CHAPTER 2: EQUAL PROTECTION AND PUBLIC SCHOOL EDUCATION

Introduction to Equal Protection Analysis

The equal protection guarantee in the United States Constitution requires that courts scrutinize laws that distinguish among classes of persons. However, not all distinctions used as the basis of a classification are equally problematic under the U.S. Constitution. Most distinctions, while they are technically “discrimination” because they treat two groups unequally, do not cause courts to suspect that the government is engaged in unconstitutional discrimination. Such classifications are viewed as “nonsuspect.” For example, there are many laws that treat people differently based on their age, including compulsory education laws, that courts uphold based on a deferential standard of review, called minimum scrutiny or rational basis review. This standard is used because courts presume that the law is constitutional and place a heavy burden on the person challenging the law to prove it is unconstitutional.

The minimum scrutiny standard requires the person challenging the law to prove that the use of the classification is not rationally related to a legitimate government interest. This is a very difficult standard for the challenger to satisfy and laws only occasionally fail to satisfy this rational basis standard. Laws can fail this standard either because the government’s interest or objective is illegitimate, such as a desire to harm the members of an unpopular group, or because there is no rational relationship between the use of the classification and the legitimate objective. Most classifications fall within this “nonsuspect” category and, therefore, equal protection challenges frequently fail.

However, a few classifications merit special scrutiny because of a presumption that laws that use such classifications, called “suspect classifications,” do so for impermissible reasons. The use of such classifications may reflect a history of prejudice against the members of the group and be used by the government for the impermissible purpose of treating the members of the class as inferior. The quintessential example of a “suspect

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1 The only provision in the U.S. Constitution that specifically mentions equal protection is the Fourteenth Amendment that provides that no state may “deny to any person within its jurisdiction the equal protection of the laws.” Unlike the Fourteenth Amendment which specifically protects both due process and equal protection against state infringements, the Fifth Amendment, which applies to the federal government, only includes protection for due process and does not contain an equal protection guarantee in its text. Nevertheless, the Supreme Court has interpreted the Fifth Amendment Due Process Clause as including an equal protection component. This is based on the fact that due process rights protect people from unfair treatment by government and unequal treatment is an aspect of unfairness, an explicit safeguard against a particular kind of unfairness. This interpretation of the Fifth Amendment avoids the troublesome possibility that the equal protection guarantee could apply to the states, but not the federal government. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (invalidating segregation in the District of Columbia public schools and decided the same day as Brown v. Board of Educ.).
classification” is a classification based on race. Similarly, classifications based on ethnicity are suspect. Courts review laws that employ such classifications using “strict scrutiny” review. This standard reflects a strong presumption that the challenged law is likely to violate the equal protection guarantee.

When courts scrutinize laws or other forms of government action that employ a suspect classification, the burden of proof is on the government to prove that the use of the classification is narrowly tailored to accomplish a compelling governmental interest. In this context, “narrowly tailored” means necessary because it requires the government to show that it cannot accomplish its compelling purpose without employing the suspect classification to the same extent as the challenged law does. If there is any alternative available that does not use the suspect classification or uses it to a lesser degree, the challenged law will be struck down as unconstitutional. In addition, only some government interests are considered to be compelling. Health and safety objectives are compelling, but administrative convenience is not. Few laws survive this strict scrutiny standard of review because the burden on the government to justify the law is so difficult to satisfy.

In addition to “nonsuspect classifications” scrutinized using minimum scrutiny, and “suspect classifications” scrutinized using strict scrutiny, a few classifications are treated as quasi-suspect. These classifications have some, but not all of the characteristics of a suspect class. Laws that employ quasi-suspect classifications are also presumed to be unconstitutional, but the standard the government must satisfy is somewhat less demanding than strict scrutiny because the courts take the view that there may be occasional circumstances in which it may be permissible for the government to employ the classification. As a result, the courts apply “intermediate scrutiny” to constitutional challenges to the use of a quasi-suspect classification. Under this standard, the use of the classification must be substantially related to an important governmental objective.

The principal example of a “quasi-suspect” classification is a classification based on gender. In applying intermediate scrutiny to gender classifications, the U.S. Supreme Court has described the burden on the government in such a case as requiring an “exceedingly persuasive justification.” Using this standard, the U.S. Supreme Court has struck down sex discrimination in a number of contexts: (1) policies governing admission to state institutions of higher education that differentiate between men and women, (2) laws allowing women but not men to obtain alimony in a divorce proceeding, (3) regulations of the sale of alcoholic beverages treating young men less advantageously than young women; and (4) government employee benefit programs providing the surviving spouses of male employees with the automatic right to survivor benefits, but not the surviving spouses of female employees. By contrast, the Court has upheld several laws that discriminate based on gender including draft registration laws requiring men but not women to register for the draft and statutory rape laws punishing young men who engage in sex with a minor but not young women who engage in the same conduct. These laws were upheld because the Court viewed them as justified by real gender differences, ones based on physical or biological difference, rather than sexual stereotypes.
A. Racial Classifications

The use of race in the public education context has come before the Supreme Court on many occasions. The landmark case ending *de jure* (by law) racial segregation in public schools is *Brown v. Board of Education*. In *Brown*, a unanimous Supreme Court ended the practice of allowing segregated schools under the doctrine of “separate but equal” by declaring that “[s]eparate educational facilities are inherently unequal.” In the years after *Brown*, the issue of how to enforce *Brown*’s mandate returned to the Supreme Court multiple times and involved issues such as the timetable for school desegregation, whether the available remedies included busing across school district lines, when a school district had sufficiently remedied past segregation so that it was no longer subject to a court order, and many other issues. In addition to a variety of post-*Brown* issues, the Court in more recent years has confronted the issue of “affirmative action,” in education. These cases involve voluntary efforts by educational institutions, including schools of higher education as well as K-12 public schools, to achieve higher levels of racial “diversity” even though they are not required to based on their past history of *de jure* segregation. While the Court has sometimes upheld such efforts in admission to state schools of higher education by finding that the strict scrutiny standard is satisfied, thus far it has not been willing to uphold pupil-assignment plans adopted by school districts to achieve greater degrees of racial diversity in their public schools.

1. *BROWN v. BOARD OF EDUCATION*

347 U.S. 483 (1954)

CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion. In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537 (1896). Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not “equal” and cannot be made “equal,” and that hence they are deprived of the equal protection of the laws. Because of the importance of the question presented, the Court took jurisdiction.
Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that these sources are, at best, inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among “all persons born or naturalized in the United States.” Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment’s history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of “separate but equal” did not make its appearance until 1896 in Plessy v. Ferguson, involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the “separate but equal” doctrine in the field of public education. In recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. The Court reserved decision on the question whether Plessy should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other
“tangible” factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In Sweatt v. Painter, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on “those qualities which are incapable of objective measurement but which make for greatness in a law school.” Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected. We conclude that in the field of public

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education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question— the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the parties are requested to present further argument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae.

2. GRUTTER v. BOLLINGER

JUSTICE O’CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I

The Law School ranks among the Nation’s top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to “admit a group of students who individually and collectively are among the most capable,” the Law School looks for individuals with “substantial promise for success in law school” and “a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others.” More broadly, the Law School seeks “a mix of students with varying backgrounds and experiences who will respect and learn from each other.” In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals. In particular, the Law School sought to ensure that its efforts to achieve student body diversity complied with this Court’s most recent ruling on the use of race in university admissions. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Upon the adoption of the committee’s report by the Law School faculty, it became the Law School’s official admissions policy.

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants’ talents, experiences, and potential “to contribute to the learning of those around them.” The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute
to the life and diversity of the Law School. In reviewing an applicant’s file, admissions officials must consider the applicant’s undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that “no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems.”

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School’s educational objectives. So-called “‘soft’ variables” such as “the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant’s essay, and the areas and difficulty of undergraduate course selection” are all brought to bear in assessing an “applicant’s likely contributions to the intellectual and social life of the institution.”

The policy aspires to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” The policy does not restrict the types of diversity contributions eligible for “substantial weight” in the admissions process, but instead recognizes “many possible bases for diversity admissions.” The policy does, however, reaffirm the Law School’s longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.” By enrolling a “‘critical mass’ of [underrepresented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.”

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 grade point average and 161 LSAT score. The Law School rejected her application. In December 1997, petitioner filed suit against the Law School. Petitioner alleged that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment. Petitioner further alleged that her application was rejected because the Law School uses race as a “predominant” factor, giving applicants who belong to certain minority groups “a significantly greater chance of admission than students with similar credentials from disfavored racial groups.”

II

We last addressed the use of race in public higher education over 25 years ago. In the landmark Bakke case, we reviewed a racial set-aside program that reserved 16 out of 100 seats in a medical school class for members of certain minority groups. 438 U.S. 265 (1978). The decision produced six separate opinions, none of which commanded a majority of the Court. Since this Court’s splintered decision in Bakke, Justice Powell’s opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private
universities across the Nation have modeled their own admissions programs on Justice Powell’s views on permissible race-conscious policies. Justice Powell approved the university’s use of race to further only one interest: “the attainment of a diverse student body.” Today we endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.

We have held that all racial classifications imposed by government “must be analyzed by a reviewing court under strict scrutiny.” This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. We apply strict scrutiny to all racial classifications to “‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” Under this exacting standard, the university’s use of race to further “the attainment of a diverse student body” is a compelling state interest that can justify the use of race in university admissions.

III

The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.

As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass’ of minority students.” The Law School’s interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. The Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”

Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still “constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” The purpose of the narrow tailoring requirement is to ensure that “the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”

To be narrowly tailored, a race-conscious admissions program cannot use a quota
system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. We are satisfied that the Law School’s admissions program does not operate as a quota. The Law School’s goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota. “[S]ome attention to numbers,” without more, does not transform a flexible admissions system into a rigid quota.

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a “plus” factor in university admissions, a university’s admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity.

We also find that the Law School’s race-conscious admissions program adequately ensures that all factors that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions. All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. What is more, the Law School actually gives substantial weight to diversity factors besides race.

Petitioner and the United States argue that the Law School’s plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity. We disagree. Narrow tailoring does require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.
The requirement that all race-conscious admissions programs have a termination point “assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.” We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell [in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)] first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

CHIEF JUSTICE REHNQUIST, with whom JUSTICES SCALIA, KENNEDY, and THOMAS join, dissenting.

I do not believe that the Law School’s means are narrowly tailored to the interest it asserts. The Law School claims it must take the steps it does to achieve a “‘critical mass’” of underrepresented minority students. But its actual program bears no relation to this asserted goal. Stripped of its “critical mass” veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.

Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference. The Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a “critical mass,” but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls “patently unconstitutional.”

Finally, I believe that the Law School’s program fails strict scrutiny because it is devoid of any reasonably precise time limit on the use of race in admissions. The Court suggests a possible 25-year limitation on the Law School’s current program. Respondents, on the other hand, remain more ambiguous, explaining that “the Law School of course recognizes that race-conscious programs must have reasonable durational limits. These discussions of a time limit are the vaguest of assurances. In truth, they permit the Law School’s use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny—that a program be limited in time—is casually subverted.

