurality); *id.* at 787-88 ("The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunities regardless of their race.").

[135] *Id.* at 782.

[136] *See id.* at 790 ("And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest.").

and squarely within the race-as-ethnicity perspective.[137] From this perspective, race is one of many personal characteristics that make up the range of human experience, but it does not necessarily implicate a hierarchy.[138] Ian Haney López has chronicled how this conception of race promotes a doctrine of strict colorblindness at the expense of other Fourteenth Amendment values, particularly the elimination of racial subordination.[139] Justice Kennedy's critique of the Seattle plan fits squarely within this tradition.[140] His main objection to the Seattle plan was to its "blunt distinction between 'white' and 'nonwhite,'" which failed to account for substantial racial and ethnic diversity in the "nonwhite" category. [141] When Justice Kennedy discussed the educational benefits of diversity, racial difference was merely a matter of perspective, not hierarchy.

When he turned, however, to the question of alternative, race-conscious integration measures, Justice Kennedy spoke the language of equality. He opened with a nod to racial progress that acknowledged "the flaws and injustices that remain" and the need for "assurance that opportunity is not denied on account of race."[142] The state interest at stake was the government's interest in "ensuring all people have equal opportunity regardless of their race."[143] He took on the plurality's invocation of Justice Harlan's dissent in *Plessy v. Ferguson*, explaining that "Our Constitution is colorblind" must be

---

[137] *See* Haney López, *supra* note 14 at 1006-11 (describing development of ideology treating race as a form of ethnicity).
[138] *See id.* at 990 (arguing that the ethnicity perspective "suggested that racial subordination was largely past and that social inequalities, if any, reflected the cultural failings of minorities themselves").
[139] *See id.* at 990 ("[M]y primary aim in this Article is to demonstrate that race-as-ethnicity provided the first coherent intellectual justification for reactionary colorblindness."); *id.* at 1011-12 (arguing that "ethnicity operated [to depict] affirmative action, not as a needed national response to racial subordination, but instead as the sort of group rent-seeking one would expect in the context of ethnic group competition").
[140] *Cf.* Gerken, *supra* note 82, at 108 (referring to the "anti-essentialist boilerplate" in Kennedy's opinion).
[141] *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment).
[142] *Id.*.
[143] *Id.*

read in context.[144] He summed up his disagreement with the plurality as follows: "To the extent the plurality opinion suggests the Constitution mandates that state and local authorities must accept the racial status quo of racial isolation in schools, it is, in my view, profoundly mistaken."[145] Justice Kennedy thus made clear that he supports state efforts to reduce structural inequality, but only if racial adjudication is avoided.

The claim that societal discrimination is not a compelling state interest has been repeated so often in affirmative action cases that it has taken on a life of its own. It thus became capable of threatening not only programs that depend on facial classifications but even race-neutral forms of affirmative action. At the same time, however, the Supreme Court's own reasoning has invoked the state's interest in equality and demonstrated that the real objection is to means that rely too heavily on racial adjudication. The government's ability to practice this contingent form of equal protection narrowly survived *Parents Involved*. Despite all the inveighing against racial balancing, the problem in *Parents Involved* was not in the fact that racial balance was *sought* but in how it was achieved. The government can legitimately seek racial integration, but it must try to do so without stamping each person with a racial identity.[146] Subject to limits that reflect that concern, the state has a compelling interest in overcoming structural inequality.

---

[144] *Id.* at 788; Plessy v. Ferguson, 163 U.S. 537, 559 (1896).

[145] *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring in part and concurring in the judgment). This statement also serves as an appropriate rejoinder to Justice Thomas's invocation of another famous line, paraphrasing, "The Fourteenth Amendment did not enact the dissent's newly minted understanding of liberty."). *Id.* at 767, n. 15 (Thomas, J., concurring); *cf.* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment did not enact Mr. Herbert Spencer's *Social Statics*."). Of course, the *Parents Involved* dissent would not have enacted any particular understanding of liberty or equality; it would merely have permitted the people of Seattle and Louisville to pursue their understanding. It was the *Parents Involved* plurality that, like the *Lochner* Court, sought to constitutionalize a particular social theory (in both cases, maintenance of a status quo of unequal power and protect it against legislative interference).

[146] *See Parents Involved*, 551 U.S. at 790 (Kennedy, J., concurring in part and concurring in the judgment).

II. Contingent Equal Protection and Sex Inequality

After centuries of pernicious racial classifications, judicial scrutiny became strict just as government was becoming more likely to enact racial classifications that could plausibly be described as benign or remedial.[147] Scrutiny of sex classifications remains formally less strict.[148] As a result, contingent equal protection has flourished in sex cases far more than in race cases.[149] Indeed, in the context of sex classifications, contingent equal protection can be generalized to include state action premised not just on social inequality but also on what the Supreme Court has perceived as biological inequality—more accurately described as the socially unequal consequences of biological sex differences.[150] Moreover, classification of individuals according to sex, rather than race, is not troubling to the Court.[151] Isolating that factor and uniting the sex and race cases under the rubric of contingent equal protection reveals the conceptual bankruptcy of the *Parents Involved* plurality's attempt to reject the state's compelling interest in equality.

Part II.A discusses the Court's greater tolerance for sex classifications designed to remedy structural inequality. It argues that this tolerance is attributable to the Court's comfort with government-imposed, binary sex classifications, as compared to its discomfort with racial adjudication. The contingent equal protection cases involving sex classifications thus repudiate (and are threatened by) the claim that the government lacks a compelling interest in eliminating structural inequality. Part II.B extends this argument to

---

[147] *See generally* Ivan E. Bodensteiner, *The Supreme Court as the Major Barrier to Racial Equality*, 61 RUTGERS L. REV. 199 (2009).

[148] *See* U.S. v. Virginia, 518 U.S. 515, 524 (1996) (formally adhering to intermediate scrutiny for sex classifications); Nguyen v. INS, 533 U.S. 53 (2001) (demonstrating that *U.S. v. Virginia* had not ratcheted up review of sex classifications by applying extremely deferential review to a sex classification clearly rooted in stereotypes).

[149] *See infra*, part II.A.

[150] *See infra*, part II.B. In most of the cases discussed below, the Court typically characterizes women's biology as imposing a burden, rather than as a difference that can be a burden or an ability to varying degrees depending on social structures.

[151] *See infra* notes 113-17 and accompanying text.

sex cases that involve biological sex differences in lieu of other structural inequality. This extension to "real differences" cases provides the groundwork for Part III's discussion of future developments in contingent equal protection.

A. Structural Inequality and Sex Classifications

One of the ironies of equal protection doctrine is that it is easier to justify remedial sex classifications than to justify remedial or benign racial classifications.[152] Doctrinally, this discrepancy is a function of the lower level of scrutiny for sex classifications, which gives the government more leeway in shaping gender relations.[153] Of course, governments often use this leeway to perpetuate stereotypes and inequality.[154] They can also use it, however, to try to improve the relative status of women, including through affirmative action programs.[155]

---

[152] *See* Mary K. O'Melveny, *Playing the "Gender" Card: Affirmative Action and Working Women*, 84 KY. L. REV. 863, 864-65 (1996). ("Ironically, the unwillingness to employ strict scrutiny for gender-based classifications means that, under the Court's most recent rulings on affirmative action issues, affirmative action programs for women may survive challenge where comparable race- based programs will not. Or, to put the issue another way, white men may look to greater constitutional protections from race-based affirmative action plans (however well-intentioned) than exist for women challenging programs that discriminate based upon sex.") (footnote omitted).

