

EQUAL PROTECTION AND RACIAL CATEGORIES

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INTRODUCTION

A touchstone of justice is the principle that like things must be treated alike, and different things differently.¹ A “thread of universal agreement” on this point runs from Aristotle “to the jurists, moralists

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¹ See, e.g., ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 76 (W.D. Ross trans., Batoche Books 1999) (“[B]ut this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares. . . . The just, then, is a species of the proportionate”); ARISTOTLE, POLITICS bk. III, pt. XII, at 68 (Benjamin Jowett trans., Batoche Books 1999) (“All men think justice to be a sort of equality For they admit that justice is a thing and has a relation to persons, and that equals ought to have equality.”); 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. Q.61, art. 3, at 56 (Fr. Laurence Shapcote trans., Encyclopaedia Britannica 1923) (“Again, good as defined by reason and put into our operations as something right and due, is found chiefly in exchanges and distributions in respect of another person, and on a basis of equality. . . . [J]ustice[is] the virtue which is about due actions between equals.”); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1977) (“The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”); JOHN FINNIS, NATURAL LAW & NATURAL RIGHTS 173–74 (2d ed. 2011) (arguing that the rule has “moral relevance” but that when it comes to resolving problems of distributive justice, it is a “residual principle” outweighed by concerns for the common good); LON L. FULLER, THE MORALITY OF LAW 211 (Yale Univ. Press rev. ed. 1969) (explaining how, in some circumstances, retrospective legislation “can serve to heal infringements of the principle that like cases should receive like treatment.”); H.L.A. HART, THE CONCEPT OF LAW 159 (3d ed. 2012) (“Hence justice is traditionally thought of as maintaining or restoring a *balance* or *proportion*, and its leading precept is often formulated as ‘Treat like cases alike’; though we need to add to the latter ‘and treat different cases differently.’”); JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 79 (Prometheus Books 1986) (“[Legislatures] are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough.”); JOHN RAWLS, A THEORY OF JUSTICE 58 (1971) (“That is, similar cases are treated similarly, the relevant similarities and differences being those identified by the existing norms. . . . If we think of justice as always expressing a kind of equality, then formal justice requires that in their administration laws and institutions should apply equally (that is, in the same way) to those belonging to the classes defined by them.”).

and philosophers of our own day.”² This principle is enshrined in the Fourteenth Amendment’s Equal Protection Clause³ (as interpreted⁴), which “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”⁵ The Supreme Court enforces

Of course, not all those theorists agree about the extent to which the like-things principle composes justice—for Finnis, it is a small component, for Hart, a much larger one—but all agree that it is, at least, part of justice. *See also* MORTIMER J. ADLER, *WE HOLD THESE TRUTHS* 95 (1987) (“This twofold principle of justice does not exhaust the essence of justice, as it is sometimes thought, but it does express the one aspect of justice that consists in fairness.”).

² CHIAM PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 12 (J. Petrie trans., 1963).

³ U.S. CONST., amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

⁴ The overwhelming weight of historical scholarship shows that the Equal Protection Clause was not originally meant to serve the general anti-discrimination purpose which it serves today. Still, because the Court has made it do so, this Article proceeds under that understanding. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT* 321 (2021) (arguing that the “general-antidiscrimination understanding” of the Equal Protection Clause is “probably incorrect as a matter of original meaning”); ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* 47 (2020) (arguing that “the equal protection of the laws required only that the government provide legal protection against private interference for our exercise and enjoyment of our existing rights to life, liberty, and property as defined by law”); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON UNIV. CIV. RTS. L.J. 1, 3 (2008) (arguing that “the current emphasis on classifications—the ‘no-improper-classification’ view—misconstrues the Equal Protection Clause,” and that the clause, properly understood, embodies a duty to “protect all persons and property within [a state’s] jurisdiction from violence and to enforce their rights through the court system”); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON UNIV. CIV. RTS. L.J. 219, 220 (2009) (“[T]he text of the Equal Protection Clause expressed, in its historical context, an entitlement to ‘protection of the laws’—that is, the minimally adequate and equal performance of the law enforcement and remedial functions of government.”); Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 299 (1993) (arguing that equal protection of the laws was “an equality only of the protection provided by civil law for natural liberty”); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1433 (1992) (“[I]t is more plausible to conclude that the Equal Protection Clause requires equality with respect to the ‘protection of the laws,’ a subset of the activities of government and, crucially, of the privileges and immunities of citizens.”); Kurt T. Lash, *The State Citizenship Clause*, 25 U. PENN. J. OF CON. L. 1097 (2024) (manuscript at 29-30) (arguing that the State Citizenship Clause of the Fourteenth Amendment mandates race-neutrality in state-level civil rights); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 993 (1995) (“To the supporters of the civil rights bills during the Reconstruction period, however, the focus [of the Equal Protection Clause] was on an equality of rights, not on whether the processes of government were infected by discriminatory intent.”).

⁵ *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *see also Plyler v. Doe*, 457 U.S. 202, 216 (1982) (“But so too, ‘the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.’”) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). This principle is incorporated elsewhere in the law too. *See, e.g.*, *Epic Sys. Corp. v. Lewis*, 138 S. Ct.

these abstract requirements through the tiers of scrutiny, which attempt to ensure that differential treatment is not based on arbitrariness or animus.⁶

Laws that discriminate between people do two things: they categorize individuals, and then they draw distinctions between individuals based on those categories. In the case of categorization, laws group people together into categories based on some unifying characteristic. In the case of distinction, laws fix legal relationships between individuals based on the relevant unifying characteristics of the categories. These operations will be explained more thoroughly later in this Article, but now they can be grasped via the following example: A law provides a \$1,000 stipend to people who qualify as “historically marginalized.” The hypothetical law first categorizes people based on the assumption that all “historically marginalized” people share some unifying characteristic relevant to the law’s purpose. Then it draws a legal distinction between people who are inside and outside of that category, granting a stipend to the former and denying it to the latter. All laws that discriminate can be described in terms of the twin functions of categorization and distinction.

This Article argues that when courts scrutinize discriminatory laws to vindicate the like-things principle, equal protection doctrine requires them to scrutinize both functions. Yet, courts, litigants, and scholars have paid insufficient attention to legal categories in the context of equal protection challenges. Courts and litigants often take for granted that racial categories do, in fact, group people together based upon relevant and shared characteristics. As recent research reveals, however, this is not necessarily true.⁷ Much of this research is

1612, 1623 (2018) (recognizing that the principle undergirds the law of precedent); *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 569 (2015) (applying the principle in dormant Commerce Clause litigation); *Shea v. Louisiana*, 470 U.S. 51, 60 (1985) (applying the principle to criminal procedure); *Grayscale Investments, LLC v. Sec. and Exch. Comm’n*, 82 F.4th 1239, 1242 (D.C. Cir., 2023) (recognizing that the principle is “fundamental” to administrative law).

⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”). One could argue that animus can be framed as a type of arbitrariness because to act arbitrarily is to act without reason, and reason cannot justify hatred or maltreatment of any individual on the basis that he belongs to a particular racial, ethnic, cultural, linguistic, or geographic group.

⁷ See e.g., DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA* (2022) (tracing the origin of America’s racial categories and examining the limits of the generalizations that formed them); MIKE GONZALEZ, *THE PLOT TO CHANGE AMERICA* (2020) (showing how some of America’s racial categories were created by activists with no anthropological,

relatively new, and so courts have not given racial categories sufficient attention. In the few cases where courts have given categories some attention, their analysis has, with a few exceptions, been unsatisfactory.

This Article begins by noting the weakness of the assumption underpinning the limited scrutiny of racial categories. America's system of racial categorization is much more arbitrary than courts and litigants seem to assume. The arbitrariness of America's racial categories means that laws based on them often treat like-things differently and different things alike. Accordingly, when courts hear equal protection challenges to such laws, they must scrutinize the categories themselves and not only the distinction that the law draws between them. This raises the question of how courts should scrutinize categories. This Article will propose a simple test: categories ought to receive the same scrutiny as distinctions drawn on the same bases. For example, racial and ethnic distinctions receive strict scrutiny, and so should categories that are drawn on racial or ethnic lines. This approach is the only way to fully vindicate the motivating principle of equal protection—that like things must be treated alike, and different things, differently.

BACKGROUND

I. THE THEORETICAL UNDERPINNINGS OF EQUAL PROTECTION

The fundamental inquiry in equal protection cases is whether a law treats like things alike, and different things differently.⁸ Likeness and difference must be defined in terms relevant to the purpose of the law under scrutiny.⁹ H.L.A. Hart explained that “[t]his is so because

sociological, or other relevant expertise for the purpose of creating race-based voting blocs); David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 218 (2021) (“There have been very few constitutional challenges to the scope of the minority MBE categories dictated by federal and state law.”); Jenny Rivera, *An Equal Protection Standard for National Origin Subclassifications: The Context That Matters*, 82 WASH. L. REV. 897, 954–64 (2007) (noting that the classification “Hispanic,” as defined by state and federal law, makes generalizations that courts almost never scrutinize).

⁸ See, e.g., *Vacco*, 521 U.S. at 799 (“The Equal Protection Clause commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws.’ . . . [I]t embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”); *Plyler*, 457 U.S. at 216 (“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.’”).

⁹ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (explaining that the “fundamental purpose” of strict scrutiny in Equal Protection cases is to determine whether a law

any set of human beings will resemble each other in some respects and differ from each other in others and, until it is established what resemblance and differences are relevant, ‘Treat like cases alike’ must remain an empty form.”¹⁰ A law fills in that empty form with its stated purpose.¹¹ A law’s stated purpose provides the lens through which relevant characteristics are identified and suggests the types and degrees of distinctions that should be made based on those characteristics.¹² Equal protection jurisprudence tries to ensure that this characteristic is, in fact, relevant to the law’s purpose.¹³ Justice Robert Jackson best summarized this function in *Railway Express Agency v. New York*, writing:

As a matter of principle and in view of my attitude toward the equal protection clause, I do not think differences of treatment under law should be approved on classification because of differences unrelated to the legislative purpose. The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. This Court has often announced the principle that the differentiation must have an appropriate relation to the object of the legislation or ordinance.¹⁴

that draws distinctions between individuals is based on “relevant differences”); *Plyler*, 457 U.S. at 216 (“In applying the Equal Protection Clause to most forms of state action, [the Court] thus seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.”); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974) (“‘Equal protection’ . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.”). The Supreme Court has held that “the equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable . . .” *Adarand*, 515 U.S. at 217 (citing numerous cases that treat the equal protection obligations of the Fifth and Fourteenth Amendment as one and the same).