3. GRATZ v. BOLLINGER

539 U.S. 244 (2003)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court, in which JUSTICES O’CONNOR, SCALIA, KENNEDY, and THOMAS, joined.

We granted certiorari in this case to decide whether “the University of Michigan’s use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of
Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan’s (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in April that the LSA was unable to offer her admission. Hamacher applied for admission to the LSA for the fall of 1997. Hamacher’s application was denied in April 1997.

In October 1997, Gratz and Hamacher filed a lawsuit in the United States District Court for the Eastern District of Michigan alleging “violations of the rights of the plaintiffs to equal protection of the laws under the Fourteenth Amendment.”

The University has changed its admissions guidelines a number of times during the period relevant to this litigation. The University’s Office of Undergraduate Admissions (OUA) oversees the LSA admissions process. In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University has considered African-Americans, Hispanics, and Native Americans to be “underrepresented minorities,” and it is undisputed that the University admits “virtually every qualified applicant” from these groups.

Beginning with the 1998 academic year, the OUA [adopted] a “selection index,” on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100–150 (admit); 95–99 (admit or postpone); 90–94 (postpone or admit); 75–89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a “miscellaneous” category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the “‘development of the selection index in 1998 changed only the mechanics, not the substance of how race and ethnicity were considered in admissions.’”

It is by now well established that “all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.” This “‘standard of review is not dependent on the race of those burdened or benefited by a particular classification.’” Thus, “any person, of whatever race, has the right to demand that any governmental actor justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny.”
To withstand our strict scrutiny analysis, respondents must demonstrate that the University’s use of race in its current admission program employs “narrowly tailored measures that further compelling governmental interests.” Because “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” our review of whether such requirements have been met must entail “‘a most searching examination.’” We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity.

In Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), Justice Powell explained that in his view it would be permissible for a university to employ an admissions program in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file.” He explained that such a program might allow for “[t]he file of a particular black applicant [to] be examined for his potential contribution to diversity without the factor of race being decisive. Such a system would be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.’”

Justice Powell’s opinion in Bakke emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual’s ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university’s diversity. Instead, each characteristic of a particular applicant was to be considered in assessing the applicant’s entire application.

The LSA policy does not provide such individualized consideration. The LSA’s policy automatically distributes 20 points to every applicant from an “underrepresented minority” group, as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell’s example, where the race of a “particular black applicant” could be considered without being decisive, the LSA’s automatic distribution of 20 points has the effect of making “the factor of race decisive” for virtually every minimally qualified underrepresented minority applicant. Instead of considering how the differing backgrounds, experiences, and characteristics of students might benefit the University, admissions counselors reviewing applications simply award 20 points because applications indicate that they are African-American.

Respondents contend that “[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the admissions system” upheld by the Court today in Grutter. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system.

We conclude that because the University’s use of race in its current freshman
admissions policy is not narrowly tailored to achieve respondents’ asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause.

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

Our jurisprudence ranks race a “suspect” category, “not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.” But where race is considered “for the purpose of achieving equality,” no automatic proscription is in order. For, as insightfully explained, “[t]he Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense, the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination.”

The mere assertion of a laudable governmental purpose should not immunize a race-conscious measure from careful judicial inspection. Close review is needed “to ferret out classifications in reality malign, but masquerading as benign,” and to “ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.”

Examining in this light the admissions policy employed by the College of Literature, Science, and the Arts, I see no constitutional infirmity. Like other top-ranking institutions, the College has many more applicants than it can accommodate. Every applicant admitted under the current plan, petitioners do not dispute, is qualified to attend the College. The racial and ethnic groups to which the College accords special consideration historically have been relegated to inferior status by law and social practice; their members continue to experience class-based discrimination to this day. There is no suggestion that the College adopted its current policy to limit or decrease enrollment by any particular racial or ethnic group, and no seats are reserved on the basis of race. Nor has there been any demonstration that the College’s program unduly constricts admissions opportunities for students who do not receive special consideration based on race.

The stain of generations of racial oppression is still visible in our society and the determination to hasten its removal remains vital.

4. PARENTS INVOLVED IN COMMUNITY SCHOOLS v. SEATTLE SCHOOL DIST. NO. 1 and MEREDITH v. JEFFERSON COUNTY BD. OF EDUC.
551 U.S. 701 (2007)

CHIEF JUSTICE ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which JUSTICES SCALIA, THOMAS, and ALITO join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In
Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student’s race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection.

I

Both cases present the same underlying legal question—whether a public school that had not operated legally segregated schools or has been found to be unitary\(^1\) may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. 1 operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. The plan allows incoming ninth graders to choose from among any of the district’s high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of “tiebreakers” to determine who will fill the open slots. The first tiebreaker selects for admission students who have a sibling currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district’s public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified for assignment purposes as nonwhite. If an oversubscribed school is not within 10 percentage points of the district’s overall white/nonwhite racial balance, it is what the district calls “integration positive,” and the district employs a tiebreaker that selects for assignment students whose race “will serve to bring the school into balance.” If necessary, the next tiebreaker is the geographic proximity of the school to the student’s residence.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker to address the effects of racially identifiable housing patterns on school assignments. For the 2000-2001 school year, five schools were oversubscribed.

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\(^1\) Professor’s note: a unitary school district is a term used to describe a school district that was previously segregated by race and under court order has now remedied that segregation so that students are no longer placed in separate schools based on their race. Unitary school systems are contrasted with dual school systems, the term used to describe a segregated school system.
Three of the oversubscribed schools were “integration positive” because the school’s white enrollment the previous school year was greater than 51 percent. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. [One] was “integration positive” because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned by operation of the racial tiebreaker in the 2000-2001 school year than otherwise would have been.

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, and in 1975 the District Court entered a desegregation decree. Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating “to the greatest extent practicable” the vestiges of its prior policy of segregation.

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue. Approximately 34 percent of the district’s 97,000 students are black; most of the remaining 66 percent are white. The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.

At the elementary school level, based on his or her address, each student is designated a “resides” school to which students within a specific geographic area are assigned; elementary resides schools are “grouped into clusters in order to facilitate integration.” The district assigns students to nonmagnet schools in two ways: Parents of kindergartners, first-graders, and students new to the district may submit an application indicating a first and second choice among schools within their cluster. “Decisions to assign students to schools within each cluster are based on available space and the racial guidelines in the current student assignment plan.” If a school has reached the “extremes of the racial guidelines,” a student whose race would contribute to racial imbalance will not be assigned there. After assignment, students at all grade levels are permitted to apply to transfer between nonmagnet schools. Transfers may be requested for any number of reasons, and may be denied because of lack of space or on the basis of the racial guidelines.

III

A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is “narrowly tailored” to achieve a “compelling” government interest.

[O]ur prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling
interest of remedying the effects of past intentional discrimination. Yet the Seattle public schools have not shown that they were ever segregated by law. The Jefferson County public schools were subject to a desegregation decree. In 2000, the District Court that entered that decree dissolved it, finding that Jefferson County had achieved “unitary” status. Jefferson County accordingly does not rely upon an interest in remedying the effects of past intentional discrimination. Nor could it. We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that “the Constitution is not violated by racial imbalance in the schools, without more.”

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in Grutter v. Bollinger, 539 U.S. 306 (2003). The specific interest found compelling in Grutter was student body diversity “in the context of higher education.” The diversity interest was not focused on race alone but encompassed “all factors that may contribute to student body diversity.”

The entire gist of the analysis in Grutter was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in Grutter was only as part of a “highly individualized, holistic review.” As the Court explained, “the importance of this individualized consideration in the context of a race-conscious admissions program is paramount.” The point of the narrow tailoring analysis in which the Grutter Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance.

In the present cases, by contrast, race is not considered as part of a broader effort to achieve “exposure to widely diverse people, cultures, ideas, and viewpoints;” race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. The plans here “do not provide for a meaningful individualized review of applicants” but instead rely on racial classifications in a “nonindividualized, mechanical” way.

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/”other” terms in Jefferson County. Under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is “ ‘broadly diverse.’ ”

In upholding the admissions plan in Grutter, this Court relied upon considerations unique to institutions of higher education, noting that in light of “the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.” The Court in Grutter expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting
the unique context of higher education. The present cases are not governed by *Grutter*.

B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests to justify their race-based assignments. Seattle contends that its use of race helps to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students “in a racially integrated environment.” Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest by relying on race alone.

It is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. The plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate. The plans are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored to “the goal established by the school board of attaining a level of diversity within the schools that approximates the district’s overall demographics.” The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts.

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. For example, in Seattle, the racial tiebreaker was applied because nonwhite enrollment exceeded 69 percent, and resulted in an incoming ninth-grade class in 2000-2001 that was 30.3 percent Asian-American, 21.9 percent African-American, 6.8 percent Latino, 0.5 percent Native-American, and 40.5 percent Caucasian. Without the racial tiebreaker, the class would have been 39.6 percent Asian-American, 30.2 percent African-American, 8.3 percent Latino, 1.1 percent Native-American, and 20.8 percent Caucasian. When the actual racial breakdown is considered, enrolling students without regard to their race yields a substantially diverse student body under any definition of diversity.

This working backward [from the demographics of the respective school districts] to achieve a particular type of racial balance is a fatal flaw. We have many times over reaffirmed that “racial balance is not to be achieved for its own sake.” *Grutter* itself reiterated that “outright racial balancing” is “patently unconstitutional.”

Allowing racial balancing as a compelling end in itself would “effectively assure that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminating entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.” The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from “patently unconstitutional” to a compelling state interest simply by relabeling it “racial diversity.”
To the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end.

C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective. Seattle’s racial tiebreaker results, in the end, only in shifting a small number of students between schools. The district could identify only 52 students who were ultimately affected adversely by the racial tiebreaker in that it resulted in assignment to a school to which they would not otherwise have been assigned. Similarly, Jefferson County’s use of racial classifications has only a minimal effect on the assignment of students. Elementary school students are assigned to their first- or second-choice school 95 percent of the time. Jefferson County estimates that the racial guidelines account for only 3 percent of assignments.

While we do not suggest that greater use of race would be preferable, the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In Grutter, the consideration of race was viewed as indispensable in more than tripling minority representation at the law school.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives.

IV

Justice Breyer’s dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today’s decision.

* * *

“Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality.” Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214 (1995). Government action dividing us by race is inherently suspect because such classifications promote “notions of racial inferiority and lead to a politics of racial hostility,” “reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,” and “endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.” “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity
and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”

The parties and their amici debate which side is more faithful to the heritage of *Brown v. Board of Education*: “The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons.”

JUSTICE THOMAS, concurring.

These race-based student-assignment programs do not serve any compelling state interest. Accordingly, the plans are unconstitutional. Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in *Brown v. Board of Education*. This approach is just as wrong today as it was a half-century ago.