[153] *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976) (adopting intermediate standard of review for sex classifications). Intermediate scrutiny requires that the state action be substantially related to an important state interest, as opposed to strict scrutiny's requirement that state action be narrowly tailored to a compelling state interest.

[154] *See, e.g.*, Nguyen v. INS, 533 U.S. 53 (2001) (upholding naturalization laws distinguishing among foreign-born children based on the sex of the citizen parent, based in part on governmental interest in avoiding citizenship claims by foreign-born children of U.S. servicemen and businessmen). Although I have criticized the analyses of both the majority and the dissent regarding the statute's presumption of a connection between mother and child, the dissent was correct that the statute rested on archaic gender stereotypes. *See* Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. OF WOMEN & L. 429, 470 and nn. 238-36 (2007) (noting points of agreement with the *Nguyen* dissent).

[155] *See, e.g.*, Johnson v. Santa Clara County Trans. Agency, 480 U.S. 616 (1987) (upholding a sex-based affirmative action program against a Title VII challenge).

A striking example of a remedial sex classification was the compensatory social security program upheld in *Califano v. Webster*.[156] For several years, women and men were subject to different rules for excluding their low-earning years from the social security benefits calculation.[157] The result was higher benefits for a woman than for a man with the same earning history.[158] The Supreme Court had no trouble accepting the important state interest justifying this rule: "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women."[159] Less dramatically, the same state interest has justified affirmative action for women in areas such as public employment, which has proceeded with far less controversy than what swirls around race-based affirmative action.[160] Equal protection analysis contingent on the fact of existing inequality is thus well established in the field of sex classifications.[161]

Importantly, the gender differential in *Webster* was intended to redress *private* discrimination in employment. There was no suggestion that Congress was at fault or had itself violated the Equal Protection Clause by, say, failing to outlaw discrimination by private

---

[156] 430 U.S. 313 (1977) (per curiam).
[157] *Id.* at 314-16.
[158] *Id.* at 316.
[159] *Id.* at 317.
[160] *See* O'Melveny, *supra* note 101, at 864-65; *but see* Celia M. Ruiz, *Legal Standards Regarding Gender Equity and Affirmative Action*, 100 ED. L. REP. 841 (1995) (discussing the Sixth Circuit's application of strict scrutiny to sex-based affirmative action in order to eliminate this anomaly). In the educational context, some institutions are now engaged in "reverse" affirmative action in order to maintain parity between male and female admissions. *See* Debra Frazese, *The Gender Curve: An Analysis of Colleges' Use of Affirmative Action Policies to Benefit Male Applicants*, 56 AM. U. L. REV. 719 (2007) (arguing that such policies are unconstitutional because based on stereotypes and unsupported by any pedagogical objective).
[161] The Supreme Court regularly cites *Webster* and the state interest in redressing past economic discrimination against women when cataloguing acceptable governmental uses of sex classifications. *See, e.g.*, U.S. v. Virginia, 518 U.S. 515, 533 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982); *see also* Orr v. Orr, 440 U.S. 268, 280 (1979) (citing *Webster* with approval).

actors.[162] The inequality that justified this sex classification is thus analogous to the structural inequality that the *Parents Involved* plurality called into question as a justification for race-conscious action It is the sort of inequality that does not meet the test for state action and thus does not trigger a judicial remedy under the Equal Protection Clause. Nonetheless, Congress had a legitimate interest in redressing the existing inequality. Congress's ability to favor women in the benefits calculation was contingent on that inequality. The plurality's refusal to apply the same contingent equal protection to remedies for racial inequality is inconsistent not only with repeated signals that race-neutral affirmative action is constitutional but also with the Court's willingness to apply the same analytical structure to the remediation of sex inequality.

Of course, there are differences between race and sex—in doctrine and in reality—that might explain different outcomes. For example, it is difficult to imagine the Court upholding a compensatory social security system similar to *Webster* but designed to compensate individual members of racial minorities for private employment discrimination.[163] A racial *Webster* would apply a different level of scrutiny. It would also reflect the Court's greater aversion to racial classification of individuals. Breaking down the analysis, howeve,r reveals that the difference cannot lie in the

---

[162] While the Equal Protection Clause might have been read to require Congress or the states to enact non-discrimination laws, the Supreme Court has never gone down that road. *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1695 n. 16 (2d ed. 1988) (suggesting that in *The Civil Rights Cases*, 109 U.S. 3 (1883), Supreme Court should have held that Congress had power to intervene under Section 5 of Fourteenth Amendment when state had repealed its common law rule of equal access).

[163] It is perhaps even more difficult to imagine that Congress would enact such a program. In addition to the doctrinal factors discussed in the text, a third reason that such a program would be neither enacted nor upheld is that redistribution of wealth on the basis of sex is a much less radical than redistribution on the basis of race. Wealth is typically held by families, which are mixed-sex far often than mixed-race. For those who were dependent on social security for survival, the sex differential upheld in *Webster* probably helped some older women get by. Given, however, that social security pays more to higher earners, the primary beneficiaries of the differential would have been the families of relatively prosperous, mostly white women.

legitimacy or weight of the state interest in ameliorating racial inequality as compared to sex inequality. Rather, the difference lies in what the Court considers acceptable means for ameliorating different kinds of equality.

Judicial scrutiny of sex classifications is, at least in theory, less intense than scrutiny of race classifications in two ways. First, a race classification must serve a "compelling" state interest, while a sex classification need serve only an "important" state interest.[164] Second, the means of achieving the state interest must be appropriate: If the means include a race classification, it must be "narrowly tailored" to the state interest.[165] A sex classification need only bear a "substantial relationship" to the state interest or, when the Court is feeling particularly hostile to sex classifications, have an "exceedingly persuasive" justification.[166] If a racial *Webster* would come out differently, then the difference must lie either in the state interest asserted or in the means used to effectuate that interest.

The Supreme Court has never provided a comparative analysis of the difference between "important" and "compelling" state interests. Indeed, it has barely distinguished between those categories and other legitimate state interests. Most legitimate state interests seem capable of being deemed at least important, with the sole exception of mere administrative convenience.[167] While the "compelling" category may yet turn out to be narrower than the "important" category, the state interest in fighting inequality is obviously the wrong place to draw that line. To hold that equality is an important but not compelling goal *under the Fourteenth Amendment* would be bizarre, even where the equality sought is more positive and substantive than the negative right to equal

---

[164] *See* Johnson v. Calif., 543 U.S. 499, 505 (2005) (strict scrutiny); Craig v. Boren, 429 U.S. 190, 197-98 (1976) (intermediate scrutiny); *U.S. v. Virginia*, 518 U.S. 515, 524 (1996).

[165] *See Johnson*, 543 U.S. at 505.

[166] *See id.*; *Craig*, 429 U.S. at 197-98; *U.S. v. Virginia*, 518 U.S. at 524; *but see* Nguyen v. INS, 533 U.S. 53 (2001) (O'Connor, J., dissenting) (complaining that majority had abandoned the "exceedingly persuasive" requirement).

[167] *See Craig*, 429 U.S. at 197-98 (noting prior rejection of state interests in reducing probate court workload and administrative ease and convenience).

treatment enforced by the Court. Equally as strange would be a holding that racial inequality was a lesser concern than sex inequality under that Amendment. Thus, if contingent equal protection analysis produces different outcomes in race and sex cases, it cannot be because of the formal difference between "important" and "compelling" state interest.