¹⁰ HART, *supra* note 1, at 159.

¹¹ See *id.* at 160 (“For here the relevant resemblances and differences between individuals, to which the person who administers the law must attend, are determined by the law itself.”).

¹² *Id.* (explaining that myriad legal standards are “designed to secure that the law is applied to all those and only to those who are alike in the relevant respect marked out by the law itself”).

¹³ See *supra* note 9.

¹⁴ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 115 (1949) (Jackson, J., concurring); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (noting that the characteristics of certain groups “are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve”).

In other words, laws purport to achieve some purpose, and the characteristic on which differential treatment turns must be related to that purpose.¹⁵ Simply put, laws must not be pretextual.

In race cases, for example, a law will often purport to remedy past racial discrimination.¹⁶ In those cases, the relevant characteristic is the quality of having suffered discrimination.¹⁷ In the context of college admissions, race-based preferences purport to increase “genuine diversity.”¹⁸ That is, diversity “of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”¹⁹ In those cases, the relevant characteristic is the possession of attributes that contribute to genuine diversity.²⁰ These relevant characteristics fill in the empty form of “treat like things alike and different things differently.” Relevance, however, is only the first of equal protection’s concerns. The relevant characteristic must also be morally salient. That is, it must provide a just basis for treating individuals differently. Moral salience incorporates a substantive moral vision. This Article does not venture into that vast field. For this Article’s limited purposes, “morally salient characteristics” are those which the Supreme Court has held to be legally permissible bases for treating people differently.²¹

A characteristic may be relevant to a law’s purpose but not morally salient. For example, a perception that members of a particular group are inherently inferior, disagreeable, or dangerous may be the relevant characteristic to some laws—Jim Crow laws, for example—but equal protection jurisprudence holds that those perceptions are not morally salient because they are arbitrary or born of animus.²²

¹⁵ Cf. HART, *supra* note 1, at 159 (explaining that the like-things principle is “a central element in the idea of justice” but “incomplete” until one establishes “what resemblance and differences are relevant”).

¹⁶ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–99 (1989) (recognizing that this is a compelling government interest provided the past discrimination is not generalized, is a specific instance, and that the government was at least a passive participant in it).

¹⁷ See *id.*

¹⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978); see also *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (adopting Justice Powell’s position).

¹⁹ *Bakke*, 438 U.S. at 315.

²⁰ See *id.*

²¹ See *infra* text accompanying notes 54–67.

²² See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 7 (commemorative ed. 2002) (describing Jim Crow laws as “the most elaborate and formal expression of sovereign white opinion upon the subject [of black inferiority]”); see also *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (upholding a law separating black people from white people because whites’ racist assumptions about blacks meant that segregation promoted “their comfort”).

The theory behind tiered scrutiny is that some distinctions are less likely than others to be rooted in a morally salient difference, and courts must use increased scrutiny for more suspect distinctions.²³ Distinctions based on race are the prototypical case because race “so seldom provides a relevant basis for disparate treatment.”²⁴ Thus, the Court applies strict scrutiny to racial distinctions.²⁵ Sex-based distinctions, by contrast, receive intermediate scrutiny because, although there is a history of sex-based animus, there are biological differences between the sexes that may furnish just grounds for differential treatment.²⁶ Finally, class-based

²³ *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting) (“When government accords different treatment to different persons, there must be a reason for the difference. Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate.”).

Rooting out animus is one justification for scrutiny; another, famously set forth in footnote four of *United States v. Carolene Products Company*, 304 U.S. 144, 152 n.4 (1938), grasps obliquely at the like-things principle through political-process theory. Under that theory, law is presumed to issue from reasoned decision-making with numerous safeguards where minorities can protect their interests. *See id.* Animus, therefore, is unlikely to be a motivating factor where the affected group had a meaningful opportunity to participate in the law’s creation. *See id.* If, however, the group is a “discrete” and “insular” minority that, traditionally, has been unable to defend its own interests in the political sphere, the court will more closely scrutinize a law that affects it. *Id.*

²⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (internal quotations omitted) (quoting *Fullilove*, 448 U.S. at 534 (Stevens, J., dissenting)); *see also, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (internal citations omitted) (“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.’”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) (“This Court has ‘consistently repudiated “[d]istinctions between citizens solely because of their ancestry” as being “odious to a free people whose institutions are founded upon the doctrine of equality.”’”); *Bakke*, 438 U.S. at 291 (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting) (internal citations omitted) (quoting *Hirabayashi*, 320 U.S. at 100) (“Moreover, race, nationality, or alienage is ‘in most circumstances irrelevant’ to any constitutionally acceptable legislative purpose Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality.”); ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (“The history of the racial quota is a history of subjugation, not beneficence.”); 3 Cong. Rec. 945 (1875) (statement of Rep. John Lynch) (“The duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned.”).

²⁵ *See* sources cited *supra* note 24.

²⁶ *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197–99 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (noting the nation’s “long and unfortunate history of sex discrimination”); *see also* Rostker

distinctions are afforded only rational-basis scrutiny because class-based distinctions are still less likely to be invidious.²⁷ Ultimately, the tiers try to ensure three things: that a relevant characteristic is morally salient; that the law is motivated by a desire to draw a distinction on that basis; and that the distinction does, in fact, separate people according to whether they possess that characteristic.²⁸ In other words, they attempt to reveal whether a distinction impermissibly treats like things differently or different things alike.

Typically, laws do not draw distinctions between every single individual or between one individual and everyone else (such as a bill of attainder).²⁹ The former would be impossible, the latter unjust.³⁰ Instead, laws first draw categories by grouping people according to some set of shared characteristics. Then they draw distinctions between those categories. For instance, a law that treats “black” and “white” people differently must define those categories before it can draw

v. *Goldberg*, 453 U.S. 57, 81 (1981) (holding that the selective-service could constitutionally exclude women because even “assuming that a small number of women could be drafted for noncombat roles, Congress simply did not consider it worth the added burdens of including women in draft and registration plans”); *Califano v. Webster*, 430 U.S. 313, 318 (1977) (upholding a statute that provided higher Social Security benefits for women than for men because “women . . . as such have been unfairly hindered from earning as much as men”).

²⁷ See, e.g., *Maier v. Roe*, 432 U.S. 464, 471 (1977) (“But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that wealth-based distinctions “have none of the traditional indicia of suspectness”). But cf., FRÉDÉRIC BASTIAT, *THE LAW* 2–3 (Dean Russell trans., Found. for Econ. Educ. 2017) (“Thus, since an individual cannot lawfully use force against the person, liberty, or property of another individual, then the common force—for the same reason—cannot lawfully be used to destroy the person, liberty, or property of individuals or groups.”).

²⁸ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”).

²⁹ Although Bills of Attainder are barred per Article I, Section 9, Clause 3 of the Constitution, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977), the Supreme Court acknowledged that Congress may in some instances regulate “a legitimate class of one.”

³⁰ See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”); FULLER, *supra* note 1, at 51 n.10 (“The prohibition of such bills [of attainder] was supported not only by the belief that laws ought to be prospective in effect, but also, and perhaps primarily, by a conviction that punitive measures ought to be imposed by rules of general application.”); HART, *supra* note 1, at 160 (“We may say that [justice] consists of two parts: a uniform or constant feature, summarized in the precept ‘Treat like cases alike’ and a shifting or varying criterion used in determining when, for any given purpose, cases are alike or different.”).

distinctions between them. Some categories are specific and objective, such as the categories “citizens” or “businesses incorporated in the state.”³¹ But others—like America’s racial categories—are based on generalizations about the groups’ members.³² Laws that create groups based on generalizations assume that all members of each group share a morally salient characteristic that may justly serve as the basis of a legal distinction between groups.

The typical equal protection challenge asks courts to consider whether a distinction between categories is based on a morally salient difference. But the typical challenge does not ask courts to consider whether the individuals who compose the categories each possess the quality that makes the distinction morally salient.³³ Thus, when courts employ scrutiny, they usually accept the assumption behind a given generalization, especially when the generalization aligns with categories that are easily defined, like sex, or that are socially familiar, like race.³⁴

Consider America’s racial and ethnic categories. Those categories are generalizations—assumptions about groups of people gathered from more specific ethnic, cultural, and regional groups.³⁵ In contrast, the benefits granted to, or burdens imposed on, members of those categories are distinctions. A better understanding of the difference between distinctions and categories, and the importance of law focusing on both, is necessary to clarify the doctrine and ensure justice.

³¹ Indeed, “[t]he basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create *discrete* and *objectively identifiable* classes.” *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 601 (2008) (emphasis added) (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 60 (Stewart, J., concurring)).

³² See BERNSTEIN, *supra* note 7, at xi–xiv (tracing the origin of America’s racial categories and examining the limits of the generalizations that formed them).

³³ See, e.g., *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941) (“It is enough that those in the same class are treated equally.”); *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920) (“It is unnecessary to say that the ‘equal protection of the laws’ required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. . . . But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”). These cases, it is worth noting, concerned economic distinctions, not racial distinctions.

³⁴ See, e.g., Bernstein, *Modern American Law of Race*, *supra* note 7, at 218 (2021) (“There have been very few constitutional challenges to the scope of the minority MBE categories dictated by federal and state law.”); Rivera, *supra* note 7, at 898 (noting that the classification “Hispanic,” as defined by state and federal law, makes generalizations that courts almost never scrutinize).

³⁵ See generally BERNSTEIN, *supra* note 7, at xi.

II. AN ILLUSTRATIVE CASE: *CITY OF RICHMOND V. J.A. CROSON COMPANY*

City of Richmond v. J.A. Croson Company provides an illustrative case study. There, the Supreme Court scrutinized a city ordinance that required prime contractors to hire subcontractors owned and controlled by “[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”³⁶ The city’s stated purpose was to “remedy various forms of past discrimination that are alleged to be responsible for the small number of minority businesses in the local contracting industry.”³⁷ Applying strict scrutiny, the Court held that the plan violated the Equal Protection Clause because there was insufficient evidence of discrimination against black contractors, and “absolutely no evidence” of discrimination against other minority contractors in the Richmond construction industry.³⁸ The Court wondered why a program meant to compensate black contractors for past discrimination would force them “to share this ‘remedial relief’ with an Aleut citizen who moves to Richmond tomorrow.”³⁹ The Court’s question focused exclusively on the distinction drawn between racial categories.