The dissent repeatedly claims that the school districts are threatened with resegregation and that they will succumb to that threat if these plans are unconstitutional. Contrary to the dissent’s rhetoric, neither of these school districts is threatened with resegregation, and neither is constitutionally permitted to undertake race-based remediation. Because this Court has authorized and required race-based remedial measures to address de jure segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to “carry out a governmental policy to separate pupils on the basis of race.”

Racial imbalance is the failure of a school district’s individual schools to match or approximate the demographic makeup of the student population at large. Racial imbalance is not segregation. Although racial imbalance might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. Because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself.

Although there is arguably a danger of racial imbalance in schools in Seattle and Louisville, there is no danger of resegregation. [R]acial imbalance without intentional state action to separate the races does not amount to segregation.

The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demean us all.” Therefore, as a
general rule, all race-based government decisionmaking is unconstitutional.

Most of the dissent’s criticisms of today’s result can be traced to its rejection of the color-blind Constitution. My view of the Constitution is Justice Harlan’s view in *Plessy*: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537 (1896) (dissenting opinion).

The segregationists in *Brown* embraced the arguments the Court endorsed in *Plessy*. Though *Brown* decisively rejected those arguments, today’s dissent replicates them to a distressing extent. What was wrong in 1954 cannot be right today. None of the considerations trumpeted by the dissent is relevant to the constitutionality of the school boards’ race-based plans because no contextual detail can “provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”

In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart. Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today’s faddish social theories. The Constitution is not that malleable. Because “our Constitution is color-blind,” such race-based decisionmaking is unconstitutional.

JUSTICE KENNEDY, concurring in part and concurring in the judgment.

I join Parts I and II of the Court’s opinion. I also join Parts III-A and III-C for reasons provided below. My views do not allow me to join the balance of the opinion by THE CHIEF JUSTICE, which seems to me to be inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause. As a consequence, this separate opinion is necessary to set forth my conclusions in the two cases before the Court.

I

These plans classify individuals by race; and as a result, they are to be subjected to strict scrutiny. The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation. The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. For this reason, among others, I do not join Parts III-B and IV. Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.

II

Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.
This is by way of preface to my respectful submission that parts of the opinion by the Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

The statement by Justice Harlan that “our Constitution is color-blind” was most certainly justified in the context of his dissent in *Plessy v. Ferguson*. And, as an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

In the administration of public schools it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible. Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.

In the cases before us it is noteworthy that the number of students whose assignment depends on express racial classifications is limited. I join Part III-C of the Court’s opinion because I agree that in the context of these plans, the small number of assignments affected suggests that the schools could have achieved their stated ends through different means. These include the facially race-neutral means set forth above or, if necessary, a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component. The latter approach would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A
compelling interest exists in avoiding racial isolation, an interest that a school district may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors, neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.

JUSTICE STEVENS, dissenting.

There is a cruel irony in the Chief Justice’s reliance on Brown v. Board of Education. The opinion states: “Before Brown, schoolchildren were told where they could and could not go to school based on the color of their skin.” This sentence reminds me of Anatole France’s observation: “The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” The Chief Justice fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

These cases consider the longstanding efforts of two local school boards to integrate their public schools. The school board plans before us resemble many others adopted in the last 50 years by primary and secondary schools throughout the Nation. All of those plans represent local efforts to bring about the kind of racially integrated education that Brown v. Board of Education promised. The plurality announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing resegregation of public schools, and it undermines Brown’s promise of integrated primary and secondary education. This cannot be justified in the name of the Equal Protection Clause.

I

In Brown, this Court held that the government’s segregation of schoolchildren by race violates the Constitution’s promise of equal protection. And it thereby set the Nation on a path toward public school integration. In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply
with Brown’s constitutional holding. The measures required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers. Beyond those minimum requirements, the Court left much of the determination of how to achieve integration to the judgment of local communities.

Overall these efforts brought about considerable racial integration. More recently, however, progress has stalled. Today, more than one in six black children attend a school that is 99-100% minority. In light of the risk of a return to school systems that are in fact (though not in law) resegregated, many school districts have felt a need to extend their integration efforts. The upshot is that myriad school districts have devised plans, often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression. Seattle and Louisville are two such districts, and the histories of their present plans set forth typical school integration stories.

II

A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it. The basic objective of those who wrote the Equal Protection Clause [w]as forbidding practices that lead to racial exclusion. The Amendment sought to bring into American society as full members those whom the Nation had previously held in slavery. There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria to keep the races apart, and the use of race-conscious criteria to bring the races together.

III

The principal interest advanced in these cases to justify the use of race-based criteria goes by various names. Sometimes a court refers to it as an interest in achieving racial “diversity.” Other times a court, like the plurality here, refers to it as an interest in racial “balancing.” I have used more general terms, describing it, for example, as an interest in promoting or preserving greater racial “integration” of public schools.

Regardless of its name, the interest at stake possesses three essential elements. First, there is a historical and remedial element: an interest in setting right the consequences of prior conditions of segregation. This refers back to a time when public schools were highly segregated, often as a result of legal or administrative policies that facilitated racial segregation in public schools. It is an interest in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes. It is an interest in maintaining hard-won gains. And it has its roots in preventing what gradually may become the de facto resegregation of America’s public schools. Second, there is an educational element: an interest in overcoming the adverse educational effects produced by and associated with highly segregated schools. Third, there is a democratic element: an interest in producing an educational environment that reflects the “pluralistic society” in which our children will live.
The compelling interest at issue here, then, includes an effort to eradicate the remnants, not of general “societal discrimination,” but of primary and secondary school segregation; it includes an effort to create school environments that provide better educational opportunities for all children; it includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds. If an educational interest that combines these three elements is not “compelling,” what is?

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation (“segregation by state action”) and *de facto* segregation (“racial imbalance caused by other factors”). But that distinction concerns what the Constitution *requires* school boards to do, not what it *permits* them to do. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do. That is what is at issue here.

I next ask whether the plans before us are “narrowly tailored” to achieve these “compelling” objectives. I shall not accept the school board’s assurances on faith, and I shall subject the “tailoring” of their plans to “rigorous judicial review.” Several factors nonetheless lead me to conclude that these plans pass even the strictest “tailoring” test.

First, the race-conscious criteria at issue only help set the outer bounds of *broad* ranges. They constitute but one part of plans that depend primarily upon nonracial elements. To use race in this way is not to set a forbidden “quota.” In fact, the defining feature of both plans is greater emphasis upon student choice. Choice, therefore, is the “predominant factor” in these plans. Race is not.

Second, broad-range limits on voluntary school choice plans are less burdensome, and hence more narrowly tailored, than other race-conscious restrictions this Court has previously approved.

Third, the manner in which the school boards developed these plans itself reflects “narrow tailoring.” Each plan was devised to overcome a history of segregated public schools. Each plan embodies the results of local experience and community consultation. Each plan is the product of a process that has sought to enhance student choice, while diminishing the need for mandatory busing. And each plan’s use of race-conscious elements is diminished compared to the use of race in preceding integration plans.

The school boards’ widespread consultation, their experimentation with numerous other plans, make clear that plans that are less explicitly race-based are unlikely to achieve the board’s “compelling” objectives. Both cities once tried to achieve more integrated schools by relying solely upon measures such as redrawn district boundaries, new school building construction, and unrestricted voluntary transfers. In neither city did these prior attempts achieve the city’s integration goals. Moreover, giving some degree of weight to a local school board’s knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act as school administrators.

Nor could the school districts have accomplished their desired aims by other means. Nothing in the history of desegregation efforts over the past 50 years gives the districts, or
this Court, any reason to believe that another method is possible to accomplish these goals.

[T]hese plans’ specific features—(1) their limited and historically-diminishing use of race, (2) their strong reliance upon other non-race-conscious elements, (3) their history and the manner in which the districts developed and modified their approach, (4) the comparison with prior plans, and (5) the lack of reasonably evident alternatives—together show that the districts’ plans are “narrowly tailored” to achieve their “compelling” goals. In sum, the districts’ race-conscious plans satisfy “strict scrutiny” and are therefore lawful.

The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Until today, this Court understood the Constitution as affording the people, acting through their elected representatives, freedom to select the use of “race-conscious” criteria from among their options. Today, however, the Court restricts (and some Members would eliminate) that leeway. I fear the consequences of doing so for the law, for the schools, for the democratic process, and for America’s efforts to create, out of its diversity, one Nation.

**B. Gender Discrimination**

**1. Higher Education**

The Supreme Court has only addressed the constitutional status of gender discrimination in education in the context of higher education. In 1982, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court, applying the intermediate scrutiny standard and stating that the government must demonstrate an “exceedingly persuasive justification” for such gender-based discrimination, found the refusal to admit men to the University’s School of Nursing to be a violation of equal protection. More recently, the Court struck down on equal protection grounds the male-only admissions policy of the Virginia Military Institute (See *United States v. Virginia* below).

In addition to equal protection challenges, gender discrimination in education can also be challenged under two federal statutes that apply to educational institutions that receive federal funds. Under Title IV of the Civil Rights Act of 1964, public schools and institutions of higher education are prohibited from discriminating on the basis of race, color, national origin, sex, and religion. In addition, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex by recipients of federal funds. Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

**UNITED STATES v. VIRGINIA**
518 U.S. 515 (1996)

JUSTICE GINSBURG delivered the opinion of the Court.

Virginia’s public institutions of higher learning include an incomparable military
college, Virginia Military Institute (VMI). The United States maintains that the
Constitution’s equal protection guarantee precludes Virginia from reserving exclusively to
men the unique educational opportunities VMI affords. We agree.

Founded in 1839, VMI is today the sole single-sex school among Virginia’s 15 public
institutions of higher learning. VMI’s distinctive mission is to produce “citizen-soldiers,”
men prepared for leadership in civilian life and in military service. VMI pursues this
mission through pervasive training of a kind not available anywhere else in Virginia. VMI
constantly endeavors to instill physical and mental discipline in its cadets and impart to
them a strong moral code. Neither the goal of producing citizen-soldiers nor VMI’s
implementing methodology is inherently unsuitable to women. And the school’s
impressive record in producing leaders has made admission desirable to some women.
Nevertheless, Virginia has elected to preserve exclusively for men the advantages and
opportunities a VMI education affords.

From its establishment in 1839, VMI has remained financially supported by Virginia.
VMI enrolls about 1,300 men as cadets. VMI produces its “citizen-soldiers” through “an
adversative, or doubting, model of education” which features “physical rigor, mental
stress, absolute equality of treatment, absence of privacy, minute regulation of behavior,
and indoctrination in desirable values.” VMI cadets live in spartan barracks where
surveillance is constant and privacy nonexistent; they wear uniforms, eat together in the
mess hall, and regularly participate in drills. Entering students are incessantly exposed to
the rat line, comparable in intensity to Marine Corps boot camp. Tormenting and
punishing, the rat line bonds new cadets to their fellow sufferers and, when they have
completed the 7-month experience, to their former tormentors.