The Court has similarly failed to explicate the difference between "narrowly tailored" and "substantially related" means for achieving state interests by way of race or sex classifications. One of the reasons, however, that sex classifications trigger a lower level of scrutiny is that the Court does not consider the government's classification of an individual as female or male to be inherently offensive. In *Bakke*, Justice Powell explained that sex classifications do not create the same "analytical and practical problems" as race classifications because "there are only two possible classifications" and thus "no rival groups" to claim entitlements.[168] Thirty years later, the Court has not yet confronted cases involving intersexed or transsexual individuals under the Equal Protection Clause. It has barely scratched the surface of other claims involving individuals whose gender or sexual identity resists binary classification. The Court's awkward stumbling in cases involving homosexuality does not bespeak a Court inclined to question its binary definition of sex.[169]

Lower court cases reflect a similar insistence on the binary nature of sex. In Title VII cases, courts faced with questions about

---

[168] Bakke v. Regents of the Univ. of Calif., 438 U.S. 265, 303 (Powell, J., announcing judgment). Justice Powell added that the perception of racial classifications as inherently odious stems from a "lengthy and tragic history that gender-based classifications do not share." *Id.*

[169] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII but failing to provide useful guidance for determining when such harassment is "because of sex" as required by the statute). On the question of when adverse action is "because of sex," see generally Jennifer S. Hendricks, *Women and the Promise of Equal Citizenship*, 8 TEX. J. WOMEN & L. 51, 85-91 (2000) (discussing "animus based on gender" under the Violence Against Women Act and "because of sex" under Title VII as applied to sexual harassment cases).

"correct" racial classification have in recent years fallen back on social reality and perception rather than purportedly scientific definitions of race.[170] Not so for sex classifications. In cases ranging from discrimination to the validity of marriages, courts have insisted on an binary, biological definition.[171] Although this approach is unrealistic and harmful in many contexts,[172] its prevalence illuminates contingent equal protection doctrine: sex cases demonstrate what courts and other state actors may do in the face of historic and persisting inequality when the classification itself is not deemed pernicious.

Because of the greater tolerance for individual classification, a greater variety of means remain open to a state actor seeking to ameliorate sex inequality. To implement a *Webster*-like program for race, Congress would have to define each person's race with the precision of Jim Crow.[173] That act of classification—not the state interest in equality—is what distinguishes *Parents Involved* from *Webster*.

Under *Grutter/Gratz* and *Parents Involved*, the act of racial classification, not the desire to reduce inequality, is what created problems under the Equal Protection Clause. The sex cases, which eliminate this classification problem but are otherwise analytically the same, prove that the Court's complaint has never been with the legitimacy of the state interest in equality. The *Parents Involved*

---

[170] *See, e.g.*, Al-Khazraji v. St. Francis College, 784 F.2d 505, 514-18 (1986) (invoking congressional intent to hold that Arab plaintiff could proceed with race discrimination claim under 42 U.S.C. § 1981, regardless of whether Arabs were "taxonomically Caucasian").

[171] *See generally* Julie Greenberg, *Defining Male and Female*, 41 ARIZ. L. REV. 265, 292-325 (1999) (surveying cases illustrative of "law's insistence on clinging to a binary system that traditionally ignores the importance of self-identification").

[172] *See* Elizabeth Reilly, *Radical Tweak: Relocating the Power to Assign Sex*, 12 Cardozo J.L. & Gender 297, 307-07 (2005) (summarizing literature about the effects on individuals of medical and legal enforcement of binary sex categories).

[173] In fact, to accurately reflect past discrimination, Congress might well adopt definitions of race from the very laws that structured *de jure* segregation. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 541-42, 549, 552 (1896) (discussing Homer Plessy's claim to property right in whiteness); Loving v. Virginia, 388 U.S. 1, 5 n. 4 (1967) (quoting Virginia's statutes defining race).

plurality's attempt to brand that interest as illegitimate is as false to precedent as it is to the Fourteenth Amendment itself.

B. Real Differences and Sex Classifications

In the race and sex cases discussed so far, contingent equal protection has two features. First, the contingency—the state interest that justifies race- or sex-conscious action—is an existing condition of structural inequality. Second, the contingent analysis creates government power rather than individual rights: a state actor can choose either to redress or to ignore the existing inequality. This section generalizes the first feature of contingent equal protection to include state action intended to accommodate biological sex differences. Part III considers the distinction between government choice and individual entitlement to remediation of inequality.

Accommodating sex differences usually means accommodating *women's* differences, given a male norm. Accommodation, like affirmative action, is a conservative response to inequality, since it retains the status quo and treats members of the disadvantaged group as exceptions. As with affirmative action, the Supreme Court has never held that governments are *required* to take even this small step toward substantive equality for women.[174] But unlike the race-based affirmative action cases, the "real differences" cases have easily permitted governments to choose accommodation. With the problem of an inherently pernicious classification removed, government is free to seek affirmative, substantive equality. The real differences cases thus further demonstrate that the *Parents Involved* plurality's

[174] *See* Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 962 (1984) (cataloguing the real differences cases) *see also* U.S. v. Virginia, 518 U.S. 515 (1996); *Nguyen v. INS*, 533 U.S. 53 (2001). In all of these cases, the Supreme Court either upheld the government's policy or (in *U.S. v. Virginia*) struck down a policy treating women and men differently because the Court rejected the government's claim that they were differently situated. The Court has never struck down a policy of facial sex-neutrality (no matter how superficial, see *Geduldig*) because it failed to account for biological difference. *Cf.* Califano v. Webster, 430 U.S. 313, 320 (1977) (stating that Congress's change of heart—repealing the sex-differential in the social security rules—did not affect the Court's analysis of whether Congress had the power to enact the differential).

rejection of the state interest in equality is unfounded in prior equal protection jurisprudence.[175]

1. The Real Differences Cases

Sylvia Law first identified the real differences cases as those in which the Supreme Court invokes natural sex differences to justify different legal treatment of men and women.[176] Of course, the Court's perception of which differences are natural has changed over time. In the infamous *Bradwell v. Illinois*,[177] the Court perceived men and women as differently situated, by biology and the Creator, with respect to the practice of law. Purported natural differences also justified early labor restrictions for female workers when men's contractual rights were still subject to *Lochner v. New York*.[178] More recently, the Court has been receptive to real differences arguments only when the link to reproductive biology is more direct.[179] In *Michael M. v. Superior Court*, for example, the Court accepted women's vulnerability to pregnancy as a justification for sex-specific

---

[175] As discussed in Part II.A, the difference between "compelling" state interests under strict scrutiny and "important" state interests under intermediate scrutiny cannot plausibly distinguish the cases. *See supra*, notes 140-51 and accompanying text.

[176] Law, *supra* note __, at 962. Professor Law identified the following as real differences cases: Michael M. v. Superior Ct., 450 U.S. 464 (1981) (statutory rape a crime only when committed by male against female); Rostker v. Goldberg, 453 U.S. 57 (1981) (male-only registration for draft); Dothard v. Rawlinson, 433 U.S. 321 (1977) (exclusion of women from contact jobs in prisons); Gen. Elec. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnancy from disability benefits policy offered by private employer); Schlesinger v. Ballard, 419 U.S. 498 (1975) (separate rules for male and female officers under navy's up-or-out policy); Geduldig v. Aiello, 417 U.S. 48 (1974) (exclusion of pregnancy from disability benefits policy offered by public employer); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (mandatory pregnancy leave).