Because it did not also scrutinize the categories themselves, the Court’s equal protection analysis was incomplete. In deciding whether the racial preference was supported by evidence, the Court asked whether a morally salient basis (there, the quality of having suffered past race-based discrimination) existed for the distinction between groups. Then, in asking whether other racial groups were also discriminated against, it asked whether that morally salient basis was shared among the groups that the plan benefited. The Court did not, however, ask whether the groups themselves were defined based on morally salient characteristics common to their individual members. For example, it assumed that all black people suffered past race-based discrimination.⁴⁰ But just as the Court asked why a black resident should have to share relief with an Aleut citizen who moves to Richmond tomorrow, it could

³⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 (1989).

³⁷ *Id.* at 498.

³⁸ *Id.* at 505–06 (emphasis omitted).

³⁹ *Id.* at 506.

⁴⁰ See *Croson*, 488 U.S. at 499 (“[T]here is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs . . .”).

and should have asked why a long-time black resident should have to share relief with a black newcomer never affected by Richmond's alleged discrimination.

Yet the case was not litigated that way.⁴¹ Just as courts have presumed that the members of generalized categories share the relevant morally salient characteristic, so too have litigants. But as scholars and judges are increasingly examining the contours of America's racial classifications and finding them arbitrary, so too are litigants challenging the assumption that these categories are meaningful proxies for morally salient characteristics.⁴²

The few courts to entertain these new challenges to racial categories have been confused about how to analyze them under current equal protection doctrine.⁴³ They should not have been. When that doctrine is considered from its underlying principle, the method for resolving these cases is clear: courts must scrutinize both the distinctions and the categories created by the law.⁴⁴ It is impossible to vindicate the like-things principle by scrutinizing only the former. The impossibility exists because if a category is defined arbitrarily, then any distinction based on that category would also be arbitrary, even if the distinction alone passes strict scrutiny. For example, an otherwise constitutional remedial preference for black victims of government racial discrimination will be arbitrary if the category "black" is defined to include white people.⁴⁵ Thus, the doctrine requires that both categories and distinctions be drawn according to morally salient characteristics.

I. THE PRACTICAL OPERATION OF EQUAL PROTECTION DOCTRINE

In rooting out arbitrary distinctions, courts do not usually attempt to divine the legislators' subjective intent.⁴⁶ For those not gifted with the power to read minds, divining intent would be difficult except

⁴¹ See Brief on Behalf of the Appellee at 10–11, *Croson*, 488 U.S. 469 (No. 87-998), 1988 WL 1023136.

⁴² See *infra* ANALYSIS PART I.

⁴³ See cases discussed *infra* ANALYSIS PART II.

⁴⁴ See *infra* ANALYSIS PART I.

⁴⁵ See *Croson*, 488 U.S. at 493–95 (setting the test for when remedial discrimination is constitutionally permissible).

⁴⁶ See, e.g., *Croson*, 488 U.S. at 493 ("Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."); *United States v. O'Brien*, 391 U.S. 367, 384 (1968) ("It is

in egregious cases.⁴⁷ And even when the legislators do state their true intentions (for example, in a committee report or floor debate), courts risk being led astray by the statements of an unrepresentative few.⁴⁸ So instead, courts erect a series of hurdles that laws must clear, each of which is designed to detect more objective indicia of arbitrary decision-making.⁴⁹ The first of these is the requirement that, where the law implicates a suspect classification, the government must present a “compelling” or “important” interest in treating people differently.⁵⁰ This requirement serves two purposes. First, it guards against plausible, but pretextual, bases for differential treatment by requiring much more than mere rationality.⁵¹ For as Chaucer reminds us, a clever lawyer can make even the egregious seem rational.⁵² And second, it forces the

entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.”).

⁴⁷ What is more, divination of subjective intent would not prevent judges’ own personal biases from clouding their view of the intent behind a law. This sort of blindness is probably what caused the majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896), to miss what was so obvious to Justice John Marshall Harlan and everyone else: that a law segregating train cars was motivated by animus against black people. See *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting) (“Every one [sic] knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from the coaches occupied by or assigned to white persons.”); GianCarlo Canaparo, *Permissions to Hate: Antiracism and Plessy*, 27 TEX. REV. L. & POL. 97, 105–07 (2023) (collecting historical sources showing that Justice Harlan was right—it was common knowledge that segregationist laws were motivated by anti-black animus).

⁴⁸ See, e.g., *O’Brien*, 391 U.S. at 383–84 (“Inquiries into congressional motives or purposes are a hazardous matter. . . . [w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a ‘wiser’ speech about it.”); see also Lawrence Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 148–53 (2012) (tracing the shift in originalist scholarship away from original intent toward original meaning).

⁴⁹ In the First Amendment context, this system of using objective indicia to smoke out subjective animus has been well-explored. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

⁵⁰ See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications . . . are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”).

⁵¹ Cf. Kagan, *supra* note 49.

⁵² GEOFFREY CHAUCER, *THE CANTERBURY TALES* 16–17 (Alfred W. Pollard, ed., 1907) (“Al was fee symple to hym in effect . . .”). The editor explains: “The suggestion seems to be (literally) that

lawmaker to identify and defend a set of relevant “resemblance[s] and differences” that may fill the “empty form” of the like-things principle.⁵³

In the race context, the Court has held that two compelling interests may permit the government to draw racial distinctions: remediation and diversity.⁵⁴ As to the first, the government has a compelling interest in remedying the effects of its own past discrimination.⁵⁵ The theory here is that race is not intrinsically a morally salient characteristic, but has been made so by the animus-motivated actions of others.⁵⁶ Put differently, because race has no salience itself, past actions taken on that basis are unjust, and ought, justly, to be corrected.⁵⁷ But the Court wisely limits the reach of this remedial interest.⁵⁸ After all, a poorly crafted remedy might itself violate the like-things principle if it gives to people who have not suffered discrimination or takes from people who have not caused it. Thus, a remedy for past discrimination is permissible only if the government establishes a clear causal chain linking the bad actor to its animus-based action, the animus-based action to the harm it caused, and the harm it caused to the person it injured.⁵⁹ Proof of this causal chain ensures that the remedy is given only to people who share the morally salient characteristic of having suffered discrimination.

As to diversity, colleges had—or perhaps still have, depending on whether one thinks the Court overruled *Grutter* in *Students for Fair Admissions*⁶⁰—a compelling interest in “achieving the educational

the [lawyer], however small the rights which he had acquired over a property, could overcome all restrictions on ownership, his skill enabling him to defeat any attempts to annul the purchase on the ground of fraud.” *Id.* at 16 n.319.

⁵³ See HART, *supra* note 1, at 159.

⁵⁴ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496–97 (1989) (recognizing that the government has a compelling interest in remedying past discrimination provided the past discrimination is not generalized, stems from a specific instance, and that the government was at least a passive participant in it); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (endorsing Justice Powell’s position in *Bakke* that “student body diversity is a compelling state interest”).

⁵⁵ See *Croson*, 488 U.S. at 496–97.

⁵⁶ See *id.* at 499.

⁵⁷ See *id.* at 489–498; see also HART, *supra* note 1, at 165 (“Thus when laws provide compensation where justice demands it, they recognize indirectly the principle ‘Treat like cases alike’ by providing for the restoration, after disturbance, of the moral status quo in which victim and wrongdoer are on a footing of equality and so alike.”).

⁵⁸ *Croson*, 488 U.S. at 499–500.

⁵⁹ See *id.*

⁶⁰ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023). It is not entirely clear whether the Court overruled its holding in *Grutter* that the benefits

benefits of a more a more diverse student body.”⁶¹ This diversity is not “simple ethnic diversity”⁶²; it is Justice Lewis Powell’s “genuine diversity”⁶³ and Justice Anthony Kennedy’s diversity of “many forms.”⁶⁴ It is epistemic, philosophical, cultural, and experiential diversity.⁶⁵ The theory was that schools may select students on the basis of race or ethnicity, because in doing so they select for genuine diversity, which is a morally salient characteristic.⁶⁶ The implicit premise was that race and ethnicity were meaningful proxies for genuine diversity.⁶⁷

If a law serves one of these compelling interests, then the second hurdle that it must clear is the tailoring requirement.⁶⁸ This requires that the chosen distinction have an immediate logical connection to the asserted interest, or a means-end fit.⁶⁹ Tailoring ensures that the distinction is in fact drawn on the morally salient basis claimed, and on that basis alone.⁷⁰ It minimizes the ability of a lawmaker both to violate

of genuine diversity are a compelling interest. One justice said it did not, four Justices said it did, and four were silent. *See id.* at 2224 (Kavanaugh, J., concurring) (arguing that although *Grutter* was not overruled, it had expired by its own terms); *id.* at 2207 (Thomas, J., concurring) (“The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”); *id.* at 2239 (Sotomayor, J., dissenting) (“As Justice Thomas puts it, ‘*Grutter* is, for all intents and purposes, overruled.’”). Regardless, the answer is not relevant to this Article’s purposes. This Article discusses the old case law on racial discrimination in college admissions only to explore the operation of the like-things principle in multiple contexts.

⁶¹ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 307 (2013).

⁶² *Grutter*, 539 U.S. at 324.

⁶³ *Bakke*, 438 U.S. at 315 (1978) (opinion of Powell, J.) (noting that the petitioner’s focus on “solely” ethnic diversity may “hinder rather than further the attainment of genuine diversity”).

⁶⁴ *Fisher*, 579 U.S. at 380 (“[The University] should remain mindful that diversity takes many forms. Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions . . .”).

⁶⁵ *See Grutter*, 539 U.S. at 324–25 (quoting *Bakke*, 438 U.S. at 313, 315) (noting that diversity, in the eyes of the court, encompasses “a far broader array of qualifications and characteristics” that allow students to be “‘trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples”).