In 1990, prompted by a complaint filed with the Attorney General by a female
high-school student seeking admission to VMI, the United States sued the Commonwealth
of Virginia and VMI, alleging that VMI’s exclusively male admission policy violated the
Equal Protection Clause. In the two years preceding the lawsuit, the District Court noted,
VMI had received inquiries from 347 women, but had responded to none of them.

The District Court rejected the equal protection challenge. The Court of Appeals for
the Fourth Circuit disagreed. The court held: “The Commonwealth of Virginia has not
advanced any state policy by which it can justify its determination to afford VMI’s unique
program to men and not to women.” The court suggested these options for the
Commonwealth: Admit women to VMI; establish parallel institutions or programs; or
abandon state support, leaving VMI free to pursue its policies as a private institution.

In response to the Fourth Circuit’s ruling, Virginia proposed a parallel program for
women: Virginia Women’s Institute for Leadership (VWIL). The 4-year, state-sponsored
undergraduate program would be located at Mary Baldwin College, a private liberal arts
school for women, and would be open, initially, to about 25 to 30 students. Although
VWIL would share VMI’s mission—to produce “citizen-soldiers”—the VWIL program
would differ, as does Mary Baldwin College, from VMI in academic offerings, methods of
education, and financial resources. The average combined SAT score of entrants at Mary
Baldwin is about 100 points lower than the score for VMI freshmen. Mary Baldwin’s
faculty holds “significantly fewer Ph. D.’s than the faculty at VMI,” and receives significantly lower salaries. While VMI offers degrees in liberal arts, the sciences, and engineering, Mary Baldwin offered only bachelor of arts degrees.

Experts in educating women at the college level composed the Task Force charged with designing the VWIL program; Task Force members were drawn from Mary Baldwin’s own faculty and staff. Training its attention on methods of instruction appropriate for “most women,” the Task Force determined that a military model would be “wholly inappropriate” for VWIL. In lieu of VMI’s adversative method, the Task Force favored “a cooperative method which reinforces self-esteem.” In addition to the standard bachelor of arts program offered at Mary Baldwin, VWIL students would take courses in leadership, complete an off-campus leadership externship, participate in community service projects, and assist in arranging a speaker series.

Virginia returned to the District Court seeking approval of its proposed remedial plan, and the court decided the plan met the requirements of the Equal Protection Clause. “Controlling legal principles,” the District Court decided, “do not require the Commonwealth to provide a mirror image VMI for women.” It concluded: “If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination.” A divided Court of Appeals affirmed the District Court’s judgment.

We note, once again, the core instruction of this Court’s pathmarking decisions in J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982): Parties who seek to defend gender-based government action must demonstrate an “exceedingly persuasive justification” for that action. Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. Not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government could withhold from women opportunities accorded men so long as any “basis in reason” could be conceived for the discrimination.

In 1971, for the first time in our Nation’s history, this Court ruled in favor of a woman who complained that her State had denied her the equal protection of its laws. Reed v. Reed, 404 U.S. 71. Since Reed, the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.

Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that denies opportunity to women (or to men). To summarize the Court’s current directions for cases of official classification based on gender: The burden of justification is demanding and rests entirely on the State. The State must show “that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’ ” The
justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

The heightened review standard our precedent establishes does not make sex a proscribed classification. Supposed “inherent differences” are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring: “The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”

Measuring the record in this case against the review standard, we conclude that Virginia has shown no “exceedingly persuasive justification” for excluding all women from the training afforded by VMI. We therefore affirm the Fourth Circuit’s initial judgment, which held that Virginia had violated the Equal Protection Clause. Because the remedy proffered by Virginia—the Mary Baldwin VWIL program—does not cure the constitutional violation, i.e., it does not provide equal opportunity, we reverse the Fourth Circuit’s final judgment in this case.

Virginia asserts two justifications in defense of VMI’s exclusion of women. First, the Commonwealth contends, “single sex education provides important educational benefits,” and the option of single sex education contributes to “diversity in educational approaches.” Second, the Commonwealth argues, “the unique VMI method of character development and leadership training,” the school’s adversative approach, would have to be modified were VMI to admit women. We consider these two justifications in turn.

Single sex education affords pedagogical benefits to at least some students, and that reality is uncontested in this litigation. Similarly, it is not disputed that diversity among public educational institutions can serve the public good. But Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State. In cases of this genre, our precedent instructs that “benign” justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.

Neither recent nor distant history bears out Virginia’s alleged pursuit of diversity through single sex educational options. A purpose genuinely to advance an array of educational options is not served by VMI’s historic and constant plan—a plan to “affor[d] a unique educational benefit only to males.” However “liberally” this plan serves the State’s sons, it makes no provision whatever for her daughters. That is not equal protection.

Virginia next argues that VMI’s adversative method of training provides educational benefits that cannot be made available, unmodified, to women. Alterations to accommodate women would necessarily be “radical,” so “drastic,” Virginia asserts, as to transform, indeed “destroy,” VMI’s program. Neither sex would be favored by the transformation, Virginia maintains: Men would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their
participation would “eliminate the very aspects of [the] program that distinguish [VMI] from other institutions of higher education in Virginia.”

The District Court forecast that coeducation would materially affect “at least three aspects of VMI’s program—physical training, the absence of privacy, and the adversative approach.” And it is uncontested that women’s admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets. It is also undisputed, however, that “the VMI methodology could be used to educate women.” The District Court even allowed that “[s]ome women would want to attend [VMI] if they had the opportunity,” and “some women,” the expert testimony established, “are capable of all of the individual activities required of VMI cadets.” In sum, as the Court of Appeals stated, “neither the goal of producing citizen soldiers,” “nor VMI’s implementing methodology is inherently unsuitable to women.”

In support of its initial judgment for Virginia, the District Court made “findings” on “gender-based developmental differences.” These “findings” restate the opinions of Virginia’s expert witnesses, opinions about typically male or typically female “tendencies.” For example, “males tend to need an atmosphere of adversativeness,” while “females tend to thrive in a cooperative atmosphere.” The United States does not challenge any expert witness estimation on average capacities or preferences of men and women. Instead, the United States emphasizes that time and again we have cautioned reviewing courts to take a “hard look” at generalizations or “tendencies” of the kind pressed by Virginia. The issue is whether the Commonwealth can constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.

The notion that admission of women would downgrade VMI’s stature, destroy the adversative system and, with it, even the school, is a judgment hardly proved, a prediction hardly different from other “self-fulfilling prophecies” once routinely used to deny rights or opportunities. When women first sought admission to the bar and access to legal education, concerns of the same order were expressed. Medical faculties similarly resisted men and women as partners in the study of medicine. Women’s successful entry into the federal military academies, and their participation in the Nation’s military forces, indicate that Virginia’s fears for the future of VMI may not be solidly grounded. The State’s justification for excluding all women from “citizen soldier” training for which some are qualified cannot rank as “exceedingly persuasive,” as we have explained and applied that standard.

In the second phase of the litigation, Virginia presented its remedial plan—maintain VMI as a male-only college and create a separate program for women. A remedial decree must closely fit the constitutional violation; it must place persons unconstitutionally denied an opportunity in “the position they would have occupied in the absence of [discrimination].” Virginia chose to leave untouched VMI’s exclusionary policy. For women only, Virginia proposed a separate program, different in kind from VMI and unequal in tangible and intangible facilities.

Virginia deliberately did not make VWIL a military institute. The VWIL House is not a
military-style residence and VWIL students need not live together, eat meals together, or wear uniforms during the school day. VWIL students thus do not experience the “barracks” life “crucial to the VMI experience.” “The most important aspects of the VMI educational experience occur in the barracks,” the District Court found, yet Virginia deemed that core experience nonessential, indeed inappropriate, for training its female citizen-soldiers.

VWIL students receive their “leadership training” in seminars, externships, and speaker series, episodes and encounters lacking the “physical rigor, mental stress, minute regulation of behavior, and indoctrination in desirable values” made hallmarks of VMI’s citizen-soldier training. Kept away from the pressures, hazards, and psychological bonding characteristic of VMI’s adversative training, VWIL students will not know the “feeling of tremendous accomplishment” commonly experienced by VMI’s successful cadets.

Virginia maintains that these differences are “justified pedagogically,” based on “important differences between men and women in learning and developmental needs,” “psychological and sociological differences” Virginia describes as “real” and “not stereotypes.” The Task Force charged with developing the leadership program for women, drawn from the staff and faculty at Mary Baldwin College, “determined that a military model and, especially VMI’s adversative method, would be wholly inappropriate for educating and training most women.”

As earlier stated, generalizations about “the way women are,” estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description. Notably, Virginia never asserted that VMI’s method of education suits most men. Admitting women would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs. Experience shows such adjustments are manageable.

In myriad respects other than military training, VWIL does not qualify as VMI’s equal. VWIL’s student body, faculty, course offerings, and facilities hardly match VMI’s. Nor can the VWIL graduate anticipate the benefits associated with VMI’s 157-year history, the school’s prestige, and its influential alumni network.

The Fourth Circuit plainly erred in exposing Virginia’s VWIL plan to a deferential analysis, for “all gender-based classifications today” warrant “heightened scrutiny.” In sum, Virginia’s remedy does not match the constitutional violation; the Commonwealth has shown no “exceedingly persuasive justification” for withholding from women qualified for the experience premier training of the kind VMI affords.

JUSTICE THOMAS took no part in the consideration or decision of this case.

JUSTICE SCALIA, dissenting.

Today the Court shuts down an institution that has served the people of the Commonwealth of Virginia with pride and distinction for over a century and a half. To
achieve that desired result, it rejects (contrary to our established practice) the factual findings of two courts below, sweeps aside the precedents of this Court, and ignores the history of our people. As to facts: It explicitly rejects the finding that there exist “gender-based developmental differences” supporting Virginia’s restriction of the “adversative” method to only a men’s institution, and the finding that the all-male composition of the Virginia Military Institute (VMI) is essential to that institution’s character. As to precedent: It drastically revises our established standards for reviewing sex-based classifications. And as to history: It counts for nothing the long tradition, enduring to the present, of men’s military colleges supported by both States and the Federal Government.

I shall devote most of my analysis to evaluating the Court’s opinion on the basis of our current equal protection jurisprudence, which regards this Court as free to evaluate everything under the sun by applying one of three tests: “rational basis” scrutiny, intermediate scrutiny, or strict scrutiny. I have no problem with a system of abstract tests such as rational basis, intermediate, and strict scrutiny (though I think we can do better than applying strict scrutiny and intermediate scrutiny whenever we feel like it). Such formulas are essential to evaluating whether the new restrictions that a changing society constantly imposes upon private conduct comport with that “equal protection” our society has always accorded in the past. But in my view the function of this Court is to preserve our society’s values regarding (among other things) equal protection, not to revise them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe progressively higher degrees. For that reason it is my view that, whatever abstract tests we may choose to devise, they cannot supersede—and indeed ought to be crafted so as to reflect—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts. More specifically, it is my view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.” The all-male constitution of VMI comes squarely within such a governing tradition.