[177] 83 U.S. (16 Wall.) 130 (1872) (holding that state could exclude women from practice of law).

[178] 198 U.S. 45 (1905) (striking down maximum hours laws for (presumably male) bakers); *see* Muller v. Ore., 208 U.S. 412 (1908) (upholding maximum hours law for women working in laundries).

[179] U.S. v. Virginia, 518 U.S. 515 (1996) (striking down male-only admissions policy for public, quasi-military college), is an example of a failed modern attempt to restore the real differences category to something like its former scope.

statutory rape laws.[180] In *Dothard v. Rawlinson*, the Court equated femaleness with rapeability to justify restricting employment opportunities for female prison guards.[181]

The most infamous of the real differences cases is *Geduldig v. Ailleo*.[182] *Geduldig* involved a comprehensive short-term disability policy for state employees in California. The Court held that the exclusion only of pregnancy from coverage under the policy was not sex discrimination. The policy, said the Court, did not distinguish between women and men but between "pregnant women and nonpregnant persons."[183] The Constitution did not require the state to make up for what the Court perceived as a natural disadvantage in the labor market.

Other cases, however, show that the state *may choose* to enact laws to promote sex equality in the face of sex differences. After the Court extended *Geduldig*'s cramped conception of sex discrimination to Title VII,[184] Congress responded with the Pregnancy Discrimination Act (PDA).[185] The PDA defines discrimination "because of sex" to include discrimination because of pregnancy, and it requires that pregnancy be treated the same as any comparable physical condition under an employer's short-term disability plan.[186] The PDA thus protects women not just from irrational discrimination based on pregnancy but also from

---

[180] *See Michael M.*, 450 U.S. at 471-73 (plurality opinion).

[181] *See Dothard*, 433 U.S. at 336 ("The employee's very womanhood would thus directly undermine her capacity to provide [security].). By conceding that the sex differences relied upon in these more recent cases are more closely connected to biology than those in *Bradwell*, I do not mean to imply that they are not also based on stereotypes or gender hierarchy. *See generally infra*, part III.B.3; Law, *supra* note 119, at 1014 n. 217 (citing *Dothard* and *Rostker* for the point, "There is substantial evidence that the judiciary is not able to distinguish between biology and the social consequences attached to it.").

[182] 417 U.S. 48 (1974).

[183] *Id*. at 496 n. 20.

[184] *See* Gen. Elec. v. Gilbert, 429 U.S. 126 (1976).

[185] 42 U.S.C. § 2500e(k)

[186] *Id.*

indifference to pregnancy's effect on their short-term ability to work.[187]

The State of California went even further than the PDA, affirmatively mandating childbirth-related maternity leave, even for employees who were not protected against any other short-term disabilities.[188] The Court upheld this statute in *California Federal Savings and Loan Association v. Guerra (CalFed)*,[189] in which an employer argued that the California law constituted both sex discrimination and pregnancy discrimination. The employer pointed out that the maternity leave requirement contradicted the PDA's insistence that pregnancy be treated "the same as" other comparable conditions.[190] Looking to congressional intent, the *CalFed* Court read "the same as" to mean "no less favorably than."[191] The state was thus given a choice: it could seek substantively equal outcomes in the face of natural difference, or it could allow natural differences to translate into unequal outcomes. This ability to choose whether to try to ameliorate "natural" inequality is characteristic of contingent equal protection.

A common denominator of the real differences cases is that, regardless of whether the classification is challenged by a male or female party, the justifying biology—susceptibility to pregnancy or rape—is constructed as the natural disadvantage of women.[192] Under the contingent equal protection approach, the state can choose but has no duty to accommodate or make up for this natural

---

[187] *Cf.* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (holding that mandatory pregnancy leave for teacher still able to work was impermissible).
[188] *See* WEST'S ANN. CALIF. GOV. CODE § 12945.
[189] 479 U.S. 272 (1987).
[190] *Id.* at 279.
[191] *Id.* at 285 ("Congress intended the PDA to be a 'floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.'") (quoting lower court decision).
[192] As the prison context of *Dothard v. Rawlinson* should have helped make clear, vulnerability to rape is a not a biologically determined sex characteristic. It is also not obvious that potential for pregnancy should be constructed as a vulnerability rather than as an ability. *See infra*, part III.B.2., for a discussion of parental rights, the only area of law in which women's biology is understood to confer advantage relative to men.

disadvantage. In each case, the state's treatment of gender was permissible but not required. The real differences cases thus share the same analytical structure as other cases of contingent equal protection, with the purportedly natural disadvantage of biology playing the role of structural inequality.[193] First, differential treatment by race or sex is justified by the Court's acceptance of the claim that an inequality exists but is not the government's fault—that it is not attributable to state action. Second, the state may choose whether to ameliorate that inequality.

2. A Not-So-Real Difference

The shared structure of contingent equal protection and real differences cases is also shown by how lawyers define the category of real differences cases. Two cases involving the exclusion of women from combat service in the military are routinely classified as real differences cases.[194] The difference—the combat exclusion—was clearly *de jure*. What mattered, however, was that, like structural race inequality or biological sex differences, the combat exclusion was unquestioned in the context of the litigation. Because an admitted inequality was beyond the Court's power to remedy, contingent equal protection gave the government the option to level the playing field or to leave it askew.

The military cases are the only modern real differences cases that do not claim to rest strictly on biology. *Rostker v. Goldberg* upheld male-only registration for the draft.[195] *Schlesinger v. Ballard* upheld the navy's policy of giving women extra time to achieve promotion under the up-or-out policy.[196] Both cases were premised on the unchallenged exclusion of women from combat positions. In *Rostker*, women's exclusion from combat was the purported reason for excluding them from the draft, since Congress believed a draft

---

[193] On the relationship between biological difference and structural inequality, see Part II.B.3, *infra.*

[194] *See* Rostker v. Goldberg, 453 U.S. 57 (1981); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

[195] 453 U.S. 57 (1981).

[196] 419 U.S. 498 (1975).

would most likely seek combat troops.[197] In *Ballard*, exclusion from combat and sea duty limited women's ability to acquire the prerequisites for promotion; the navy allowed them extra time to make up for its own discriminatory policy.[198]

Rostker and *Ballard* are consistently classed with the real differences cases, even though they are based not on biological differences but on the military's explicit, sex-based exclusion of women from combat.[199] Analytically, then, *Rostker* and *Ballard* show that what makes a difference "real" is that the law takes it as a given. No party in *Ballard* or *Rostker* challenged women's exclusion from combat.[200] This failure made the fact that women did not serve in combat, even though clearly a function of law, just as "real" as the differences that the Court saw as imposed by nature in cases like *Michael M.*, *Dothard*, and *Geduldig*. A real difference is simply one that the Court can not (or will not) order to be changed.

This analytical structure unites the real differences cases with the explicitly remedial cases involving social security, affirmative action, and integration. In all of these cases, the Court's analysis takes some social fact of inequality—structural inequality, biological sex differences, or the combat exclusion— as a given for purposes of the litigation. Because that social fact is treated as unproblematic under the Equal Protection Clause, the state is under no duty to try to

---

[197] *See Rostker*, 453 U.S. at 76. The more likely reason for excluding women from registration, over the protest of military officers who testified in favor of registering women, was the political desire to maintain an ideology that looks to the male military to protect the women and children at home.

[198] *See Ballard*, 419 U.S. at 508.