⁶⁶ *See id.*

⁶⁷ *See id.* at 324 (quoting *Bakke*, 438 U.S. at 311) (recounting that Justice Powell’s opinion in *Bakke* allowed for the university to use race “to further only one interest: ‘the attainment of a diverse student body’”).

⁶⁸ *Adarand*, 515 U.S. at 227.

⁶⁹ *Crosen*, 488 U.S. at 493 (“The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”).

⁷⁰ *See Adarand*, 515 U.S. at 228 (“The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking.”).

the like-things principle intentionally—that is, to act pretextually—and to violate the like-things principle accidentally by drawing an imprecise distinction that either treats different people alike or like people differently.

An example makes the importance of tailoring concrete. In *Croson*, the City of Richmond’s race-based preference purported to remedy past racial discrimination.⁷¹ A remedial preference, the Court held, is a just reason to draw a distinction between groups of people.⁷² But the distinction was imprecise; it gave the preference to Aleuts who did not suffer discrimination.⁷³ Thus, it violated the like-things principle by treating different people alike. On the other hand, whites, who were not discriminated against, were excluded from the benefits given to Aleuts who, like whites, were not discriminated against.⁷⁴ Like things were treated differently.⁷⁵

The discussion of tailoring brings this Article to the perennial legislative problem of over- and under-inclusion. When a law’s distinction could be redrawn to omit groups that do not share the morally salient characteristic, then the law is overinclusive; it treats different things alike. When a law’s distinction could be redrawn to include groups that do share the morally salient characteristic, then the law is underinclusive; it treats like things differently. To vindicate the like-things principle, equal protection jurisprudence treats these errors as proof of arbitrariness or animus and, thus, invalidates laws that make them.⁷⁶

⁷¹ *Croson*, 488 U.S. at 478.

⁷² *Id.* at 504 (noting that “States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination . . .”).

⁷³ *Id.* at 506.

⁷⁴ *Id.* at 515–16 (“The class of persons benefitted by the ordinance is not . . . limited to victims of . . . discrimination – it encompasses persons who have never been in business in Richmond as well as minority contractors who may have been guilty of discriminating against members of other minority groups.”).

⁷⁵ Again, what determines likeness for the purpose of equal protection jurisprudence is the law’s stated purpose. Yes, whites and Aleuts are different in that they have different skin colors and come from different parts of the world, but those are not relevant differences when the law’s purpose is to remedy discrimination.

⁷⁶ To say that a court “invalidates” laws is to step carelessly into the ongoing debate about whether the judicial power includes the power to strike down laws or merely to enjoin their enforcement. This Article acknowledges the imprecision of its word choice; it is merely useful and should not be construed as this Article taking a position in that debate. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV.

ANALYSIS

I. TESTING CATEGORIZATION AND DISTINCTION: A COMPELLING SOLUTION

Equal protection jurisprudence is correct to police both over- and under-inclusion. After all, the purpose of that clause (as interpreted⁷⁷) is to uncover violations of the like-things principle.⁷⁸ But if one focuses only on distinctions, as most litigants and courts have, until recently, then the like-things principle remains only partially vindicated. To understand why, one must consider how the law operates.

Law is a function of two separate operations: categorization and distinction. Because law must be generally applicable—not case-by-case, which is impractical, unjust, or both⁷⁹—it must create categories of persons to whom it applies. Categorization involves two steps. First, a law identifies a relevant characteristic, and then it puts people into categories according to whether they possess it. Sometimes there is a perfect fit between the category and the relevant characteristic. For example, a law that restricts the franchise to ‘citizens’ on the grounds that only citizens ought to vote has perfect fit; every member of the category shares the relevant characteristic. But other times, it is hard to determine whether people share the relevant characteristic. For example, in remedying past discrimination, it may be hard to identify

417, 425 (2017); Paul J. Larkin, Jr., GianCarlo Canaparo, *One Ring to Rule Them All: Individual Judgments, Nationwide Injunctions, and Universal Handcuffs*, 96 NOTRE DAME L. REV. REFLECTION 55 (2020); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 924, 959–79 (2020); Samuel Bray, *Response to The Lost History of the “Universal” Injunction*, YALE J. ON REG. NOTICE & COMMENT BLOG (Oct. 6, 2019), <https://www.yalejreg.com/nc/a-response-to-the-lost-history-of-the-universal-injunction-by-samuel-bray/>.

⁷⁷ See sources cited *supra* note 4.

⁷⁸ See cases cited *supra* notes 6 and 9.

⁷⁹ See *supra* text accompanying notes 11–12; see also FULLER, *supra* note 1, at 46 (“The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality. . . . In recent history perhaps the most notable failure to achieve general rules has been that of certain of our regulatory agencies, particularly those charged with allocative functions. . . . The reason for this failure lies, I believe, in the nature of the tasks assigned to these agencies; they are trying to do through adjudicative forms something that does not lend itself to accomplishment through those forms.”); HART, *supra* note 1, at 161 (“[T]o apply a law justly to different cases is simply to take seriously the assertion that what is to be applied in different cases is the same general rule, without prejudice, interest, or caprice.”).

individuals who have suffered that harm.⁸⁰ In those cases, a law creates its categories by generalizing. The law assumes—without truly knowing—that people who fall within the generalization share the relevant characteristic that the law aims at. The assumption is that the generalization is a good proxy for the characteristic.

After creating its categories, the law then draws a distinction between them. That is, having separated people into groups according to a relevant characteristic, it treats the groups differently based on whether they have that characteristic.

Again, *Croson* illustrates how these two operations work. At the categorization stage, the law identified a relevant characteristic: the quality of having suffered discrimination.⁸¹ Then it created generalized racial groups—categories that are themselves generalizations of smaller geographic, cultural, and ethnic groups⁸²—assuming that membership in one of those groups was a good proxy for having suffered discrimination.⁸³ Then, drawing its distinction, the law allocated its

⁸⁰ See, e.g., GianCarlo Canaparo, *The Intellectual Failings of Antiracism* 16 (Heritage Found., Legal Memo. No. 347, 2023), https://www.heritage.org/sites/default/files/2023-12/LM347_0.pdf (listing reasons why “the category ‘black’ is a very poor proxy” for suffering harm from slavery); Debra Satz, *Countering the Wrongs of the Past: The Role of Compensation*, 51 NOMOS 129, 130 (2012) (“Efforts to respond to and repair the wrongs of the past raise both practical and philosophical concerns. Such concerns include not only the questions related to identifying those who are the appropriate recipients of reparation and those who are obligated to bear the costs but also questions about the appropriate goal of programs aimed at countering wrongs . . . and the best means for meeting that goal . . .”); Adrian Vermeule, *Reparations as Rough Justice*, 51 NOMOS 151, 151 (2012) (“On both principled and pragmatic grounds, such compensation is exposed to many familiar objections and misfires in a familiar set of hard cases. . . . Philosophers and others have thoroughly demolished the compensatory rationale for reparations . . .”). For an interesting case study see Richard A. Epstein, *California’s Reparations Overreach*, HOOVER INST.: DEFINING IDEAS (June 22, 2022), <https://www.hoover.org/research/californias-reparations-overreach> (discussing the failure of the California reparations task force to identify people who have suffered a remediable harm).

⁸¹ *Croson*, 488 U.S. at 492. The Court also held that this characteristic was also morally salient. *Id.* (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”).

⁸² See generally BERNSTEIN, *supra* note 7, at xi (“Modern American racial and ethnic classifications do not reflect biology, genetics, or any other objective source. Classifications such as Hispanic, Asian American, and white combine extremely internally diverse groups in terms of appearance, culture, religion, and more under a single, arbitrary heading.”).

⁸³ See *Croson*, 488 U.S. at 488–89 (“Two ‘congressional assumptions’ underlay the MBE program: first, that the effects of past discrimination had impaired the competitive position of minority businesses, and second, that ‘adjustment for the effects of past discrimination’ would assure that at least 10% of the funds from the federal grant program would flow to minority businesses.”)

preference to categories of people it assumed suffered discrimination and denied the preference to categories of people it assumed had not.⁸⁴

When, as in *Croson*, the law draws categories and distinctions, the like-things principle imposes three requirements on it. First, the law must identify a morally salient characteristic. Second, the members of the categories must share that characteristic. Finally, the distinction created by the law separates categories according to that characteristic. The law in *Croson* met the first requirement because remedying discrimination is a just basis for treating people differently.⁸⁵ But it failed the third requirement because it placed one of the categories, Aleuts, on one side of the distinction, although there was no proof that its members belonged there.⁸⁶ What is more, the law would have treated Aleuts as part of the discriminated class, even if there was proof to the contrary.⁸⁷ Thus, the distinction did not obey the like-things principle.

But as for the categorizations, the Court did not consider the second requirement, whether the members of the categories shared the morally salient characteristic. It did not ask, for example, whether all persons categorized as “black” shared the quality of having suffered discrimination. It asked why a recently arrived Aleut should receive the preference, but it did not ask why, for example, a recently arrived black Nigerian immigrant should too. The Nigerian immigrant would be black but would not have suffered past discrimination in Richmond and perhaps not present discrimination either. Thus, he would not share the morally salient characteristic at which the law aimed. To fully vindicate

⁸⁴ *Id.* at 479 (“The HRC verified that the MBE’s named in the commitment form were in fact minority owned, and then either approved the commitment form or made a recommendation regarding the prime contractor’s request for a partial or complete waiver of the 30% set-aside.”).

⁸⁵ See *Croson*, 488 U.S. at 497–98 (noting that the government has a “compelling interest in favoring one race over another” when findings of past discrimination are available). Today’s racially charged political climate might, to some readers, give this line more meaning than it has. It amounts to nothing more than the statement that remedying an unjust harm is a reason to treat the victim differently than people who have not suffered that harm. It is, in short, just a specific application of the maxim “where there is a right there is a remedy” (*ubi jus ibi remedium*). And, of course, it is cabined by the maxims “an action is not given to one who is not injured” (*actio non datur non damnificato*) and “the immediate, not the remote cause is to be considered” (*causa proxima, non remota spectatur*), which try to ensure that the like-things principle determines who does and does not receive a remedy. See *supra* text accompanying notes 54–67; see also *Adarand*, 515 U.S. at 239 (opinion of Scalia, J.) (“Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.”).