Today, however, change is forced upon Virginia, and reversion to single-sex education is prohibited nationwide, not by democratic processes but by order of this Court. Even while bemoaning the sorry, bygone days of “fixed notions” concerning women’s education, the Court favors current notions so fixedly that it is willing to write them into the Constitution by application of custom-built “tests.” This is not the interpretation of a Constitution, but the creation of one.

To reject the Court’s disposition today, however, it is not necessary to accept my view that the Court’s made-up tests cannot displace longstanding national traditions as the primary determinant of what the Constitution means. It is only necessary to apply honestly the test the Court has been applying to sex-based classifications for the past two decades. It is well settled, as JUSTICE O’CONNOR stated some time ago for a unanimous Court, that we evaluate a statutory classification based on sex under a standard that lies “between the extremes of rational basis review and strict scrutiny.” We have dennomated this standard
“intermediate scrutiny” and under it have inquired whether the statutory classification is “substantially related to an important governmental objective.”

Although the Court in two places recites the test as stated in Hogan, which asks whether the State has demonstrated “that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives,” the Court never answers the question presented in anything resembling that form. The Court instead prefers the phrase “exceedingly persuasive justification.” The Court’s nine invocations of that phrase would be unobjectionable if the Court acknowledged that whether a “justification” is “exceedingly persuasive” must be assessed by asking “[whether] the classification serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.” Instead, however, the Court proceeds to interpret “exceedingly persuasive justification” in a fashion that contradicts the reasoning of Hogan and our other precedents.

Essential to the Court’s result is there are some women interested in attending VMI, capable of undertaking its activities, and able to meet its physical demands. Only the amorphous “exceedingly persuasive justification” phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI’s single sex composition is unconstitutional because there exist several women willing and able to undertake VMI’s program. Intermediate scrutiny has never required a least restrictive means analysis, but only a “substantial relation” between the classification and the state interests that it serves. There is simply no support in our cases for the notion that a sex based classification is invalid unless it relates to characteristics that hold true in every instance.

If the question of the applicable standard of review for sex-based classifications were an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis review. The latter certainly has a firmer foundation in our past jurisprudence and would be much more in accord with the genesis of heightened standards of review, the famous footnote in United States v. Carolene Products Co., 304 U.S. 144 (1938), which said (intimatingly) that we did not have to inquire in the case at hand “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

It is hard to consider women a “discrete and insular minority” unable to employ the “political processes ordinarily to be relied upon,” when they constitute a majority of the electorate. And the suggestion that they are incapable of exerting that political power smacks of the same paternalism that the Court so roundly condemns.

As is frequently true, the Court’s decision today will have consequences that extend far beyond the parties to the litigation. Under the constitutional principles announced and applied today, single-sex public education is unconstitutional. By going through the motions of applying a balancing test—asking whether the State has adduced an
“exceedingly persuasive justification” for its sex-based classification—the Court creates the illusion that government officials in some future case will have a clear shot at justifying some sort of single-sex public education.

The Supreme Court of the United States does not sit to announce “unique” dispositions. Its principal function is to establish precedent—that is, to set forth principles of law that every court in America must follow. As we said only this Term, we expect both ourselves and lower courts to adhere to the “rationale upon which the Court based the results of its earlier decisions.”

And the rationale of today’s decision is sweeping: for sex-based classifications, a redefinition of intermediate scrutiny that makes it indistinguishable from strict scrutiny. Indeed, the Court indicates that if any program restricted to one sex is “unique,” it must be opened to members of the opposite sex “who have the will and capacity” to participate in it. I suggest that the single-sex program that will not be capable of being characterized as “unique” is nonexistent.

In any event, regardless of whether the Court’s rationale leaves some small amount of room for lawyers to argue, it ensures that single-sex public education is functionally dead. The costs of litigating the constitutionality of a single-sex education program, and the risks of ultimately losing that litigation, are simply too high. No state official in his right mind will buy such a high-cost, high-risk lawsuit by commencing a single-sex program. The enemies of single-sex education have won; by persuading seven Justices that their view of the world is enshrined in the Constitution, they have effectively imposed that view on all 50 States.

2. Elementary and Secondary Education

Until 2006, the legal status of single-sex public schools and single-sex classes offered by coeducational public elementary and secondary schools was uncertain. While no Supreme Court opinion had outlawed a sex-segregated public school education option, neither had a majority of the Court specifically upheld a gender-based “separate but equal” educational program. In 2006, the U.S. Department of Education adopted new Title IX regulations permitting single-sex education in public primary and secondary schools receiving federal financial assistance under certain circumstances. The Department was required to issue these regulations under the provisions of the No Child Left Behind Act which allowed funds provided under the Act to be used for “Programs to provide same-gender schools and classrooms (consistent with applicable law)” and required the Department to issue implementing regulations.

The regulations adopted by the Department of Education, 34 C.F.R. § 106.34, made it easier for a public school district to create single sex schools than to offer single-sex classes within coeducational schools, although both were authorized. The regulations allowed single-sex classes under the following circumstances:

(b) Classes and extracurricular activities.
   (1) General standard. Subject to the requirements in this paragraph, a recipient that
operates a nonvocational coeducational elementary or secondary school may provide nonvocational single-sex classes or extracurricular activities, if—

(i) Each single-sex class or extracurricular activity is based on the recipient’s important objective—

(A) To improve educational achievement of its students, through a recipient’s overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;

(ii) The recipient implements its objective in an evenhanded manner;

(iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and

(iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

(2) Single-sex class or extracurricular activity for the excluded sex. A recipient that provides a single-sex class or extracurricular activity, in order to comply with paragraph (b)(1)(ii) of this section, may be required to provide a substantially equal single-sex class or extracurricular activity for students of the excluded sex.

(3) Substantially equal factors. Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether classes or extracurricular activities are substantially equal include, but are not limited to, the following: the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.

These regulations, among other things, require that enrollment in a single-sex class be voluntary and that a substantially equal coeducational alternative be provided to students.

Under the regulations permitting single-sex schools, the focus is only on the requirement that students excluded from the single-sex school be provided “a substantially equal single-sex school or coeducational school” and even this requirement does not apply to charter schools:

(c) Schools.

(1) General Standard. Except as provided in paragraph (c)(2) of this section, a recipient that operates a public nonvocational elementary or secondary school that excludes from admission any students, on the basis of sex, must provide students of the excluded sex a substantially equal single-sex school or coeducational school.

(2) Exception. A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without
regard to the requirements in paragraph (c)(1) of this section.

(3) Substantially equal factors. Factors the Department will consider, either individually or in the aggregate as appropriate, in determining whether schools are substantially equal include, but are not limited to, the following: The policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the quality and range of extracurricular offerings, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources, and intangible features, such as reputation of faculty.

(4) Definition. For the purposes of paragraph (c)(1) through (3) of this section, the term “school” includes a “school within a school,” which means an administratively separate school located within another school.

a. A.N.A. v. BRECKINRIDGE COUNTY BOARD OF EDUCATION
833 F. Supp. 2d 673 (W.D. Ky. 2011)

MEMORANDUM OPINION

Breckinridge County Middle School (“BCMS”) is a public school of approximately 600 students, both male and female, in grades six through eight, located in Harned, Kentucky. BCMS receives state and federal funding through the Breckinridge County School District, and is thus subject to the requirements of Title IX. Plaintiffs filed this action against the Breckinridge County Defendants claiming that the single-sex education program utilized at BCMS, purportedly designed in accordance with the provisions of 34 C.F.R. § 106.34 (2007), violates Title IX, the Equal Education Opportunities Act, [and] the Equal Protection Clause.

The plaintiffs urge that all BCMS students are injured by being required to attend a public middle school which engages in sex discrimination in education by offering a single-sex program. They urge that because, in their view, single-sex and coeducational classes can never offer substantially equal educational opportunities, the coexistence of coed and single-sex classrooms in schools constitutes sex discrimination. This theory, however, finds no support either in law or in the record of this case.

No legal authority supports the conclusion that optional single-sex programs in public schools are ipso facto injurious to the schools’ students. Unlike the separation of public school students by race, the separation of students by sex does not give rise to a finding of constitutional injury. Individuals are harmed when they attend schools in which students are separated on the basis of race because such separation “generates a feeling of inferiority that may affect [students’] hearts and minds in a way unlikely to ever be undone.” Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954). This is true even if all other “tangible” factors, such as the schools’ physical facilities, are equal. Moreover, because of the inherent harm that arises from educating students in racially separate schools, and because the intent of Brown and its progeny was to create “a unitary, nonracial system of public education,” even “voluntary” racial segregation is prohibited.

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No such historically-grounded injury has been recognized as inherent in the separation of students by sex. The Supreme Court has never held that separating students by sex in a public school—unlike separating students by race—or offering a single-sex public institution is per se unconstitutional. See United States v. Virginia, 518 U.S. 515, 533 n. 7 (1996) (“We do not question [Virginia’s] prerogative evenhandedly to support diverse educational opportunities [such as single-sex schools].”). See also Vorheimer v. Sch. Dist. of Philadelphia, 532 F.2d 880, 888 (3d Cir. 1976), aff’d by an equally divided Court, 430 U.S. 703 (1977) (holding that a school board’s offering of an optional single-sex public school did not violate the Equal Protection Clause). Therefore, to the extent the plaintiffs attempt to rely on cases that prohibit the separation of students by race, their arguments fall short.

It is uncontested, of course, that barring students from educational opportunities based on their sex without an exceedingly persuasive justification constitutes an invasion of a legally protected interest. See Virginia, 518 U.S. at 534. However, the record does not support the conclusion that such a violation occurred because BCMS students were afforded the option of being educated in a single-sex environment.

The plaintiffs repeatedly refer to “exclusion” and “discrimination” in their briefs, but we have been shown no evidence of exclusion or discrimination in this case. The plaintiffs argue that students at BCMS were excluded from educational opportunities on the basis of sex because “boys [were] excluded from the all-girls classes, while girls [were] excluded from the (separate and distinct) all-boys classes.” The plaintiffs’ assertion that girls were deprived of the opportunity to be in a “boys’ class” or boys were deprived of an opportunity to be in a “girls’ class” is simply incorrect. All BCMS students could choose to participate in coeducational classes. Therefore, girls could choose to be in a class with boys and boys could choose to be in a class with girls. What students could not do is choose to be in a certain class, be taught by a certain teacher, or learn with a certain group of other students of the opposite sex. However, BCMS is required only to provide students substantially equivalent single-sex and coed classes. It is not required to provide students the classes, teachers, or classmates of their choice. Coeducational classes (and thus the opportunity to learn alongside students of both the same and opposite sex) were available to all students at BCMS.

Students may suffer concrete harm if they are not provided substantially equivalent coeducational classes when a single-sex program is offered in their school. This was the case in Doe ex rel. Doe v. Vermilion Parish Sch. Bd., 421 Fed. Appx. 366, 369 (5th Cir. 2011), which was recently decided by the Fifth Circuit Court of Appeals. In Vermilion Parish, a mother brought an action on behalf of her daughters (Joan and Jill Doe) to challenge an optional single-sex program implemented at Rene A. Rost Middle School in Louisiana.