[199] *See, e.g.*, Law, *supra* note 119, at 962 (listing real differences cases). Although many would surely argue that the combat exclusion itself was justified by biology, the Court has not confronted that claim because the exclusion was unchallenged in both cases. Moreover, biology has not changed in recent decades, but the combat exclusion has nearly disappeared. The justifications for what remains have more to do with the behavior of male troops than with women's abilities.

[200] *See Ballard*, 419 U.S. at 508 (noting that plaintiff did not challenge combat and sea duty restrictions); *Rostker*, 453 U.S. at 83 (White, J., dissenting) ("I assume what has not been challenged in this case—that excluding women from combat positions does not offend the Constitution."). Although the issue was not raised, the majority in *Rostker* clearly would have upheld the combat exclusion.

change it. But because that social fact creates conditions of actual inequality, the state has a legitimate interest in change if it chooses to try.

Because the analytical structure is the same, the plurality view in *Parents Involved* threatens not only remedial efforts that involve race-conscious state action but also those that involve sex classifications and even sex-conscious social policy. For example, under *Geduldig*, the PDA and the California maternity leave statute arguably do not contain sex classifications. Because pregnancy is not a sex classification, special protection for pregnancy fails to trigger heightened review, just as the targeted exclusion failed to trigger heightened review in *Geduldig*. However, both the PDA and the California law were adopted to give women a relative advantage, as compared to a status quo in which disfavored treatment of pregnancy was legal. Altering the playing field in women's favor was a motivating factor for the legislation.

Similarly, the Family and Medical Leave Act (FMLA),[201] although gender neutral on its face, was enacted and even upheld by the Supreme Court as an attempt to achieve greater substantive equality for women in the workplace.[202] Although Congress could have enacted the FMLA solely pursuant to its power to regulate interstate commerce, states would have been immune from damages suits by their employees.[203] For states to be liable under the FMLA, Congress had to act pursuant to its power to enforce the Fourteenth Amendment.[204] In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court held that Congress could use the Fourteenth Amendment to enforce the FMLA against the states.[205] To reach this conclusion, the Court had to strain to identify a pattern of state action unconstitutionally discriminating against female employees that corresponded to the remedy provided by the

---

[201] 29 U.S.C. §§ 2601-54.
[202] *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).
[203] *See id.* at 726 (explaining states' sovereign immunity under Eleventh Amendment and Congress's power to abrogate immunity pursuant to Section 5 of Fourteenth Amendment).
[204] *See id.*
[205] *See id.* at 740.

FMLA.[206] A more honest assessment of the FMLA is that its purpose was to alter the playing field: to restructure employment markets to accommodate employees with caretaking responsibilities, in large part in order to achieve greater substantive sex equality.

If eliminating *de facto* racial segregation is not a legitimate state interest, it is hard to see how the government would fare much better in claiming an interest in restructuring employment markets to facilitate greater achievement by a naturally less suited class of people (such as women who have or plan to have or might accidentally have children). A Supreme Court prepared to constitutionalize de facto racial segregation would not necessarily balk at doing the same for gender hierarchy.[207]

The real differences cases turn out to be a special case of contingent equal protection in which the structural inequality appears as the product of natural biology rather than human history. Understanding the shared doctrinal structure is important for two reasons. First, any doctrinal shift is unlikely to be confined to the context of K-12 integration, an effort that hardly needed the Supreme Court's help to join the ranks of the nation's neglected aspirations. Despite the claimed importance of context in equal protection analysis,[208] doctrinal developments in one area eventually carry over into others.[209] Second, understanding that the state interest in racial equality plays the same analytical role as the state interests in

---

[206] *See id.* at 728-32. While Congress certainly had evidence of sex discrimination, including discrimination with respect to parental leave, the FMLA's affirmative requirements for family and medical leave go well beyond remedying anything that the Court would have found to be unconstitutional sex discrimination. For further discussion of the relationship of contingent equal protection to Congress's Section 5 power, see *infra*, part III.B.1.

[207] The main reason one might expect them to balk is non-doctrinal and is that white male members of the Court may have greater empathy with, for example, the plight of professional women. *See* Joan C. Williams, Hibbs *as a Federaliam Case*, Hibbs *as a Maternal Wall Case*, 73 U. CINN. L. REV. 365, 374-75 (2004) (describing Justice Rehnquist's experiences caring for his wife when she was ill and helping his daughter, a lawyer and single mother, with child care).

[208] *See* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

[209] *See* Mayeri, *supra* note 3; Karlan, *Small Numbers*, *supra* note 2, at 1387.

Webster, *CalFed*, and *Hibbs* shows that rejecting equality as a compelling state interest would be an abrupt departure from existing law.

3. Real Differences as Structural Inequality

The analytical parallel between accommodating sex differences and correcting structural inequality is unsurprising. The problem in real differences cases is not a problem of women's natural and inherent disadvantage but a problem of structural features of society that are premised on a male norm.[210] Social mechanisms reproduce that structure together with the reproduction of racial hierarchy. For example, existing demand for workers who are free of caretaking responsibilities is premised on the social fact of gender hierarchy. The same is true of the pregnancy exclusion in *Geduldig*. Sex difference is the material basis for women's subordination, so it is not surprising that these "real" differences play the same role in contingent equal protection as structural inequality. The problem that presents as women's difference is in fact the social structure that makes that difference problematic.

At the same time, the apparent naturalness of sex differences can give greater force to claims for substantive equality. The persistent effects of structural racism are often dismissed as personal or cultural failures. Although similar claims are also made about women's choices or propensities, it is hard to deny that, say, lack of pregnancy leave means that women's economic opportunities are, on the whole, constrained in a way that men's are not. The obviousness of this fact is illustrated by the fact that Chief Justice Rehnquist—generally no friend to feminist claims—wrote the sweeping opinion in *Hibbs* upholding the FMLA as a matter of sex equality.[211] The

---

[210] *But see* Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975) ("From the humblest beginnings of the social order based on a primitive system of retaliatory force … woman was unequal before the law. By anatomical fiat … the human male was a natural predator and the human female served as his natural prey.").

[211] *See* Williams, *supra* note 145, at 374-75 ("Justice Rehnquist … is not known as a feminist. Yet he has had ample opportunity to experience first-hand various kinds of family caretaking.").

connection between claims of natural difference and structural inequality is even more obvious—and more likely to draw the sympathy of the Supreme Court—in the rare instance, discussed in Part III, where the perceived natural disadvantage falls on men.[212] Thus, while one wing of the Supreme Court seeks to use race cases to turn the Equal Protection Clause into a tool for entrenching inequality,[213] sex difference cases point to the possibility of an Equal Protection Clause that promotes and perhaps even requires not just facially neutral treatment but affirmative equality. Part III outlines these two possible futures for contingent equal protection.

III. The Future of Contingent Equal Protection

Parents Involved exposed a fault line in equal protection doctrine. In affirmative action cases, the Court has loosely asserted that societal discrimination is not a compelling state interest.[214] The *Parents Involved* plurality took that statement out of context and at face value. Fortunately, Justice Kennedy spun out the implications and distanced himself from the plurality's project. The Court is thus narrowly divided over whether the government can even try to alter the status quo of racial hierarchy.

Government efforts to reduce both racial and gender inequality fall under the analytic umbrella of contingent equal protection. Developments in one area will tend to affect the other. This Part explores potential consequences, depending on which way the split revealed in *Parents Involved* is resolved. Part III.A outlines the ramifications beyond school integration for the plurality's vision of willful blindness to structural inequality. Part III.B sketches some

---

[212] *See infra* part III.B.