⁸⁶ *Croson*, 488 U.S. at 506.

⁸⁷ *Id.*

the like-things principle, the Court should have asked whether the individuals grouped together by the law's categories shared the relevant characteristic.⁸⁸

Tailoring provides another way to look at the problem. Tailoring examines the distinction drawn between categories to see whether it separates those categories according to the relevant characteristic.⁸⁹ In other words, tailoring looks at whether groups on the same side of the distinction are alike, and whether groups on opposite sides are different. Thus, the Court in *Croson*, using narrow tailoring because the categories were racial, asked whether the groups to whom the law gave a preference shared the characteristic of having suffered discrimination.⁹⁰ They did not.⁹¹ Yet the Court did not scrutinize the groups' internal coherence.⁹²

To see why an exclusive focus on distinctions can lead to violations of the like-things principle, consider the following hypothetical based on *Croson*. In this hypothetical, Richmond has evidence of discrimination against black individuals in the contracting industry and, on that basis, gives a preference only to black contractors. The law targets a morally salient characteristic and separates the categories accordingly. But assume, too, that Richmond's black contractors include both long-time residents who have faced discrimination and recent immigrants who have not. These two groups are not "alike" in the relevant way; they have not both suffered discrimination adversely affecting their contracting businesses. Thus, some people may be awarded better or worse treatment than others without justification. The principle has

⁸⁸ See FULLER, *supra* note 1, at 160–62 (observing that laws making legal rights dependent on racial categories that are neither uniform nor scientific violate "the demands of the internal morality of law").

⁸⁹ See *supra* text accompanying notes 69–70.

⁹⁰ *Croson*, 488 U.S. at 500, 506–07.

⁹¹ *Id.* at 506–07.

⁹² Somewhat confusingly, however, the language that the Court uses in equal protection cases might suggest that it does scrutinize categories. The Court typically refers to "classifications," which sounds like a synonym of "categories," but in practice what it does is examine distinctions. See, e.g., *Adarand*, 515 U.S. at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest."); *Croson*, 488 U.S. at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."); *Plyler*, 457 U.S. at 216 ("A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived . . ."). Again, *Croson*, is a good example, but any of the race cases proves the point. See *supra* text accompanying note 72–76 (explaining how *Croson* did not scrutinize racial categories themselves, but distinctions drawn between them).

been violated, but a lawsuit that targets only distinction and not the categories themselves will not likely vindicate the principle.⁹³

The hypothetical shows how a focus on distinctions alone fails to fully defend equal protection's animating principle: it takes categories as they come, assuming without reflection that they are internally coherent. In short, it applies the like-things principle to one of law's two operations, distinction, but not to the other, categorization. Thus, in some cases, the doctrine will fail to do the job it is meant to do. Those will be cases in which a law's categorizations are based on generalizations that the legislature believes are related to the relevant characteristic. Generalizations are proxies for the relevant morally salient characteristic, and proxies are, at best, imperfect fits. When categories are determined by proxies alone, they will group together individuals who are not alike.

Racial and ethnic categories are prototypical cases because they are always proxies, and usually poor ones. Professor David Bernstein's research into the origins and contours of America's racial and ethnic categories reveals just how poor they are.⁹⁴ He is not alone in concluding that America's categories are arbitrary generalizations.⁹⁵ America's categories "combine extremely internally diverse groups

⁹³ See generally *Croson*, 488 U.S. at 506–07, 511.

⁹⁴ See generally BERNSTEIN, *supra* note 7, at xi–xiv.

⁹⁵ See, e.g., *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2168 (2023) ("Indeed, the use of these opaque racial categories undermines, instead of promotes, respondents' goals."); *id.* at 2210 (Gorsuch, J., concurring) ("These classifications rest on incoherent stereotypes."); *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198, 2230 (2016) (Alito, J., dissenting) ("UT's crude classification system is ill suited for the more integrated country that we are rapidly becoming."); *Vitolo v. Guzman*, 999 F.3d 353, 364 (6th Cir. 2021) ("This scattershot approach does not conform to the narrow tailoring strict scrutiny requires."); *Concrete Works of Colo., Inc. v. City of Denver*, 86 F. Supp. 2d 1042, 1069 (D. Colo. 2000) ("[T]here is no agreed working definition of Hispanic persons since they may be of different races and may have very different cultural, religious and geographic origins."), *rev'd*, 321 F.3d 950 (10th Cir. 2003); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 8 (2d ed. 2012) ("Not objective, inherent, or fixed, [racial categories] correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient."); PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 164 (2003) ("Defining the relevant community—that which will be used in making the proportionality assessment on which a legal obligation will directly turn—almost always entails highly controversial judgments, if not arbitrary empirical and normative ones."); Sean A. Pager, *Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 303 (2007) ("Examined more closely, however, the categories of the quadrangle appear far more anomalous and arbitrary."); Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7, 16 (1997) ("From birth to death, current systems of racial classification are arbitrary and inconsistent.").

in terms of appearance, culture, religion, and more under a single, arbitrary heading.”⁹⁶ They arose not from any attempt to group like people together, but from “a combination of amateur anthropology and sociology, interest group lobbying, incompetence, inertia, lack of public oversight, and happenstance.”⁹⁷ They group Iranians with Norwegians, Indians with Japanese, descendants of American slaves with black African immigrants, and anyone whose ancestors once lived in a Spanish colony with anyone else who shares a similar family history.⁹⁸ Some people do not fit in any of the categories.⁹⁹ In sum, although America’s categories seem descriptive when unexamined, they reveal themselves, when scrutinized, to be arbitrary.¹⁰⁰

In the context of remedying past discrimination, the arbitrariness of America’s racial categories leads the categories to bear, at best, rough semblance to the morally salient characteristic they are a proxy for. A semblance made all the rougher through the passage of time

⁹⁶ BERNSTEIN, *supra* note 7, at xi.

⁹⁷ *Id.*

⁹⁸ See generally *id.* at 16–20 (explaining how America’s racial categories group together a broad array of people and groups).

⁹⁹ See BERNSTEIN, *supra* note 7, at ix (“There is no mestizo racial classification in the United States); *id.* at 20 (“There is also no category for indigenous peoples like Australian Aborigines and New Zealand’s Māori, and an ‘ambiguous or confused’ status for people from countries such as Brazil, Madagascar, and Cape Verde.”).

¹⁰⁰ See, e.g., BERNSTEIN, *supra* note 7, at xi; MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 122 (3d ed. 2015) (noting that “racial categories are rife with inconsistencies and lack parallel construction”); SCHUCK, *supra* note 95, at 164 (describing the process of defining racial categories as involving “almost comically arbitrary judgments.”).

The arbitrariness of America’s chosen racial categories is well-trodden ground in the field of critical race theory. See, e.g., DELGADO & STEFANCIC, *supra* note 95, at 8–9 (“A third theme of critical race theory, the ‘social construction’ thesis, holds that race and races are products of social thought and relations. . . . [Physical commonalities] have little or nothing to do with distinctly human, higher-order traits, such as personality, intelligence, and moral behavior.”); Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES (Sept. 6, 2016) (“Race is not biological. It is a social construct. There is no gene or cluster of genes common to all blacks or all whites. Were race ‘real’ in the genetic sense, racial classifications for individuals would remain constant across boundaries. Yet, a person who could be categorized as black in the United States might be considered white in Brazil or colored in South Africa.”); Ta-Nehisi Coates, *What We Mean When We Say ‘Race Is a Social Construct’*, THE ATLANTIC (May 15, 2013) (“Race clearly has a biological element—because we have awarded it one. Race is no more dependent on skin color today than it was on ‘Frankishness’ in [Ralph Waldo] Emerson’s day. Over history, race has taken geography, language, and vague impressions as its basis.”). And yet, to the best of the authors’ knowledge, critical race theory scholars have not explored the implications of this observation for category-based equal-protection challenges.

and the increasing prevalence of multiracial individuals.¹⁰¹ Further, when the relevant morally salient characteristic is the possession of those qualities that contribute to genuine diversity, they usually fail to be proxies at all.¹⁰² Thus, when a law uses these categories to draw distinctions between people, there is a high risk that it violates the like-things principle.

Historically, litigants and courts have been insensitive to the risk of overbroad categories, although there are exceptions. In one case, which predates the tiers of scrutiny, the Supreme Court seemed to grasp that generalized categories can violate the like-things rule, but its grasp was weak and slipped almost immediately. In *Ozawa v. United States*, the Court had to decide whether a Japanese person was a “white person” within the meaning of a law restricting naturalization to members of that category.¹⁰³ A test based on skin color, the Court reasoned, would be “impracticable” because it “would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation.”¹⁰⁴ So the Court reached for what “scientific authorities” assured it was a more objective criterion and held that “white persons” meant “the Caucasian race.”¹⁰⁵ The next year, however, in *United States v. Thind*, the Court encountered a man of “high-caste Hindu stock” who argued that he was eligible for naturalization because scientific authorities classified such persons as Caucasian.¹⁰⁶

¹⁰¹ See *Students for Fair Admissions*, 143 S. Ct. at 2211 (Gorsuch, J., concurring) (“If anything, attempts to divide us all up into a handful of groups have become only more incoherent with time. American families have become increasingly multicultural, a fact that has led to unseemly disputes about whether someone is *really* a member of a certain racial or ethnic group”); see, e.g., BERNSTEIN, *supra* note 7, at xii, 110–16. On the increasing percentage of the population with multiracial heritage, see Nicholas Jones, Rachel Marks, Roberto Ramirez, & Merarys Ríos-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html>; Kim Parker, Juliana Menasce Horowitz, Rich Morin & Mark Hugo Lopez, *Multiracial in America: Proud, Diverse and Growing in Numbers*, PEW RSCH. CTR. (June 11, 2015), <https://www.pewresearch.org/social-trends/2015/06/11/multiracial-in-america/>.

¹⁰² See BERNSTEIN, *supra* note 7, at 179–181; see also generally Brief of Professor David E. Bernstein as Amicus Curiae in Support of Petitioner at 5, *Students for Fair Admissions*, 143 S. Ct. 2141 (2023) (No. 20-1199) (arguing the racial categories used in college admissions are “arbitrary and irrational in the context of achieving diversity in higher education”).

¹⁰³ See *Ozawa v. United States*, 260 U.S. 178, 196–197 (1922).