The Court of Appeals identified specific shortcomings in the Rost program that rendered coeducational classes substandard, thus depriving students of substantially equal educational opportunities. For instance, there was some evidence that due to efforts by the school district, students with learning difficulties almost always ended up in coeducational
classrooms, while “talented and gifted” students ended up in the single-sex classes. Jill testified that her coeducational class used different subject-matter tests than the single-sex class and that her teacher read tests aloud for students. Jill also stated that she was taunted because other students considered the coeducational class a “special needs” class. The Court of Appeals agreed that “[B]oth the coed and the same-sex classes are inferior to what would be available were this program not in place.”

This case differs significantly from Vermilion Parish. While plaintiffs recite the mantra that single-sex offerings result in substandard coed education, there is simply no evidence in the record to support such an argument. Notably, the plaintiffs fail to identify any facts showing that any educational opportunity was offered exclusively to boys, exclusively to girls, or exclusively to coeducational classes. Further, experts for both the plaintiffs and the defendants found little difference in the way the single-sex and coeducational classes were conducted, and no disparity was found in the content taught. Although both expert reports noted variations among (1) classroom management styles, (2) teaching methods used, and (3) the pace of progress through materials, both experts concluded: “There were no differences in the ways the single-sex and coed classes were conducted. The teachers used the same classroom set-up, the same text books, the same instructional strategies, and the same behavior management techniques for their coed and single-sex classes.” The plaintiffs’ claims of substandard or unequal educational opportunities as a result of the single-sex offerings are unsubstantiated.

Finally, we feel compelled to address the plaintiffs’ wielding of certain emotionally charged terminology. The plaintiffs contend that students were “classified” or “segregated” by sex. This contention is belied by the record. BCMS did not “classify” or “segregate” its students. To “segregate,” as that term has been used historically, means “to cause or force the separation of (as races or social classes) from the rest of society or from a larger group,” Webster’s Third New International Dictionary. At BCMS, the single-sex or coeducational classrooms were not forced upon students. The choice was left to the parents, and participation in either classroom format was wholly voluntary. The plaintiffs’ bald assertions of “classification” and “segregation” are nothing more than a vain attempt to cast a pall of unconstitutionality over the BCMS program.

b. DOE v. WOOD COUNTY BOARD OF EDUCATION

JOSEPH R. GOODWIN, Chief Judge.

This case arises from the single-sex program adopted by Van Devender Middle School (“VDMS”) in a commendable attempt to improve the education of its students. The plaintiffs are a mother and her three daughters. Defendant Wood County Board of Education (“WCBE”) is the entity responsible for the administration of public schools within Wood County, West Virginia, including VDMS, and has overseen and approved the implementation of sex-separated classes at VDMS. In 2010, the WCBE approved the single-sex education program at VDMS. Classes for reading, math, social studies, and science are separated by gender, while classes in other subjects are coeducational.
On August 15, 2012, the plaintiffs filed this action alleging that the single-sex classes at VDMS violated the Equal Protection Clause of the Fourteenth Amendment and Title IX, 20 U.S.C. § 1681, as interpreted by the United States Department of Agriculture and Department of Education in their respective regulations, 7 C.F.R. § 15a.34 and 34 C.F.R. § 106.34. On August 27, 2012, the court held a hearing on the instant motion for preliminary injunction.

In 2006, the United States Department of Education (“Department of Education”) issued regulations authorizing public schools to offer single-sex education options under certain, specific conditions:

(i) Each single-sex class or extracurricular activity is based on the recipient’s important objective—
   (A) To improve educational achievement of its students, through a recipient’s overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or
   (B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective;
   (ii) The recipient implements its objective in an evenhanded manner;
   (iii) Student enrollment in a single-sex class or extracurricular activity is completely voluntary; and
   (iv) The recipient provides to all other students, including students of the excluded sex, a substantially equal coeducational class or extracurricular activity in the same subject or activity.

34 C.F.R. § 106.34(b)(1)(i)-(iv). Moreover, the regulations provide several factors that the Department considers when determining whether classes or extracurricular activities are substantially equal. 34 C.F.R. § 106.34(b)(3). Finally, the regulations provide for periodic evaluations by the school every two years “to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex.” 34 C.F.R. § 106.34(b)(4). The Department of Education regulations thus establish some authority permitting a narrow exception to the general rule of coeducation, to allow schools to experiment with single-sex programs to improve educational achievement. The language in these regulations closely tracks the legal standards established by the United States Supreme Court in United States v. Virginia, 518 U.S. 515 (1996).

The Department of Education did not define the phrase “completely voluntary” when it adopted the 2006 regulations. However, the discussion leading up to the adoption of the regulation, particularly subsection (iii), provides some insight on the meaning of the phrase. The discussion first states that:

The proposed regulations in § 106.34(b)(1)(ii) were intended to require recipients to offer single-sex classes only on a completely voluntary basis, by requiring a
recipient to provide a coeducational class in the same subject, in conjunction with
the requirement in § 106.34(a) that a recipient may not require participation in
classes on the basis of sex.

The discussion then states:

In order to ensure that participation in any single-sex class is completely
voluntary, if a single-sex class is offered, the recipient is strongly encouraged to
notify parents, guardians, and students about their option to enroll in either a
single-sex or coeducational class and receive authorization from parents or guardians
to enroll their children in a single-sex class.

The court holds today that the Department of Education regulations require an
affirmative assent by parents or guardians before placing children in single-sex classrooms.
Such affirmative assent would preferably come in the form of a written, signed agreement
by the parent explicitly opting into a single-sex program. An opt-out provision is
insufficient to meet the requirement that single-sex classes be “completely voluntary” for
several reasons. First, the above discussion leading to the addition of the “completely
voluntary” language strongly suggests that this outcome is proper. The regulations closely
track the language of United States v. Virginia, yet the commentators and drafters
ultimately felt the need to add an additional element of voluntariness, “clearly requiring
that student participation in a single-sex class must be completely voluntary.”

Moreover, because single-sex classes are, by their very nature, a gender classification,
it makes perfect sense to require the parent or guardian’s clear and affirmative assent.
While a failure to opt out may be a legal substitute for agreement in some other areas of
the law, presuming that parents or guardians have enrolled their child in a single-sex class
completely voluntarily because they failed to opt out would undermine the purpose of Title
IX to prevent discrimination based on gender.

Finally, this reading of the Department of Education regulations is supported by the
meaning of the word “voluntary.” Black’s Law Dictionary defines “voluntary” as “[d]one
by design or intention.” Black’s Law Dictionary 1569 (7th ed. 1999). The first word in the
definition, “done,” indicates that the actor must do something—in other words, an
affirmative act. The phrase “by design or intention” indicates that the actor must have
decided upon the act that was taken. In other words, the definition of the word “voluntary”
suggests that one cannot be said to have agreed to something voluntarily if they have not
taken an affirmative act to agree to it.

The evidence, even as presented by the defendants, shows that the single-sex program
at VDMS was presented solely in an opt-out manner to parents and guardians of the
children attending VDMS. At no point do the defendants dispute that the form of notice
given to the parents was that of opting out, rather than opting in.

The court also finds significant the timing of the opt-out notices sent to the parents and
guardians. The record reflects that letters suggesting that parents may opt out of the
single-sex program, and the opt-out forms, were not made available to the parents and
guardians until very close to the beginning of each school year. The close proximity of the
notices to the beginning of the school year, after students have already enrolled, suggest that their choice was not fully voluntary. As the record reflects, students opting out of single-sex classes would be sent to a different school if not enough students at VDMS opted to take a coeducational class.

The court does not decide the question of whether single-sex classes violate the Equal Protection Clause. Rather, the court finds, as discussed, that the defendants have not met their burden to ensure that single-sex classes at VDMS are “completely voluntary” under the Department of Education regulations.

The court strongly believes that educators should be in charge of educating, and strongly encourages teachers and schools to adopt innovative learning techniques to improve our struggling education system. No one is better suited to develop effective teaching methods than our public school teachers. The teachers, through their underappreciated service in the classroom, are in the best position to determine what it takes to reach their students in ways that no laws or regulations can anticipate. It is admirable that the teachers at VDMS are attempting to find different ways to connect with their students.

Thus, the court does not wish to interfere with or stifle innovation in our education system. However, it is the court’s duty to ensure that the government complies with the law. Without making any findings regarding the evidence heard on the merits of VDMS’s single-sex classes, or single-sex curricula generally, the court finds that the requirements set forth by the Department of Education under Title IX that single-sex programs be “completely voluntary” means that there must be unequivocal assent to participation given by parents of all students involved.

Because the court FINDS, for the reasons stated above, that VDMS’s program was not completely voluntary, the court hereby ENJOINS the defendants from separating students into single-sex classes at Van Devender Middle School until any single-sex program offered meets the requirements of the Constitution and Title IX, in particular the Department of Education regulations as interpreted by the court today.

C. Undocumented Children

Discrimination based on the distinction between U.S. citizens and legally resident noncitizens has been treated as a suspect classification and subjected to strict scrutiny review, with some exceptions. The reasons for treating “alienage” as a suspect classification include the fact that noncitizens, because they are ineligible to vote, are politically powerless, and the fact that there is a history of discrimination against noncitizens. Using the strict scrutiny standard, the Supreme Court has struck down the denial of welfare benefits, the exclusion from the practice of law, ineligibility for state civil service jobs, and the denial of the right to become a notary public. The exceptions to the use of strict scrutiny occur in connection with activities that are “bound up with the operation of the state as a governmental entity,” so-called “public functions.” These include serving as a public school teacher and a police officer. When laws discriminate
against legally-present noncitizens in relation to public functions, the government only has
to satisfy the rational basis standard. Moreover, because the regulation of immigration is
largely left to the federal government under the U.S. Constitution, federal restrictions on
noncitizens are more likely to be upheld than state restrictions.

Despite the fact that the Supreme Court neither declared discrimination against
undocumented noncitizens as suspect nor classified the right to education as fundamental,
in *Plyer v. Doe*, the Supreme Court struck down the exclusion of undocumented school-
age children from Texas public schools.

**PLYLER v. DOE**

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection
Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age
children the free public education that it provides to children who are citizens of the United
States or legally admitted aliens.

Since the late 19th century, the United States has restricted immigration into this
country. Unsanctioned entry into the United States is a crime and those who have entered
unlawfully are subject to deportation. But despite the existence of these legal restrictions, a
substantial number of persons have succeeded in unlawfully entering the United States,
and now live within various States, including the State of Texas.

In May 1975, the Texas Legislature revised its education laws to withhold from local
school districts any state funds for the education of children who were not “legally
admitted” into the United States. The 1975 revision also authorized local school districts to
deny enrollment in their public schools to children not “legally admitted” to the country.
Tex. Educ. Code Ann. § 21.031. These cases involve constitutional challenges to those
provisions.