[213] *See, e.g.*, *Parents Involved*, 551 U.S. at _; *Ricci v. DeStefano*, 129 S.Ct. 2658, 2681-83 (2009) (Scalia, J., concurring); *see generally* Bodensteiner, *The Supreme Court as the Major Barrier to Racial Equality*, *supra* note _; Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race":The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 UNIV. ILL. L. REV.615 (2003); Haney López, *supra* note 14; Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, *supra* note _..

[214] *See* Bakke v. Regents of the Univ. of Calif., 438 U.S. 265, 307 (Powell, J., announcing judgment); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995); *see also supra*, Part I.B.1.

possibilities of the alternative path. Beyond just preserving the basic contingent equal protection that most people assumed was constitutional before *Parents Involved*, recognizing the state interest in equality would provide a structure for further pro-equality efforts, as well as the seeds for modest legislative and judicial protection of positive rights.

A. Constitutionalizing the Status Quo: The Path of the *Parents Involved* Plurality

The *Parents Involved* plurality would have held that racial integration of K-12 public schools was not a compelling state interest and was thus unconstitutional regardless of the means through which it was pursued. Radical enough in its own right, this ruling would have had far-reaching implications for both race and sex cases in the realm of contingent equal protection.

1. Perpetuating Racial Hierarchy

The most immediate consequences of the plurality's view are laid out in the record of *Parents Involved*. In the particular context of public schools, the difference between Justice Kennedy and the plurality was that Justice Kennedy would have allowed race-conscious measures to promote integration without individual classification of students. The consequences of the position ultimately taken by the plurality were clearly exposed and explored during oral argument. At the K-12 level, the plurality's approach would invalidate the entire spectrum of site selection, magnet, and voluntary transfer programs that schools have developed to strive for racial integration in the post-*Brown* era. Higher education admissions program of the kind proposed in Justice Thomas's *Grutter* dissent would be similarly doomed.

Ironically, it was Justice Scalia who led the charge at oral argument for distinguishing between a race-conscious state interest and racial classification of individuals.[215] Justice Kennedy and the ultimate dissenters asked whether it made sense to say that

---

[215] *See* Oral Argument, Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1, 2006 WL 3486958, *28-29.

integration was an appropriate goal but then prevent the state from using the most obvious means for achieving it.[216] Echoing the debate in *Grutter* and *Gratz* over holistic versus transparent evaluations, this argument overlooked the problematic nature of racial classification itself. Justice Kennedy, it seems, was persuaded by Justice Scalia's arguments that the state interest could be preserved but the classifications should be rejected. Justice Scalia himself inexplicably joined the plurality's embrace of the plaintiffs' extreme position and gratuitously expanded on it in his *Ricci* concurrence. That position would render unconstitutional all conscious efforts by state actors to achieve racially integrated schools. The only exception would be when the state could establish the affirmative defense that it would have taken the same action even if race had not been a factor.

As Justice Scalia 's opinion in *Ricci* showed,this reasoning need not stop with preventing the conscious integration of schools. In some ways, the concept of integration can be distinguished from the concept of equality. Much of our nation's history can be understood as suggesting that the two go together, but people of good faith debate whether and when separation might be a better path to equality. At the level of the Court's analysis, however, virtually any question of state-desired equality can be analogized to a question of integration. "Integration," meaning diversity in the schools, is not all that different from integration or diversity in workplaces, particular professions, representative bodies, or even economic classes. The Court has already suggested that low minority participation in a particular profession should be interpreted not as a symptom of persisting inequality but as a reflection of cultural or ethnic preference.[217] An expressed desire to improve the relative status of a

---

[216] *See id.* at *20-21 (Justice Ginsburg), 22 (Justice Kennedy), 23 (Justice Souter).
[217] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501-02 (1989) (rejecting argument that proportionately small number of government contracts awarded to minority-owned firm was evidence of discrimination, and stating that blacks may simply prefer other careers); Haney López, *supra* note 14, at 1050 ("O'Connor followed [ethnicity theory] and, however implausible the claim, confidently suggested that the virtual absence of blacks from one of the few employment sectors where persons with relatively little formal education

particular racial group could easily become grounds for striking down state action taken on that basis. The path of the *Parents Involved* plurality could thus lead quite easily and predictably to a racial version of *Lochner*, in which, in a final irony of the disparate impact doctrine, any intentional governmental interference with the racial status quo is deemed a violation of the Equal Protection Clause.

Some of this ground has already been scouted. Professor Forde-Mazrui's early insight into the potential vulnerability of race-neutral affirmative action has already been borne out by the *Parents Involved* plurality opinion. Similarly, in 2003 Richard Primus described (but, like Forde-Mazrui, did not advocate) how the Equal Protection Clause could be used to attack Title VII disparate impact rules.[218] Like alternative action, they could be deemed unconstitutional for taking race into account. Justice Scalia relied on Primus's article for his *Ricci* concurrence,[219] although he omitted Primus's conclusion that "only a very uncompromising court" would take colorblindness that far.[220] A plurality, however, appears to be willing. Moreover, the Supreme Court will not be the first to consider such a challenge: Opponents of affirmative action are already preparing to attack race-neutral alternative action in states that have banned "racial preferences" by statute.[221] If successful, such a case would be the first use of disparate impact doctrine to strike down a facially neutral policy aimed at promoting equality, setting the stage for this new doctrinal twist to expand to its logical limits, unless and until it is overhauled by the Supreme Court.[222]

---

nevertheless earned a living wage actually reflected some perverse volition or cultural maldisposition on their part.").

[218] *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 293 (2003).

[219] Ricci v. DeStefano, 129 S.Ct. 2658, 2681 (Scalia, J., concurring)

[220] Primus, *supra* note__, at 585.

[221] *See, e.g.*, Fitzpatrick, *supra* note __ (advocating state constitutional challenges to race-neutral affirmative action at universities in Michigan and Texas).

[222] For a survey of those logical limits, see Crenshaw, *supra* note 50, at 126 ("They should not be surprised to find challenges to ethnic and women's studies programs, identity-based student organizations, ethnic alumni associations, outreach and noticing requirements, and even breast cancer screenings and domestic violence

2. Perpetuating Gender Hierarchy

Harder to predict is how the elimination of contingent equal protection for racial inequality would affect government efforts to promote sex equality. One aim of this Article is to help forestall the retrenchment of racial hierarchy implicit in the *Parents Involved* plurality opinion by pointing out the logical implications not just for race but also for gender. Although they could be distinguished on the basis of the differing standards of review, that distinction is not warranted on the question of whether equality is a legitimate state interest. Once the racial status quo becomes constitutionalized, there is little to stop the same from happening with gender.

For example, the Supreme Court could well find itself persuaded that *Geduldig* was wrong, and that a pregnancy classification is, after all, a sex classification. That would mean that pure pregnancy discrimination—e.g., firing an employee who becomes pregnant—would be unconstitutional when practiced by a state employer. But it would also provide a constitutional basis for overruling *CalFed*. The Court has already co-opted a liberal rhetoric of colorblindness to oppose affirmative action.[223] Co-opting liberal arguments that sex classifications should receive nearly-strict scrutiny and that *Geduldig* was wrongly decided, a Court following the logic of the *Parents Involved* plurality could easily strike down California's maternity leave statute as wrongly conferring "special rights."[224]

Even if well-established precedent and practices were preserved, cutting back on contingent equal protection could prevent the flourishing of more recent efforts toward substantive equality. For

---

shelters as forms of preference."). For initial confirmation of these predictions, see Corey Kilgannon, *Lawyer Files Antifeminist Suit Against Columbia*, N.Y. TIMES CITY ROOM, Aug. 18, 2008, available at http://cityroom.blogs.nytimes.com/2008/08/18/ lawyer-files-antifeminist-suit-against-columbia/ (reporting the filing of a lawsuit charging Columbia University with sex discrimination for having a women's studies program).