¹⁰⁴ *Id.* at 197.

¹⁰⁵ See *id.* at 197–98.

¹⁰⁶ See *United States v. Thind*, 261 U.S. 204, 210 (1923).

His argument forced the Court to admit that “the Caucasian race” was not as objective a category as it had thought in *Ozawa*.¹⁰⁷ The phrase was “by no means clear” and using it “in its scientific sense as an equivalent for the words of the statute, other considerations aside, would simply mean the substitution of one perplexity for another.”¹⁰⁸ It concluded that “white person” meant, simply, “the type of man whom [the drafters] knew as white.”¹⁰⁹ Finding itself thus “entangled” between *Ozawa* and *Thind*, the Court did not attempt to cut a path to the like-things principle, but chose instead to make itself comfortable in its briar patch.¹¹⁰

In the decades that followed, a few justices noticed the problem. Chief Justice Warren Burger, dissenting in *United Jewish Organizations v. Carey*, a racial redistricting case, observed that “[t]he assumption that ‘whites’ and ‘nonwhites’ in the County form homogenous entities for voting purposes is entirely without foundation.”¹¹¹ The former category “consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations.”¹¹² The latter included black people and Puerto Ricans who “expressly disavowed any identity of interest” with black people.¹¹³ Some years later, Justice Potter Stewart, dissenting in *Fullilove v. Kutznick*, wrote, “[i]n today’s society, it constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination.”¹¹⁴ Some years after *Fullilove*, Justice Samuel Alito, dissenting in the second *Fisher v. University of Texas at Austin* case, recognized that the university’s racial categories were “overly simplistic,” and that both its favored and disfavored groups included people with traits that contribute to genuine diversity.¹¹⁵

It was not until *Students for Fair Admissions v. Harvard*, that a majority of the Court understood the poor fit between America’s racial

¹⁰⁷ See *id.* at 208–09.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 213.

¹¹⁰ See FULLER, *supra* note 1, at 161 (describing these two cases as getting the Court “entangled in its own interpretations” of early U.S. naturalization laws).

¹¹¹ *United Jewish Orgs. v. Carey*, 430 U.S. 144, 185 (1977) (Burger, C.J., dissenting).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Fullilove v. Kutznick*, 448 U.S. 448, 530 n.12 (Stewart, J., dissenting).

¹¹⁵ See *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 413–14 (2016) (Alito, J., dissenting).

categories and the characteristics at which race-based laws aim.¹¹⁶ There, Harvard College and the University of North Carolina were sued for using race in their admissions process.¹¹⁷ The schools argued that they needed to give preference to members of certain racial groups to produce the sort of “genuine diversity” that Justice Powell identified in *Bakke*.¹¹⁸ But for the first time, a majority of the Court seriously considered whether generalized racial groups were meaningful proxies for that characteristic.¹¹⁹ It concluded that they were not.¹²⁰ The schools’ racial categories suffered from several defects. First, some were overinclusive; the category “Asian” grouped together South and East Asians as if every applicant from that part of the world is fungible.¹²¹ Second, some were underinclusive; applicants from Middle Eastern countries did not fit in any of them.¹²² Finally, some were arbitrary; the categories “Hispanic” and “Latino” had no clear or static definitions.¹²³ The Court, because of the reductive and arbitrary way that the schools defined their racial categories, concluded that there was no fit between “the means respondents employ and the goals they seek.”¹²⁴ Thus, for the first time, a majority of the Court awoke to the poor means-end fit between the categories used and the characteristic identified, and recognized that, without a proper fit, use of these categories may violate equal protection. In their concurring opinions, Justices Clarence Thomas and Neil Gorsuch expanded this criticism beyond the context of diversity, implicitly raising the question whether America’s racial categories can ever be meaningful proxies for any morally salient characteristic.¹²⁵

¹¹⁶ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2167–68 (2023) (discussing the poor fit between the categories used and the ends to which the universities put them).

¹¹⁷ *Id.* at 2167.

¹¹⁸ *See id.* at 2167–68; *see also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978) (opinion of Powell, J.).

¹¹⁹ *See Students for Fair Admissions*, 143 S. Ct. at 2167–68.

¹²⁰ *Id.* at 2167 (“[R]espondents’ admissions programs fail to articulate a meaningful connection between the means they employ and the goals they pursue.”).

¹²¹ *Id.*

¹²² *Id.* at 2167–68.

¹²³ *Id.* at 2167.

¹²⁴ *Id.* at 2168.

¹²⁵ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2201–02 (2023) (Thomas, J., concurring) (“[R]ace is a social construct . . . [i]n fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow

These justices rightly recognized that generalized categories may cause a law to violate the like-things principle. To fully vindicate the principle, therefore, courts must scrutinize categories created under the challenged law. But how should they do that? Only a few recent cases have aimed at that problem, and the courts have been unsure of how to decide them. Using those decisions as case studies, the next Section explains how the doctrine applies to such challenges.

II. APPLYING THE DOCTRINE TO CATEGORIES

The discussion of categories raises three questions. How can a court determine which generalizations are permissible, and which are not? Assuming it can be done, can it be done in a judicially administrable manner? And what level of scrutiny should apply to different sorts of generalizations?¹²⁶

These questions seem to require a troubling balancing act. On the one hand, generalizations may violate the like-things principle and, thus, create miscarriages of justice. But on the other, stringent judicial scrutiny of all generalizations might seriously restrict lawmaking. After all, laws must categorize, and sometimes they must generalize.¹²⁷ If every law had to draw distinctions on a mix of specific factors, rather than neat generalities, then many laws would never pass scrutiny. Alternatively, scrutiny could devolve into the sort of multi-factor balancing test decried for its complexity, unpredictability, and unfairness.¹²⁸ How then are courts to strike an appropriate balance?

conclusively determine a person's ideology, beliefs, and abilities."); *id.* at 2210–11 (Gorsuch, J., concurring) (quoting 43 Fed. Reg. 19269) ("Recognizing the limitations of their work, federal regulators cautioned that their classifications 'should not be interpreted as being scientific or anthropological in nature, *nor should they be viewed as determinants of eligibility for participation in any Federal program.*'"). At least one Circuit Judge, Amul Thapar, has also noticed the problem. See *Vitolo v. Guzman*, 999 F.3d 353, 363–64 (2021) (objecting to a racial preference, in part, because its "Asian Pacific American" category drew an arbitrary line between Indians and Afghans).

¹²⁶ Some argue that the tiers of scrutiny should be abolished. See, e.g., Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 73, 73 (2019) (arguing that the Supreme Court ought to abandon the tiers of scrutiny because "they have no basis in the text or original meaning of the Constitution" and "do not withstand critical analysis even on their own terms"). That debate is outside this Article's scope. The tiers have not been abolished, so the Article proceeds with that understanding.

¹²⁷ See *supra* text accompanying notes 29–34.

¹²⁸ See, e.g., *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 25 (2022) ("But reliance on history to inform the meaning of constitutional text . . . is, in our view, more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the

If courts were starting from scratch, it would be hard to strike this balance, but they are not. The questions raised about generalizations apply to distinctions too, and in that context, the Court has struck a balance by applying different levels of scrutiny to different sorts of distinctions.¹²⁹ That balance might not be well struck—the tiers of scrutiny have their critics¹³⁰—but it is enough for present purposes that it has been struck. Thus, the generalizations used to create categories must receive the same level of scrutiny that distinctions receive, which turns on the nature of the criteria used to create them. If a generalization is based on race, ethnicity, or national origin, it must receive strict scrutiny as would a distinction drawn on that basis. If based on sex, it must receive intermediate scrutiny. If class, rational basis.

Consider the category “Asian.” Although most people think of it as a racial category, federal law defines it according to national origin.¹³¹ The category includes everyone from nations between (and including) Pakistan and Japan, and some Pacific Island nations too.¹³² National origin—not genetics or ethnicity—determines whether someone is Asian under federal law.¹³³ A distinction drawn according to national

costs and benefits of firearms restrictions,’ especially given their ‘lack of expertise’ in the field.”) (quoting *McDonald v. Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring)); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 136 (2014) (“Finally, experience has shown that the *Conte Bros.* approach, like other open-ended balancing tests, can yield unpredictable and at times arbitrary results.”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (“For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”).

¹²⁹ See *supra* text accompanying notes 23–28 (describing how the tiers of scrutiny search for objective indicia of arbitrariness or animus and are raised or lowered according to the risk of improper motive).

¹³⁰ See, e.g., Alicea & Ohlendorf, *supra* note 126, at 79.

¹³¹ See Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,269 (May 4, 1978) (defining “Asian or Pacific Islander” as “[a] person having origins in any of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands”). Pacific Islander was later separated into its own category because of successful lobbying by people who saw disadvantages in being included in the large and diverse category Asian. BERNSTEIN, *supra* note 7, at 23–24.

¹³² See BERNSTEIN, *supra* note 7, at 19–20, 23.

¹³³ *Id.* As further proof of this, consider that the border between Pakistan and Afghanistan separates people who belong to the same racial and ethnic groups. They are of the same genetic and ethnic origin, but the former are Asian and the latter white based solely on their nation of origin. See, e.g., *Pashtun*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Pashtun> (last visited April 12, 2023) (showing that the Pashtun have long inhabited the land now divided by the Pakistan-Afghanistan border).

origin would receive strict scrutiny.¹³⁴ So, a category drawn on that basis would too. Another example: although “white” is defined by national origin, “black” is defined by race in the genetic sense (“a person having origins in any of the black racial groups of Africa”).¹³⁵ Distinctions based on race receive strict scrutiny, and so must categories.

The complications with the Asian category raise further questions about the “Hispanic” and “American Indian” categories. Both categories are, in some contexts, defined by cultural heritage regardless of genetics, ethnicity, or national origin.¹³⁶ Thus, a person of Japanese ancestry who was born and raised in a Spanish-speaking South American country would be Hispanic, although the reverse would not be true.¹³⁷ The Court has not explained what level of scrutiny applies to cultural distinctions.¹³⁸ But given that culture is often perceived as intertwined with race, ethnicity, national origin, or religion, all which have been targets of animus, cultural distinctions might receive strict scrutiny.¹³⁹

Another question about the American Indian category is whether and when it is a “political” classification. In *Morton v. Mancari*, the Supreme Court considered a challenge to part of the Indian Reorganization Act of 1934, which created an employment preference for Indians at the Bureau of Indian Affairs.¹⁴⁰ The category “Indian” was defined by race or tribal membership.¹⁴¹ Despite the racial component, the Court held that the Act’s discrimination was not racial, but rather “political” and, thus, entitled to rational basis review.¹⁴² Even so, *Mancari* limited its holding to the Bureau of Indian Affairs, which, in its view, needed the preference so it could be “more responsive to the

¹³⁴ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986).