The Fourteenth Amendment provides that “[no] State shall . . . deprive any person of
life, liberty, or property, without due process of law; nor deny to any person within its
jurisdiction the equal protection of the laws.” Appellants argue at the outset that
undocumented aliens, because of their immigration status, are not “persons within the
jurisdiction” of the State of Texas, and that they therefore have no right to the equal
protection of Texas law. We reject this argument. Whatever his status under the
immigration laws, an alien is surely a “person” in any ordinary sense of that term. Aliens,
even aliens whose presence in this country is unlawful, have long been recognized as
“persons” guaranteed due process of law by the Fifth and Fourteenth Amendments.

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the
benefit of the Fourteenth Amendment’s guarantee of equal protection only begins the
inquiry. The more difficult question is whether the Equal Protection Clause has been
violated by the refusal of the State of Texas to reimburse local school boards for the
education of children who cannot demonstrate that their presence within the United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn.

The Equal Protection Clause directs that “all persons similarly circumstanced shall be treated alike.” But so too, “[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.” The initial discretion to determine what is “different” and what is “the same” resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a “suspect class,” or that impinge upon the exercise of a “fundamental right.” With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. We turn to a consideration of the standard appropriate for the evaluation of § 21.031.

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial “shadow population” of illegal migrants —numbering in the millions —within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficience from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their “parents have the ability to conform their conduct to societal norms,” and presumably the ability to remove themselves from the State’s jurisdiction; but the children who are plaintiffs in these cases “can affect neither their parents’ conduct nor their own status.” Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.
“[Visiting] . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the . . . child is an ineffectual—as well as unjust—way of deterring the parent.”

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.

Public education is not a “right” granted to individuals by the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). But neither is it merely some governmental “benefit” indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” We have recognized “the public schools as a most vital civic institution for the preservation of a democratic system of government,” and as the primary vehicle for transmitting “the values on which our society rests.” In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests. In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, “education prepares individuals to be self-reliant and self-sufficient participants in society.” Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a “constitutional irrelevancy.”
Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

It is the State’s principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. Indeed, in the State’s view, Congress’ apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State’s prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State’s authority to deprive these children of an education.

Appellants argue that the classification at issue furthers an interest in the “preservation of the state’s limited resources for the education of its lawful residents.” Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate. Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status—an asserted prerogative that carries only minimal force in the circumstances of these cases—we discern three colorable state interests that might support § 21.031.

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, § 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State’s economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country in order
to avail themselves of a free education. Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that “[charging] tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration,” at least when compared with the alternative of prohibiting the employment of illegal aliens.

Second, while it is apparent that a State may “not reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools,” appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State’s ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the quality of education in the State. The State failed to offer any “credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education.” In terms of educational cost and need, however, undocumented children are “basically indistinguishable” from legally resident alien children.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State’s borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O’CONNOR join, dissenting.

I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically “within the jurisdiction” of a state. However, this “only begins the inquiry.” The Equal Protection Clause does not mandate identical treatment of different categories of persons.

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The dispositive issue in these cases, simply put, is whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there. The distinction the State of Texas has drawn—based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional.

The Court acknowledges that, except in those cases when state classifications disadvantage a “suspect class” or impinge upon a “fundamental right,” the Equal Protection Clause permits a state “substantial latitude” in distinguishing between different groups. Moreover, the Court expressly rejects any suggestion that illegal aliens are a suspect class, or that education is a fundamental right. Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to these cases. In the end, we are told little more than that the level of scrutiny employed applies only when illegal alien children are deprived of a public education. If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.

The Court first suggests that these illegal alien children, although not a suspect class, are entitled to special solicitude under the Equal Protection Clause because they lack “control” over or “responsibility” for their unlawful entry into this country. Similarly, the Court appears to take the position that § 21.031 is presumptively “irrational” because it has the effect of imposing “penalties” on “innocent” children. However, the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack “control.” A state legislature is not barred from considering, for example, relevant differences between the mentally healthy and the mentally ill, or between the residents of different counties, simply because these may be factors unrelated to individual choice or to any “wrongdoing.” The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing “equalizer” designed to eradicate every distinction for which persons are not “responsible.”

The second strand of the Court’s analysis rests on the premise that, although public education is not a constitutionally guaranteed right, “neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.” Whatever meaning or relevance this opaque observation might have in some other context, it simply has no bearing on the issues at hand. The importance of education is beyond dispute. Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a “fundamental right” for purposes of equal protection analysis. Moreover, the Court points to no meaningful way to distinguish between education and other governmental benefits in this context. Is the Court suggesting that education is more “fundamental” than food, shelter, or medical care?

The central question in these cases, as in every equal protection case not involving truly fundamental rights “explicitly or implicitly guaranteed by the Constitution,” is
whether there is some legitimate basis for a legislative distinction between different classes of persons. The fact that the distinction is drawn in legislation affecting access to public education—as opposed to legislation allocating other important governmental benefits, such as public assistance, health care, or housing—cannot make a difference in the level of scrutiny applied.

Once it is conceded—as the Court does—that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose. Without laboring what will undoubtedly seem obvious to many, it simply is not “irrational” for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.

Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them. But that is not the issue; the fact that there are sound policy arguments against the Texas Legislature’s choice does not render that choice an unconstitutional one.

D. Bona Fide Residents

The year after the Supreme Court decided Plyer v. Doe, the Court confronted a second case involving a restriction on enrollment in a Texas school district. This time a Texas school district sought to deny an American-born child of Mexican citizen parents a free public education on the ground he was not a genuine resident of the district because he had moved to the district to reside with his sister for the express purpose of attending public school. Unlike in Plyer, this time the Court sided with the school district and rejected the equal protection challenge.

MARTINEZ v. B YNUM
461 U.S. 321 (1983)

JUSTICE POWELL delivered the opinion of the Court.

This case involves a facial challenge to the constitutionality of the Texas residency requirement governing minors who wish to attend public free schools while living apart from their parents or guardians.

Roberto Morales was born in 1969 in McAllen, Texas, and is thus a United States citizen by birth. His parents are Mexican citizens who reside in Reynosa, Mexico. He left Reynosa in 1977 and returned to McAllen to live with his sister, petitioner Oralia Martinez, for the primary purpose of attending school in the McAllen Independent School
District. Although Martinez is now his custodian, she is not - and does not desire to
become - his guardian. As a result, Morales is not entitled to tuition-free admission to the
McAllen schools. Sections 21.031(b) and (c) of the Texas Education Code would require
the local school authorities to admit him if he or “his parent, guardian, or the person having
lawful control of him” resided in the school district, but 21.031(d) denies tuition-free
admission for a minor who lives apart from a “parent, guardian, or other person having
lawful control of him under an order of a court” if his presence in the school district is “for
the primary purpose of attending the public free schools.” Respondent McAllen therefore
denied Morales’ application for admission in the fall of 1977.

This Court frequently has considered constitutional challenges to residence
requirements. On several occasions the Court has invalidated requirements that condition
receipt of a benefit on a minimum period of residence within a jurisdiction, but it always
has been careful to distinguish such durational residence requirements from bona fide
residence requirements. In Shapiro v. Thompson, 394 U.S. 618 (1969), for example, the
Court invalidated one-year durational residence requirements that applicants for public
assistance benefits were required to satisfy despite the fact that they otherwise had “met
the test for residence in their jurisdictions.” In Dunn v. Blumstein, 405 U.S. 330 (1972), the
Court similarly invalidated Tennessee laws requiring a prospective voter to have been a
state resident for one year and a county resident for three months, but it explicitly
distinguished these durational residence requirements from bona fide residence
requirements.

We specifically have approved bona fide residence requirements in the field of public
example, was unconstitutional because it created an irrebuttable presumption of
nonresidency for state university students whose legal addresses were outside of the State
before they applied for admission. The statute violated the Due Process Clause because it
in effect classified some bona fide state residents as nonresidents for tuition purposes. But
we “fully recognize[d] that a State has a legitimate interest in protecting and preserving . . .
the right of its own bona fide residents to attend [its colleges and universities] on a
preferential tuition basis.” This “legitimate interest” permits a “State [to] establish such
reasonable criteria for in-state status as to make virtually certain that students who are not,
in fact, bona fide residents of the State, but who have come there solely for educational
purposes, cannot take advantage of the in-state rates.” Last Term, in Plyler v. Doe, 457
issue in this case. Although we invalidated the portion of the statute that excluded
undocumented alien children from the public free schools, we recognized the school
districts’ right “to apply . . . established criteria for determining residence.”

A bona fide residence requirement, appropriately defined and uniformly applied,
furthers the substantial state interest in assuring that services provided for its residents are
enjoyed only by residents. Such a requirement with respect to attendance in public free
schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does
not burden or penalize the constitutional right of interstate travel, for any person is free to
move to a State and to establish residence there. A bona fide residence requirement simply
requires that the person does establish residence before demanding the services that are restricted to residents.

There is a further, independent justification for local residence requirements in the public-school context. The provision of primary and secondary education, of course, is one of the most important functions of local government. Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly. The State thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public schools.

The central question we must decide here is whether 21.031(d) is a bona fide residence requirement. Although the meaning may vary according to context, “residence” generally requires both physical presence and an intention to remain. This classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again.

Section 21.031 is far more generous than this traditional standard. It compels a school district to permit a child such as Morales to attend school without paying tuition as long as the child is not living in the district for the sole purpose of attending school. For example, if a person comes to Texas to work for a year, his children will be eligible for tuition-free admission to the public schools. Or if a child comes to Texas for six months for health reasons, he would qualify for tuition-free education. In short, 21.031 grants the benefits of residency to everyone who satisfies the traditional residence definition and to some who legitimately could be classified as nonresidents. Since there is no indication that this extension of the traditional definition has any impermissible basis, we certainly cannot say that 21.031(d) violates the Constitution.

The Constitution permits a State to restrict eligibility for tuition-free education to its bona fide residents. We hold that 21.031 is a bona fide residence requirement that satisfies constitutional standards.

E. Classifications Based on Wealth

In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court rejected a challenge to the use of school district wealth as a basis for public school funding. In that case, the Court rejected the argument that the school-financing scheme discriminated based on the wealth of individuals with poorer individuals receiving a lower quality education than wealthier ones. The Court concluded that district wealth was not the same thing as individual wealth because some poorer individuals lived in wealthier school districts and some wealthier individuals lived in poorer school districts. This was due to the fact that district wealth is a product of many factors including the value of commercial property subject to taxation in the district, the amount of tax-exempt property in the district, as well as the value of residential properties.

In addition to concluding that the financing scheme did not utilize a classification scheme based on individual wealth and thus did not discriminate “against ‘poor’ persons whose incomes fall below some identifiable level of poverty,” the Court also took the view
that past cases in which the Court struck down laws that discriminated based on wealth were all cases in which indigent individuals were completely denied a particular benefit because of their inability to pay for it. These included striking down a law that required a candidate in a primary election to pay a significant filing fee and invalidating the need for an indigent criminal defendant to pay to obtain a trial transcript to use either at the trial or on appeal. In *Rodriguez*, while richer districts might provide a more expensive public school education, poorer districts still provided public school education to their residents, even though they might spend less on that education. Thus, there was no absolute deprivation.