[223] *See, e.g.*, Pamela S. Karlan, *What Can Brown(R) Do For You?Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1050, 1063-66 (2009).

[224] *Cf.* Romer v. Evans, 517 U.S. 620 637 (1996) (Scalia, J., dissenting) (arguing that anti-discrimination laws constitute "special rights").

example, recent medical emphasis on the importance of breastfeeding has led to a wave of disputes over whether employers should allow breaks for women to express milk, or whether childbirth-related leave should be extended when there is difficulty establishing milk flow. Federal courts generally have been hostile to employees who pursue such questions under Title VII and the PDA. For example, in a passage eerily reminiscent of *Geduldig*'s "pregnant women and nonpregnant persons," one federal court held that a breastfeeding woman was not "affected by pregnancy, childbirth, or related medical conditions" as required by the PDA.[225] The court therefore granted a motion to dismiss her claim that she was denied breaks to express milk while others were allowed to take similar breaks to smoke.[226] In other words, there was no entitlement to judicial intervention to level the playing field along this particular axis.

Non-judicial actors in several states have taken the opposite view. Recently enacted legislation in Oregon requires employers to accommodate breastfeeding where reasonably possible.[227] Some state agencies have taken the position that failure to reasonably accommodate breastfeeding is sex discrimination under state law.[228] The federal EEOC is considering a similar approach.

The breastfeeding dispute is thus shaping up to be a reprise of *Geduldig* and the PDA, with the federal courts taking a narrow view of equality and everyone else taking a broader view. Contingent equal protection would allow the states to enact that broader view in order to promote substantive equality for women. Without equality as a legitimate, important state interest, however, laws for

---

[225] *See* Puente v. Ridge, 2005 WL 1653017, *4 (S.D. Tex. July 6, 2005)

[226] *See id.*; *see also* Wallace v. Pyro Mining Co., 1991 WL 270823 (6th Cir. Dec. 19, 1991) (holding that breastfeeding was not medical conditions related to pregnancy, even where infant refused bottles); Barrash v. Bowen, 846 F.2d 927, 931 (4th Cir. 1988) (rejecting disparate impact challenge to denial of discretionary leave for breastfeeding); Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487 (D. Colo. 1997) (holding that "medical conditions" pertains only to the mother and that breastfeeding was a child rearing concern).

[227] ORE. REV. STAT. § 653.077.

[228] Personal communication from Judy Bovington, Mont. Dep't. of Labor & Indus.

accommodating breastfeeding are, like race-neutral affirmative action, vulnerable under disparate impact doctrine.

Some remedies for sex discrimination might be justified by state interests other than equality. For example, accommodation of breastfeeding might be justified as a health measure. However, human rights advocates have increasingly recognized the importance of seeking substantive sex equality through measures designed to improve the status of "women who encounter multiple forms of discrimination," including race discrimination.[229] Under current doctrine, a policy that took both race and sex into account would be analyzed twice: once as a sex classification, once as a race classification. Because the level of scrutiny is higher for race classifications, that standard would effectively control. Measures aimed at improving the worst instances of structural inequality would thus be among the most vulnerable to constitutional attack.

B. Contingent Equal Protection and the Seeds of Positive Equality

In the hope that the *Parents Involved* plurality will not become a majority, this section considers the possibility of a path in the opposite direction. A standard critique of the Supreme Court's equal protection jurisprudence is that its disparate impact and real differences cases reflect willful blindness to serious race and gender subordination,[230] from *Washington v. Davis* to *McKleskey v. Kemp*,[231] and from *Feeney* to *Geduldig*. The concept of contingent equal protection gives a name and structure to the small silver lining,

---

[229] International Women's Rights Action Watch—Asia Pacific, *Addressing Intersectional Discrimination with Temporary Special Measures*, Occasional Paper Series No. 6 (2006) (available at www.iwraw-ap.org); *see generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex*, 1989 U. CHI. L.F. 139.

[230] *See* Michael Boucci, *Caught In a Web of Ignorances: How Black Americans Are Denied Equal Protection of the Laws*, 18 Nat'l Black L.J. 239, 262 (2004-05) ("*McCleskey v. Kemp* may be the paradigmatic case where the Court's inability to know reaches nearly unbelievable proportions."); *id.* at 250-51 (discussing the same aspect of *Washington v. Davis*).

[231] 481 U.S. 279 (1987) (rejecting claim of race discrimination in administration of death penalty).

that at least the Court has left some space for benign state action against race and gender subordination. Explicit recognition of the state interest in equality would assure the constitutionality of state efforts to eliminate structural inequality. It would also provide an opportunity to revisit the scope of federal power to promote equality under Section 5 of the Fourteenth Amendment. Finally, contingent equal protection could provide a basis for establishing a governmental obligation to overcome existing inequality in at least some contexts.

1. Implications for Legislative Power

State legislatures have plenary police power and may enact laws to promote equality as long as equality is a legitimate state interest. Congress, however, must act pursuant to an enumerated power. Explicit recognition of a state interest in equality would raise the question whether Congress may enact legislation on that same basis.

Section 5 of the Fourteenth Amendment confers on Congress the power to enforce the Amendment, including the Equal Protection Clause. Although the framers expected Section 5 to be the primary means of enforcement, Congress's power went largely unused while the Supreme Court took over the task of interpreting and enforcing the Fourteenth Amendment.[232] Congress later relied on its power over interstate commerce to enact civil rights legislation.[233] Recently, however, the Court decided that civil rights laws could not be fully enforced against the states if they were based solely on the commerce power. Congress needed Section 5.[234]

At the same time, the Supreme Court began to construe the Section 5 power narrowly. In most cases, it demanded that Congress limit its efforts to combating unequal treatment that was illegal under

---

[232] *See* Steven Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 YALE L.J. 115, 123 (1999).

[233] *See* Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964) (upholding Title II of Civil Rights Act of 1964 as an exercise of the commerce power).

[234] *See* Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996) (holding that pre-Civil War enumerated powers (in this case the Indian Commerce Clause) cannot abrogate state sovereign immunity).

the Court's own precedents. As the Court saw it, anything else was unauthorized expansion of the Equal Protection Clause. On this basis, the Court struck down the civil rights remedy of the Violence Against Women Act and limited the scope of the Americans with Disabilities Act and the Age Discrimination in Employment Act.[235]

One notable aberration in this line of cases is the Court's decision to uphold the FMLA.[236] As discussed above, that decision is hard to square with the Court's other pronouncements about Section 5.[237] Another aberration is disparate impact doctrine. The Court has arguably been moving toward allowing Congress greater leeway when it uses Section 5 to redress discrimination on the basis of suspect characteristics, like race and sex.[239] That would explain the contrast between the Court's deference to the FMLA and Title VII and its lack of deference to the ADA and ADEA. Justice Scalia's *Ricci* concurrence, by contrast, positions the Equal Protection Clause itself as directly opposed to Congress's power to reduce structural inequality.