¹³⁵ Directive No. 15, Race and Ethnic Standards, 43 Fed. Reg. at 19269.

¹³⁶ *Id.*

¹³⁷ See BERNSTEIN, *supra* note 7, at 19.

¹³⁸ For what it is worth, the Department of Justice takes the position that participation “in certain customs associated with a national origin group” is protected under national-origin discrimination. See *Federal Protections Against National Origin Discrimination*, DEPT. OF JUSTICE (Oct. 2000), <https://www.justice.gov/crt/federal-protections-against-national-origin-discrimination-1>.

¹³⁹ *Cf. id.*

¹⁴⁰ *Morton v. Mancari*, 417 U.S. 535, 537 (1974). Note that this case considered equal protection through the lens of the Fifth Amendment Due Process Clause, not the Fourteenth Amendment Equal Protection Clause. See *id.*

¹⁴¹ 25 U.S.C. § 5129 (1934) (“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction.”).

¹⁴² *Mancari*, 417 U.S. at 553 n.24, 554–55.

needs of its constituent groups.”¹⁴³ But it expressly did not apply to any other contexts.¹⁴⁴

Later, in *Rice v. Cayetano*, the Court declined to extend *Mancari* and cast doubt on that decision by characterizing a similar definition of native Hawaiians as a “racial classification.”¹⁴⁵ Regardless, if “American Indian” is a political classification, it should be given rational basis review, and if it is a racial classification, it should receive strict scrutiny. Again, a generalized classification should receive whatever level of scrutiny the basis for the generalization—national origin, sex, legitimacy, alienage, and so on—would receive if it was used to draw a distinction. To hold otherwise is to enforce the like things principle only for the second of law’s two operations, distinction, but not the first, categorization.

Several cases show what this error looks like. *Jana-Rock Construction v. New York Department of Economic Development* involved a challenge to a category.¹⁴⁶ There, the state gave a remedial preference to businesses owned by “Hispanic” people, defined to include people of Central and South American origin and to exclude those of Spanish and Portuguese origin.¹⁴⁷ The plaintiff was of Spanish origin.¹⁴⁸ He had no problem with the preference itself, conceding that it passed strict scrutiny, but challenged the definition of “Hispanic” because Spaniards too had been discriminated against.¹⁴⁹ He argued that the category was subject to strict scrutiny, and that it failed narrow tailoring because it was underinclusive.¹⁵⁰ He argued that because Hispanic people of Spanish origin also suffered discrimination, New York had to justify its choice to exclude them from the category.¹⁵¹

The Second Circuit was immediately confused. It wondered whether the plaintiff’s challenge was a narrow-tailoring argument or

¹⁴³ *Id.* at 554.

¹⁴⁴ *Id.* (“Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity . . .”).

¹⁴⁵ *Rice v. Cayetano*, 528 U.S. 495, 522 (2000).

¹⁴⁶ *See Jana-Rock Constr., Inc. v. New York Dep’t of Econ. Dev.*, 438 F.3d 195, 200 (2d Cir. 2006).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 199.

¹⁴⁹ *See id.* at 205.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

some other sort of challenge.¹⁵² Either way, the plaintiff's argument failed.¹⁵³ If it was a narrow-tailoring argument, the court reasoned, it failed because requiring the state to justify its categories would be "incompatible" with *Croson's* rejection of an overinclusive preference.¹⁵⁴ The court's reasoning is hard to follow because it did not recognize that *Croson* involved a distinction and *Jana-Rock* involved a categorization.¹⁵⁵ But the court seems to have thought that scrutinizing categories for underinclusiveness and distinctions for overinclusiveness would, as a matter of policy, make it too hard for lawmakers to create racial preferences.¹⁵⁶ So the court held that the state had discretion to define categories how it wanted.¹⁵⁷ In the alternative, the court interpreted the plaintiff's claim as "an argument that we should use strict scrutiny to evaluate the correctness of New York's chosen definition of 'Hispanic.'"¹⁵⁸ The court acknowledged that a "decision to use classifications based on race"—that is, race-based *distinctions*—could pass strict scrutiny without "reliev[ing] those *categories* of their possible arbitrariness and unreliability."¹⁵⁹ Yet it refused to apply strict scrutiny to categories because "[t]he purpose of [strict scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct."¹⁶⁰ The court's claim could appear correct only if one forgets that strict scrutiny is meant to vivify the "general rule that States must treat like cases alike but may treat unlike cases accordingly."¹⁶¹ It is passing strange to settle for a doctrine that gives its principle only half life, but that is what the Second Circuit did. The Circuit could have achieved full life for the principle if it had applied strict scrutiny to the boundaries of

¹⁵² See *Jana-Rock Constr., Inc. v. New York Dep't of Econ. Dev.*, 438 F.3d 195, 206 (2d Cir. 2006).

¹⁵³ See *id.* at 206, 209–10.

¹⁵⁴ See *id.* at 207.

¹⁵⁵ See *id.* at 200.

¹⁵⁶ See *id.* at 207.

¹⁵⁷ *Id.* at 206 ("We conclude that the narrow-tailoring requirement allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating conclusively that no other groups merit inclusion."); see also Rivera, *supra* note 7, at 941 (describing the Second Circuit's approach as "turn[ing] on its head equal protection doctrine").

¹⁵⁸ *Jana-Rock Construction*, 438 F.3d at 209.

¹⁵⁹ *Id.* at 210 (emphasis added).

¹⁶⁰ *Id.*

¹⁶¹ *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

the state's racial categories. Thus, the court should have asked whether the members of the category share the relevant and morally salient characteristic.

Students for Fair Admissions seems impliedly to reject the Second Circuit's decision not to scrutinize categories for underinclusiveness. Although that case involved a challenge to distinctions—the preference given to different racial groups—the Court found fault with the universities' racial and ethnic categories because they were underinclusive, overinclusive, and arbitrary.¹⁶² The like-things principle at the heart of the equal protection doctrine required the Second Circuit to scrutinize categories, and after *Students for Fair Admissions*, that requirement is even clearer.¹⁶³

In another case involving a challenge to the categories themselves, the Eleventh Circuit, like the Second, refused to apply strict scrutiny to a “Hispanic” category.¹⁶⁴ In *Peightal v. Metropolitan Dade County*, the plaintiff argued that a preference for “Hispanics” was underinclusive because it included Brazilians of Spanish origin but excluded Brazilians of Portuguese origin.¹⁶⁵ In that court's view, the category was based on stereotypes, but it was powerless to address it.¹⁶⁶ The Court noted that redrawing arbitrary classifications could solve the problem, but it thought that it could not do so “without resort[ing] to the same stereotypes which application of the definition seeks to eradicate.”¹⁶⁷ That conclusion reveals a wholesale failure to appreciate the like-things

¹⁶² See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2167–68 (2023) (“For starters, the categories are themselves imprecise in many ways. Some of them are plainly overbroad.... And still other categories are underinclusive.”).

¹⁶³ See David E. Bernstein, *Students for Fair Admissions and the End of Racial Classification as We Know It*, 2023 CATO SUP. CT. REV. 143, 163 (2023) (arguing that the Court's scrutiny of classifications in *Students for Fair Admissions* “provides an opportunity for litigants to challenge the classifications used to provide racial references, inter alia, in government contracting, in biomedical research by government dictate, and in laws that classify people by American Indian status and that rely on factors other than tribal membership”).

¹⁶⁴ See *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1560–61 (11th Cir. 1994).

¹⁶⁵ *Id.* at 1561.

¹⁶⁶ *Id.* at 1561 n.25 (“The most troubling facet of defining a group who have been the victims of prior discrimination is the derivation of the definition itself. As noted by the Tenth Circuit: ‘Prejudice is as irrational as is the selection of groups against whom it is directed. It is thus a matter of practice or attitude in the community, it is usage or image based on all the mistaken concepts of “race.”’ . . . Because of the irrationality of the definitional process underlying social stereotypes, it is equally vexatious to develop a definition, or to criticize one that has been developed, without resort to the same stereotypes which application of the definition seeks to eradicate.”).

¹⁶⁷ *Id.*

principle and equal protection doctrine's efforts to vindicate it. The court failed to understand that the principle does not permit categories and distinctions to be based on stereotypes. Both must be based on morally salient differences. The court also failed to understand that if a category is based on a stereotype, the court need not rely on stereotypes itself to criticize it. Courts must require the government to identify the relevant characteristic and to prove that the members of the categories possess it. This exercise is a matter of evidence, not stereotypes.

To do equal protection analysis properly requires a court to do several things. First, after scrutinizing a law's distinction, the court must turn its attention to the categories that will be distinguished. It must then look at the nature of the generalization used to create the categories, and if it is race, ethnicity, national origin, or, perhaps, culture, then it must consider whether the category is narrowly tailored. Thus, in *Jana-Rock*, after forcing the government to identify a relevant and morally salient characteristic for creating race-based categories,¹⁶⁸ the court then should have forced the government to prove that Spaniards did not share that characteristic with other Hispanics. One could call this "narrow tailoring," but it may be better not to describe it as such. As the *Jana-Rock* court's confusion shows, "narrow tailoring" does not fit comfortably in the context of categories.¹⁶⁹ The word "narrow" coupled with courts' typical focus on overinclusive distinctions convinced that court not to look for underinclusive categories.¹⁷⁰ But categories can fail to treat like things alike in both directions, as the Supreme Court observed in *Students for Fair Admissions*.¹⁷¹ So in the context of categorizations, we might reframe narrow tailoring as a more straightforward inquiry: do the people grouped together within a category share the relevant morally salient characteristic?¹⁷² This would have required the government in *Jana-Rock* to prove that Spaniards

¹⁶⁸ See *Jana-Rock Constr., Inc. v. New York State Dept. of Econ. Dev.*, 438 F.3d 195, 209 (2006) (noting that the government was enjoined from implementing Article 15-A until adequate evidence supporting the use of a race-based remedy was supplied).