One other aspect of *Rodriguez* was its consideration of whether education is a fundamental right. While fundamental rights analysis is usually an aspect of due process analysis, there is a strand of equal protection analysis that considers whether there has been a deprivation of an equality-based fundamental right. If there has been, the standard of review is elevated in a similar fashion to the rigorous scrutiny used for suspect and quasi-suspect classifications. The quintessential example of such an equal protection style fundamental right is the right to vote.

In *Rodriguez*, the Court considered, but rejected the argument that the right to education, a right not explicitly protected in the Constitution, should be considered fundamental under equal protection analysis. The challengers argued that “education is itself a fundamental personal right, because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote,” but the Court refused to either find education to be fundamental based on its importance or based on the connection the challengers attempted to draw to other fundamental rights. The Court reasoned that even if some minimum quantity of education was necessary to the exercise of the right to free speech and the right to vote, even the poorest school districts were providing a sufficient level of education. It left open the question of whether an absolute deprivation of public education to persons unable to pay for it would deprive them of a fundamental right. The plaintiffs in a recent federal district court case, *Gary B. v. Snyder*, argued that the Detroit Public Schools had deprived students of “access to literacy” in violation of the Due Process Clause, an argument similar to an absolute deprivation of the right to education, but the court rejected the claim and dismissed the lawsuit in June, 2018.

In 1988, the Court considered a case involving the impact of a school district fee for bus transportation to school and its impact on indigent children. Relying on minimum scrutiny review, the Court upheld the transportation fee.

**KADRMAS v. DICKINSON PUBLIC SCHOOLS**

487 U.S. 450 (1988)

JUSTICE O’CONNOR delivered the opinion of the Court.

Appellants urge us to hold that the Equal Protection Clause forbids a State to allow some local school boards, but not others, to assess a fee for transporting pupils between their homes and the public schools. Applying well-established equal protection principles,
we reject this claim and affirm the constitutionality of the challenged statute.

North Dakota is a sparsely populated State. Since 1947, the legislature has encouraged thinly populated school districts to consolidate or “reorganize” themselves into larger districts so that education can be provided more efficiently. Reorganization proposals, which obviously must contemplate an increase in the distance that some children travel to school, are required by law to include provisions for transporting students back and forth from their homes.

Appellee Dickinson Public Schools, which serves a relatively populous area, has chosen not to participate in such a reorganization. Until 1973, this school system provided free bus service to students in outlying areas, but the “pickup points” were often at considerable distances from the students’ homes. After a plebiscite of the bus users, Dickinson’s School Board instituted door-to-door bus service and began charging a fee. During the period relevant to this case, about 13% of the students rode the bus; their parents were charged $97 per year for one child or $150 per year for two children. Such fees covered approximately 11% of the cost of providing the bus service, and the remainder was provided from state and local tax revenues. In 1979, the State enacted the legislation at issue in this case. This statute expressly indicates that nonreorganized school districts, like Dickinson, may charge a fee for transporting students to school.

Appellants are a Dickinson schoolchild, Sarita Kadmas, and her mother. The Kadmas family lives about 16 miles from Sarita’s school. The family’s annual income at the time of trial was at or near the poverty level. Until 1985, the Kadmas family had agreed to pay the fee for busing Sarita to school. Having fallen behind on these and other bills, the family refused to sign a contract for the 1985 school year. Accordingly, the school bus no longer stopped for Sarita, and the family arranged to transport her to school privately. Appellants filed an action seeking to enjoin appellees from collecting any fee for the bus service.

Unless a statute provokes “strict judicial scrutiny” because it interferes with a “fundamental right” or discriminates against a “suspect class,” it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose. Appellants contend that Dickinson’s user fee for bus service deprives those who cannot afford to pay it of “minimum access to education.” Sarita Kadmas, however, continued to attend school during the time that she was denied access to the school bus. Appellants must therefore mean to argue that the busing fee unconstitutionally places a greater obstacle to education in the path of the poor than it does in the path of wealthier families. Alternatively, appellants may mean to suggest that the Equal Protection Clause affirmatively requires government to provide free transportation to school, at least for some class of students that would include Sarita Kadmas. Under either interpretation, we are being urged to apply a form of strict or “heightened” scrutiny to the statute. Doing so would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take.

We have rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny. Nor have we accepted the proposition that education is a “fundamental right,” like equality
of the franchise, which should trigger strict scrutiny. San Antonio Independent School Dist. v. Rodriguez.

Relying primarily on Plyler v. Doe, however, appellants suggest that North Dakota’s 1979 statute should be subjected to “heightened” scrutiny. This standard of review, which is less demanding than “strict scrutiny” but more demanding than the standard rational relation test, has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. In Plyler, which did not fit this pattern, the State of Texas had denied to the children of illegal aliens the free public education that it made available to other residents. Applying a heightened level of equal protection scrutiny, the Court concluded that the State had failed to show that its classification advanced a substantial state interest. We have not extended this holding beyond the “unique circumstances” [of] that [case]. Nor do we think that the case before us today is governed by Plyler. Unlike the children in that case, Sarita Kadrmas has not been penalized by the government for illegal conduct by her parents. On the contrary, Sarita was denied access to the school bus only because her parents would not pay the same user fee charged to all other families. Nor do we see any reason to suppose that this user fee will “promot[e] the creation and perpetuation of a subclass of illiterates within our boundaries, adding to the problems and costs of unemployment, welfare, and crime.” The case before us does not resemble Plyler, and we decline to extend the rationale of that decision to cover this case.

Appellants contend, finally, that whatever label is placed on the standard of review, this case is analogous to decisions in which we have held that government may not withhold certain especially important services from those who are unable to pay for them. Griffin v. Illinois, 351 U.S. 12 (1956) (right to appellate review of a criminal conviction conditioned on purchase of a trial transcript); Boddie v. Connecticut, 401 U.S. 371 (1971) (action for dissolution of marriage could be pursued only upon payment of court fees and costs for service of process). These cases each involved a rule that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process. Decisions invalidating such rules are inapposite here. North Dakota does not maintain a monopoly on the means of transporting children to school. Thus, unlike the complaining parties in the cases cited by appellants, the Kadrmas family could and did find a private alternative to the public school bus service. We have no reason to doubt that hardships were endured by the Kadrmas family when Sarita was denied access to the bus. Such facts, however, do not imply that the Equal Protection Clause has been violated.

Applying the appropriate test - under which a statute is upheld if it bears a rational relation to a legitimate government objective - we think it is clear that a State’s decision to allow local school boards the option of charging a user fee for bus service is permissible. The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free. No one denies that encouraging local school districts to provide school bus service is a legitimate state purpose or that such encouragement would be undermined by a rule requiring that general revenues be used to subsidize an optional service that will benefit a minority of the district’s families. It is manifestly rational for the State to refrain from undermining its legitimate objective with such a rule.
Appellants contend that, even without the application of strict or heightened scrutiny, the 1979 statute violates equal protection because it permits user fees for bus service only in nonreorganized school districts. This distinction, they say, can be given no rational justification whatsoever. The principles governing our review of this claim are well established. “‘The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state.’ Rather, the Equal Protection Clause is offended only if the statute’s classification ‘rests on grounds wholly irrelevant to the achievement of the State’s objective.’ Social and economic legislation like the statute at issue in this case, moreover, carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.” “[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature’s actions were irrational.” Those challenging the legislative judgment must convince us “that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.”

Applying these principles to the present case, we conclude that appellants have failed to carry the “heavy burden” of demonstrating that the challenged statute is both arbitrary and irrational. The court below offered the following justification for the distinction drawn between reorganized and nonreorganized districts: “The obvious purpose is to encourage school district reorganization with a concomitant tax base expansion and an enhanced and more effective school system. The legislation provides incentive to approve school district reorganization by alleviating parental concerns regarding the cost of student transportation in the reorganized district.” The explanation offered is adequate to rebut appellants’ contention that the distinction drawn between reorganized and nonreorganized districts is arbitrary and irrational.

In sum, the statute challenged in this case discriminates against no suspect class and interferes with no fundamental right. Appellants have failed to carry the heavy burden of demonstrating that the statute is arbitrary and irrational. The statute does not violate the Equal Protection Clause of the Fourteenth Amendment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), I wrote that the Court’s holding was a “retreat from our historic commitment to equality of educational opportunity and [an] unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential.” Today, the Court continues the retreat from the promise of equal educational opportunity.

This case involves state action that places a special burden on poor families in their pursuit of education. Children living far from school can receive a public education only if they have access to transportation. For children in Sarita’s position, imposing a fee for transportation is no different in practical effect from imposing a fee directly for education. Moreover, the fee discriminated against Sarita’s family because it fell more heavily upon
the poor than upon wealthier members of the community. This case presents the question whether a State may discriminate against the poor in providing access to education.

The North Dakota statute discriminates on the basis of economic status. This Court has determined that classifications based on wealth are not automatically suspect. However, to the extent that a law places discriminatory barriers between indigents and the basic tools and opportunities that might enable them to rise, exacting scrutiny should be applied.

The statute at issue here burdens a poor person’s interest in an education. The extraordinary nature of this interest cannot be denied. Brown v. Board of Education, 347 U.S. 483, 493 (1954). Since Brown, we frequently have called attention to the vital role of education in our society. A statute that erects special obstacles to education in the path of the poor naturally tends to consign such persons to their current disadvantaged status. By denying equal opportunity to exactly those who need it most, the law not only militates against the ability of each poor child to advance herself or himself, but also increases the likelihood of the creation of a discrete and permanent underclass. Such a statute is difficult to reconcile with the framework of equality embodied in the Equal Protection Clause.

This Court’s decision in Plyler v. Doe, 457 U.S. 202, 213 (1982), supports these propositions. The Court in Plyler upheld the right of the children of illegal aliens to receive the free public education that the State of Texas made available to other residents. The Plyler Court’s reasoning is fully applicable here. As in Plyler, the State in this case has acted to burden the educational opportunities of a disadvantaged group of children, who need an education to become full participants in society.

The State’s rationale for this policy is based entirely on fiscal considerations. The State has allowed Dickinson and certain other school districts to charge a nonwaivable flat fee for bus service so that these districts may recoup part of the costs of the service. The money that Dickinson collects from applying the busing fee to indigent families, however, represents a minuscule proportion of the costs of the bus service. Exempting indigent families from the busing fee therefore would not require Dickinson to make any significant adjustments in the operation or the funding of the bus service. The state interest involved in this case is therefore insubstantial; it does not begin to justify the discrimination.

The Court’s decision to the contrary “demonstrates once again a ‘callous indifference to the realities of life for the poor.’ ” In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result. I therefore dissent.

Professor’s Note: After the Supreme Court’s 1973 decision in Rodriguez, lawsuits arguing inequity and/or inadequacy in funding for public education shifted to the state courts and raised state constitutional arguments, mainly asserting that state constitutional language recognized a right to education and required additional funding for public schools. The results in these cases were mixed with both victories and defeats in the initial phases of the litigation. However, even where state supreme courts found constitutional violations, only occasionally did significant changes in educational funding result from the remedial phase of the litigation in part due to separation of powers concerns.