Criticisms of the Court's recent Section 5 jurisprudence are many. For purposes of this Article it is sufficient to note that the concept of contingent equal protection provides a foundation for expanding Section 5 powers without letting them run rampant in the style of the commerce power. The same interest in structural inequality that justifies race- or sex-conscious legislation by states could also mark the scope of Congress's Section 5 power.[240] This

---

[235] *See* U.S. v. Morrison, 529 U.S. 598 (2000) (striking down the civil rights remedy of the Violence Against Women Act); *see also* Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (holding that Section 5 did not include the power to outlaw disability discrimination in state employment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (same for age discrimination).

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

[237] *See supra* notes 140-44 and accompanying text (discussing the implausibility of the reasoning in *Nevada v. Hibbs*).

[239] *See* Hibbs, 538 U.S. at 735.

[240] This approach would be consistent with most of the outcomes in the Section 5 cases since *Boerne*, including the distinction between race and sex cases—where Congress's power appears to be broader—and cases involving other characteristics, such as age or disability—where Congress's power appears to be

would give Congress the same authority as states to seek substantive equality in the face of *de facto* inequality and sex differences.

2. The Road Less Travelled: Positive Protection of Equal Access to Fundamental Rights

In all of the contexts discussed so far, contingent equal protection has been characterized by government choice, rather than obligation, to redress inequality. That choice ultimately derives from the state action doctrine. The state action doctrine makes the government accountable only for harms linked through a tight chain of causation to specific, illegal acts of discrimination by the government. Everything else is societal discrimination or structural inequality. When the purportedly natural workings of society result in inequality, the government may choose whether to act as a counter-weight. The difficulty of establishing an affirmative right to government help is that government is not required to act without proof of fault and causation. Equal protection is a restraint, not a prod.

In one context, however, the Supreme Court has restrained the government in a way that required accommodation of biological inequality. The "real differences" cases discussed above included sexual vulnerability, work and family, and military combat, all of which put women at a disadvantage relative to men. In a series of cases about the parental rights of unwed fathers, however, the Court for the first and only time *required* accommodation of a biological difference, rather than leaving the matter to legislative discretion.[241]

The unwed father cases involved a series of challenges to state laws that treated the mother but not the father as the legal parent of a child born outside of marriage.[242] The Court started with the assumption that the biological mother's parental rights were

---

narrower. The interest in eliminating structural inequality would, however, provide a sounder basis for *Hibbs* that what the Court offered in its opinion.

[241] For a more detailed argument on this point, see Hendricks, *Essentially a Mother*, *supra* note 103, at 433-50.

[242] The main cases are Stanley v. Ill., 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); and Lehr v. Robertson, 463 U.S. 248 (1983).

established by the birth of the child.[243] The Court also accepted the state's argument that biological fathers were not similarly situated to biological mothers: biological maternity implied a caretaking relationship to the child, which is not part of biological paternity.[244] Men were thus at a biological disadvantage when it came to parental rights.[245] By analogy to cases such as *Geduldig*, where women were biologically disadvantaged in the workplace, the conclusion should have been that the state could choose whether to accommodate men's disadvantage by giving them parental rights.

The Court, however, did not end its analysis with the observation that women and men are not similarly situated and therefore need not be treated the same. Instead, having identified a relevant biological difference between the sexes, the Court took another step: it used motherhood as the model for crafting a "biology-plus-relationship" test to accommodate fathers' physical disadvantage. As the Court later explained, it makes sense to allow a man to acquire parental rights comparable to a mother's by creating a test "in terms the male can fulfill."[246] Men's biological disadvantage thus served not as a justification for different legal treatment but as the impetus for devising a legal standard that fairly accommodated their disadvantage. Parental rights, the one area of

---

[243] *See* Hendricks, *Essentially a Mother*, *supra* note 103, at 435-36.

[244] *See id.*

[245] Men are disadvantaged in that they are unable to become pregnant and give birth to a child. *Cf.* Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 303 (1990) (noting "disadvantage men experience in accessing child-nurturing opportunities").

[246] *Nguyen v. INS*, 533 U.S. 53, 67 (2001) (describing Congress's effort to give male citizens means to obtain citizenship for foreign-born children). *See also* Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 88-90 (1995) (stating that model parent is pregnant woman but "different biological roles of men and women in human reproduction make it imperative that law and public policy 'recognize that a father and a mother must be permitted to demonstrate commitment to their child in different ways'") (quoting *Recent Developments: Family Law—Unwed Fathers' Rights—New York Court of Appeals Mandates Veto Power Over Newborn's Adoption for Unwed Father Who Demonstrates Parental Responsibility*, 104 HARV. L. REV. 800, 807 (1991).

law in which men's biology rather than women's is a disadvantage, is also the one area in which the Supreme Court has adopted a flexible, accommodating theory of sex equality as a matter of constitutional command, not just governmental choice.

The fathers' rights cases, understood in the broader context of contingent equal protection, provide a basis for finding some affirmative rights to accommodation and substantive equality in the Equal Protection Clause. Constitutional lawyers and theorists have tried many strategies over time for trying to find affirmative human rights in our Constitution: subsistence, equality, health care. These efforts have floundered on the libertarian and property-protective nature of the Constitution. Contingent equal protection does not provide a way around that roadblock. It does, however, shine light on the tension in the Supreme Court's dominant narrative of negative equality, and the light reveals a few cracks.

One such crack is the equality rhetoric about abortion. Although the abortion right is formally deemed a matter of liberty under the Due Process Clause, many commentators and even the Court have suggested that the right has an equality component as well.[247] The problem with such arguments is that they assume a governmental duty to accommodate *de facto* inequality. For example, some have argued that women have a right to abortion because women are disproportionately and discriminatorily saddled with responsibility for rearing children.[248] That discrimination, however, is not attributable to the government under the state action doctrine. As we have seen, the existing inequality in biology and in social circumstances typically means that the government may choose

---

[247] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007) (canvassing literature on this issue).

[248] *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT.291, 323-24 (2007) (arguing that abortion bans force women to become mothers, which society links to disproportionate burdens with respect to child care).

whether to level the playing field by, say, giving women access to abortion.

The fathers' rights cases, however, suggest a different approach. The abortion right is closely related to the right at stake in those cases, since it involves the parent-child relationship as well as bodily integrity.[249] In the fatherhood cases, the state was required to accommodate biological sex inequality when it acted to deny putative fathers of their liberty interest in the parent-child relationship. When the state restricts abortion, it also denies a liberty interest, and might similarly be required to accommodate *de facto* inequality.[250]

Conclusion

Contingent equal protection has been implicit in several of the Supreme Court's decisions upholding remedial programs. It also underlay the assumption that race-neutral affirmative action was available when the courts restricted traditional programs. That consistent acknowledgement that the state has a compelling interest in equality should not be overshadowed by the Court's dismissal of "societal discrimination" as a basis for certain kinds of state action. The Court should explicitly recognize that both state and federal governments are empowered to strive for the elimination of structural inequalities. Doing so would produce a more consistent and appropriate relationship among the Equal Protection Clause, disparate impact doctrine, and Section 5. It may also provide a foundation for modest development of affirmative governmental obligation to redress inequality.

---

[249] *Cf.* Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood*, 94 MICH. L. REV. 371, 372 (1995) ("suggesting a connection between mother and abortion").
[250] I explore this argument in greater depth in a forthcoming article,, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*.