¹⁶⁹ See *Jana-Rock*, 438 F.3d at 206, n.5.

¹⁷⁰ See, e.g., *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (rejecting a racial preference for including a group that did not suffer discrimination).

¹⁷¹ See *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2167–68 (2023) (criticizing the schools' racial and ethnic categories as both over- and underinclusive).

¹⁷² In fairness, this reframing of narrow tailoring could also be applied to distinctions because they too can err in both directions. Doing so would likely work an improvement over the current approach by increasing the fit between the judicial inquiry and the principle it attempts to vindicate.

had not suffered discrimination. Alternatively, in the case of a claim that a category is overbroad, the government would have to prove that an included subgroup has suffered discrimination. In this way, equal protection jurisprudence will engage with both of law's functions and will better vindicate the like-things principle.

One district court has engaged with both categorization and distinction. In *Ultima Services v. Department of Agriculture*, the court heard a challenge to the way that the U.S. Department of Agriculture and the Small Business Administration administer the Small Business Act's racial preferences.¹⁷³ The Act permits agencies to offer preferential treatment to businesses bidding on government contracts if the businesses are at least 51% owned by a "socially disadvantaged individual."¹⁷⁴ These individuals are those who "have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."¹⁷⁵ Rather than give the preference to individuals who have actually suffered prejudice, the two defendants created a presumption—rebuttable in theory, but likely not in fact¹⁷⁶—that any person from certain racial and ethnic groups qualifies for the preference.¹⁷⁷ The groups that get the preference are "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, 'and members of other groups designated from time to time by [the Small Business Administration].'"¹⁷⁸ The question before the court on summary judgment was whether the rebuttable presumption violated the equal protection rights of a white person who lost contracts because she did not qualify for the preference.¹⁷⁹

The court began its analysis with the familiar compelling-interest and narrow tailoring analysis which, as is typical, focused on the distinction drawn between categories rather than the categories

¹⁷³ See *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-CV-00041-DCLC-CRW, 2023 WL 4633481, at *6–7 (E.D. Tenn. July 19, 2023).

¹⁷⁴ See *id.* at *9–10 (citing 15 U.S.C. § 637(a)(1)(B)).

¹⁷⁵ *Id.* at *10 (citing 15 U.S.C. § 637(a)(5)).

¹⁷⁶ *Id.* at *13 (referencing an employee of the Small Business Administration who said "there's no process for a third party to question someone's social disadvantage as part of the application process").

¹⁷⁷ *Id.* at *12–13 (citing 13 C.F.R. § 124.103(b)(1)).

¹⁷⁸ *Id.* at *12 (citing 13 C.F.R. § 124.103(b)(2)).

¹⁷⁹ *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-CV-00041-DCLC-CRW, 2023 WL 4633481, at *1 (E.D. Tenn. July 19, 2023).

themselves.¹⁸⁰ As the Supreme Court did in *Croson*, the district court ruled that the defendants lacked a compelling interest in remedying past discrimination because they had no evidence linking general statistical disparities to their own intentional discrimination.¹⁸¹ But unlike the Supreme Court in *Croson*, the district court here considered the contours of the categories themselves.¹⁸² Whereas the Supreme Court's analysis stopped after it asked why a black resident of Richmond should have to share the preference with an Aleut resident,¹⁸³ the district court continued and asked whether some people that the defendants classified as "white" shared the morally salient characteristic of having suffered past racial or ethnic discrimination.¹⁸⁴ Why, the court wondered, should the "Asian" categories exclude Mongolians, Afghanis, and Uzbeks?¹⁸⁵ Individuals from all of these groups have "faced significant discrimination in a number of areas, including in business formation and development."¹⁸⁶ And yet, the defendants defined the categories to exclude them.¹⁸⁷ Thus, the categories treated like things—that is, people who have suffered racial and ethnic prejudice—differently. At the same time, the categories treated different things alike: Arabs, other Middle Eastern people, and Hasidic Jews were treated the same as Anglo-Saxons.¹⁸⁸ Quoting *Students for Fair Admissions*, the district court concluded that the defendants' "arbitrary line drawing . . . shows that the 'categories are themselves imprecise in many ways.'"¹⁸⁹ Thus, the categories' arbitrariness violated the like-things rule.¹⁹⁰

This conclusion reveals what governments may not do, but it does not reveal what they may do. The district court provided an answer: the government must make "specific determinations as to whether certain groups in certain industries have faced discrimination."¹⁹¹ The *Ultima*

¹⁸⁰ See *id.* at *10.

¹⁸¹ See *id.* at *14.

¹⁸² See *id.* at *16–17.

¹⁸³ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

¹⁸⁴ *Ultima Servs.*, 2023 WL 4633481, at *17.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (quoting *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 216 (2023)).

¹⁹⁰ See *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-CV-00041-DCLC-CRW, 2023 WL 4633481, at *17 (E.D. Tenn. July 19, 2023).

¹⁹¹ *Id.*

court's answer, although better than those offered by the Second and Eleventh Circuits, does not fully satisfy the like-things principle. As the district court made abundantly clear in the paragraphs preceding that line, what matters is how those "certain groups" are defined.¹⁹² And to fully vindicate the like-things principle, they must be defined so that all members share the morally salient characteristic. Thus, a more fitting answer is that governments must make specific determinations about whether each individual has faced discrimination.

One might argue, as the Second Circuit seemed to in *Jana-Rock*, that this answer would make it impossible for lawmakers to craft legal racial preferences.¹⁹³ So the argument goes: it is simply too hard to prove, on an individual basis, who has suffered past discrimination at the government's hands. Yes, America's racial categories are arbitrary. Yes, they will give the remedy to some people who do not deserve it and deny it to others who do. But some overbreadth and underbreadth are fair prices to pay for useful categories. This Article's response is twofold. First, whether the categories used in any scenario are, in fact, more useful than individual determinations raise empirical and normative questions that must be answered before the "fair price" argument is persuasive. The "fair price" argument can be persuasive only if, as an empirical matter, more people who deserve the remedy receive it when it is allocated through arbitrary classifications than through individual determinations. Similarly, the "fair price" argument can be persuasive only after one has decided, as a normative matter, how to weigh the costs of arbitrary categories. There are at least three costs: some people who deserve the remedy will not get it; some who do not deserve it will; and giving out benefits and burdens through a process that commits these errors may foster racial strife and the belief that the government is ineffective or unjust.¹⁹⁴ This is a complicated set of considerations but, ultimately, the Equal Protection Clause sounds

¹⁹² See *id.* at *16–17.

¹⁹³ See *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 207 (2d Cir. 2006).

¹⁹⁴ See Ralph K. Winter, Jr., *Improving the Economic Status of Negroes Through Laws Against Discrimination: A Reply To Professor Sovern*, 34 U. CHI. L. REV. 817, 855 (1967) ("If accomplishments are not forthcoming—and gains achieved through symbolic value of law are never highly visible—the motives of those responsible for enforcement will be questioned, and the demands for laws with 'teeth' will increase. By then political pressures may be created which do not permit a viable solution of the underlying problems."); cf. TOM R. TYLER, *WHY PEOPLE COOPERATE* 13–14 (Princeton University Press, 2011) (summarizing psychological, and sociological literature and arguing that people—whether in organizations, communities, or societies—are most willing

more in deontological command than in consequentialist balancing. The Clause forbids states from making or enforcing any laws that deny equal protection. Thus, once one accepts the thesis of this article—that laws based on America’s current racial categories often *do* deny equal protection—then the analysis stops there. Just as it is no defense against a First Amendment claim to say that suppressing protected speech is useful to a legislature, neither is it a defense against an equal protection claim to say that an arbitrary generalization was useful.

Equal protection is concerned with what is due to “individuals, not classes,” whether those classes are arbitrary or not.¹⁹⁵ And the doctrine is keenly aware of the history of discrimination in America.¹⁹⁶ It therefore errs—if it errs at all—on the side of individual justice rather than legislative usefulness. With great suspicion, it wonders why a lawmaker would wish to use a bad proxy.¹⁹⁷ And it asks that question precisely because it knows that historically the answer has nearly always been racial animus or, the reverse of that coin, racial favoritism.¹⁹⁸

It is true that the like-things principle tends to forbid the use of proxies entirely in the context of race-based laws. Yet even still, courts rarely operate in the realm of absolutes,¹⁹⁹ and they need not necessarily do so. For example, it is not necessary to find that the *Ultima Services* court contradicted itself when it said that the government should make “specific determinations” for “certain groups.”²⁰⁰ Rather, it tried to do what courts have always tried to do within the strictures of equal protection: find a workable balance between neat justice and messy reality. But if the doctrine errs, it errs where it should: toward that ancient principle of justice that like people ought to be treated alike.

to cooperate for the collective good when they share common values, attitudes, and identities and when their groups are organized around principles of *procedural* justice).

¹⁹⁵ *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 597 (2008) (“[T]he Equal Protection Clause protects individuals, not classes . . .”).

¹⁹⁶ *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–99 (1989) (noting the “sorry history of both private and public discrimination in this country”).

¹⁹⁷ *See id.* at 493 (“Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”).

¹⁹⁸ *See id.* at 498–499; *see also supra* note 24.

¹⁹⁹ *See generally* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1069 (1975).

²⁰⁰ *See Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, No. 2:20-CV-00041-DCLC-CRW, 2023 WL 4633481, at *17 (E.D. Tenn. July 19, 2023).

CONCLUSION

Justice demands that like things be treated alike and different things differently. Equal protection is meant to vindicate that principle. But at present, with few exceptions, courts are doing only half of the job. They engage only with one of law's two operations, distinction, and fail to engage with its other, categorization. Courts largely take for granted that when governments create racial categories, those categories group together people who are, for legitimate purposes, alike and exclude people who are different. Recent scholarship, however, reveals that the racial categories typically used by governments are arbitrary. They often separate people who are alike and group together people who are different. As a result, courts fail to fully vindicate the like-things principle unless they apply scrutiny to racial categories. In short, equal protection doctrine requires that courts scrutinize both the distinctions that governments draw between racial categories and the contours of the racial categories themselves.