

## FOREWORD

### Equal Protection

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The Cato Institute's Center for Constitutional Studies is pleased to publish this 12th volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions from the term just ended, plus a look at the term ahead—all from a classical Madisonian perspective, grounded in the nation's first principles, liberty through limited government. We release this volume each year at Cato's annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court's term or from the larger setting in which the term unfolded.

Clearly, the theme that ran through the major decisions the Court handed down during its final days was equal protection. The long-awaited decision in *Fisher v. University of Texas at Austin* was expected by many to put an end at last to the use of racial preferences in public higher-education admissions decisions. Instead, the Court vacated the Fifth Circuit's decision upholding the university's affirmative action scheme and remanded the case for further proceedings under scrutiny more strict than the lower courts had employed.

In another closely watched case with roots in the civil rights movement of the 1960s, *Shelby County v. Holder*, the Court found the formula for determining which state and local governments must comply with the preclearance requirements of the 1965 Voting Rights Act so out of date as to be unconstitutional, thus raising serious questions about equal protection as it concerns not only voters but state sovereignty as well.

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Finally, equal protection was squarely before the Court in a complex pair of same-sex marriage cases the Court decided on its last day, *United States v. Windsor* and *Hollingsworth v. Perry*, although the Court ducked the issue in *Perry*, holding that the petitioners had no standing to defend California's Proposition 8, which defined "marriage" as between one man and one woman, while in *Windsor* the Court found Congress's similar effort to define "marriage" in the Defense of Marriage Act unconstitutional on federalism, due process, and equal protection grounds.

### Equal Protection's Difficult History

Over the years the Court has had no little difficulty deciding cases on the basis of the equal protection principle, often conflating equal protection and due process. Witness *Plessy v. Ferguson* and *Brown v. Board of Education*, *Bowers v. Hardwick* and *Lawrence v. Texas*, and especially "class-of-one" cases like *Engquist v. Oregon Department of Agriculture*, where the Court came up short. That's not surprising, first because equal protection as such is merely a formal principle, and second because we got off to a bad start with the idea, not only at the outset but even after we incorporated it at last in our constitutional firmament.

Grounded as we are in the natural-rights tradition—which emerged from natural law by emphasizing equality, as in Locke's theory of equal rights and Jefferson's premise of equality in the Declaration of Independence—we flinched when it came to drafting the Constitution. To ensure unity among the states, slavery was recognized, if only obliquely. The Framers knew the "peculiar institution" was inconsistent with our founding principles. They hoped that it would wither away in time. It did not. It took a civil war to end slavery and the passage of the Civil War Amendments to constitutionalize the change, thus instituting at last an express guarantee that states could not deny to any person within their jurisdiction the equal protection of the laws.

The proximate cause of that change, however, can be found in the pernicious Black Codes that Southern states passed shortly after the Civil War ended. They were met by the Civil Rights Act of 1866, which the 39th Congress enacted to protect "the natural rights of man," as members of that Congress said in so many ways during their debates. But in both cases, both in the Black Codes and in the

1866 Act, the language of racial classes—“black” and “white”—was explicit.

Thus, despite the fact that Section 1 of the final version of the Fourteenth Amendment speaks only of “citizens” and “persons,” the understanding and application of the equal protection principle was colored from the start by a class-based approach when in truth the principle is deeper and more far-reaching. And the potential difficulties inherent in that approach were only exacerbated when brought to the surface by the “scrutiny theory” entailed by *Carolene Products’* (in)famous footnote four. For after that, not only did laws implicating different “classes” get different levels of judicial scrutiny—“strict” for racial classifications, for example, “heightened” for gender classifications—but laws employing most classifications—sexual orientation in most jurisdictions, for example, entrepreneurs everywhere—got effectively no judicial scrutiny because they were not “suspect classes,” at least not until a legislature or a court recognized them as such.

### **First Principles**

We’ve had, therefore, an “evolving” equal protection jurisprudence, much like our evolving and closely connected due process jurisprudence, which protects the unenumerated rights the Ninth Amendment tells us we “retained” only insofar as courts have recognized them as “fundamental” because “deeply rooted in the nation’s history.” By contrast, a jurisprudence grounded in First Principles—the nation’s First Principles, as it happens—would go about the matter very differently. It would begin by recognizing the theory of political legitimacy implicit throughout the Constitution, slavery aside, as manifest most clearly in the Preamble and in the Ninth, Tenth, and Fourteenth Amendments, which taken together restate the Declaration’s theory of legitimacy: namely, that we all have equal natural rights to property justly acquired (Locke’s “lives, liberties, and estates”), to enter into contracts, to remedy wrongs regarding those rights, and to institute governments to secure those rights and do the few other things we’ve authorized them to do, as illustrated by the federal government’s limited, enumerated powers.

Thus, equal protection under a government so limited, whether explicitly guaranteed as in the Fourteenth Amendment or implicit as through the Fifth Amendment’s Due Process Clause, would not

turn on class membership or recognition but rather would be a function simply of the larger background theory. Individuals would have a right to be treated by governments, federal, state, or local, not as members of particular classes but as abstract individuals—much like law students are graded, behind a veil of ignorance as to their particular characteristics. Not for nothing is Lady Justice blindfolded. In fact, she illustrates the clearest understanding of equal protection: because we all have equal rights, and because government belongs to all of us, it must treat all equally in all of its functions—legislative, executive, and adjudicative—notwithstanding our many differences.

In operation that means that if government does treat an individual differently than others, it must have not just a reason—we all have reasons for what we do—but a compelling reason related to the background theory of legitimacy. Thus, treating wrongdoers differently than others is perfectly legitimate; so too is discrimination that may be necessary for carrying out authorized governmental functions. And that presumption of equal treatment means also that the burden is on government to justify unequal treatment, not on the individual treated unequally to show that he has a right to equal treatment in the case at hand.

### **Facing Reality, Affirmative Action**

But equal protection's difficult path into the Fourteenth Amendment and thereby into our Constitution more broadly does not alone account for our uneven equal protection jurisprudence. More recently, as we were employing the principle correctly at last to end Jim Crow segregation in the South we were faced with the legacy of that wretched institution and with the question of what to do about it. Strict adherence to First Principles would have prohibited only illegitimate *public* discrimination, of course, as just noted. It would not have prohibited "unreasonable" or "irrational" *private* discrimination, even though such discrimination could no longer be *imposed* through force of law, as under Jim Crow. So entrenched was that discrimination in Southern culture, however, that we decided—for better or worse, doubtless for better—to bend our principles, to limit *private* freedom of association, which we did by prohibiting unreasonable discrimination in most commercial and, over time, many other private associations on the basis of race, color, religion, sex, or national origin, grounds that have expanded over the years.

To enforce this desegregation there followed various kinds and degrees of “affirmative action,” all of which required discrimination in the name of ending discrimination. Initially justified mainly as necessary to break the social hold segregation had in the South, affirmative action soon was rationalized as rectification for past wrongs—even though the individuals rewarded by the practice were often not those who’d suffered under segregation while those now discriminated against had not themselves engaged in discrimination. (Such are the distributional inequities that arise from “social justice” schemes.) More recently, however, rectification has been replaced by an even less justified rationale—diversity. Discrimination is needed, it is said, to ensure a more diverse student body, workforce, loan portfolio, housing unit, what have you. And so we come to our first case, *Fisher v. University of Texas*.

### ***Fisher v. University of Texas***

*Fisher* offers a good illustration of how equal protection has been ignored under current law. Start with the most basic question: Why is government involved in higher education at all—or even in education, for that matter? Like food, clothing, and shelter, education is a private good. It exhibits neither of the cardinal characteristics of public goods—nonexcludability and nonrivalrous consumption. And publicly subsidized *higher* education, which is enjoyed by only a portion of the population, is especially problematic from the perspective of equality: on balance, as economists have long noted, it constitutes a massive wealth transfer from the poorer to the richer parts of society, a point Justice Clarence Thomas explored in some detail in *Grutter v. Bollinger*. Thus, the initial inequality arising from such programs is between those who benefit from them and those who do not, even as they subsidize the beneficiaries through taxation.

But set that fundamental objection aside because it can be said about any redistributive program—the main business of governments today—and ask how, if we have such programs, they can be conducted, insofar as possible, consistent with equal protection, with treating all as individuals. Let’s approach that question by starting with a simple, unproblematic example of discrimination by a public institution. Public fire departments use strength, among other criteria, to screen applicants for firefighter positions because that criterion is central to their purpose or mission, even though doing so

has a “disparate impact” on female applicants, and even though an occasional woman may satisfy the standard. We accept that discrimination because the ground on which it is based is closely connected to the very reason we create a fire department in the first place. The discrimination is “rational,” we say. No one wants to be protected by firefighters who are not up to the job.

Well what is the reason for which we create public universities and public law schools? Plainly, there are many reasons, not all of them praiseworthy, which is why the issue here is relatively more difficult. But unless such institutions are open to all, indiscriminately—and the existence alone of “flagship” institutions gives a lie to that—then discrimination in admissions will be required. Yet to be justified at all, that discrimination must be tied fairly closely to the core reasons that justify the institution in the first place, as in the firefighter example. Otherwise it risks being arbitrary or even “unreasonable.”

Given the core educational business of universities, admissions officers have tended to focus mainly, though not exclusively, on a student applicant’s aptitude as the main ground for discrimination, because there are relatively objective measures for that criterion and, more to the point here, because it is central to the basic purpose of the institution—again, much as in the firefighter example. By contrast, other criteria—legacy, athletic ability, life experience—may be less central to a university’s core mission, while some criteria—race, ethnicity, gender, religion, appearance—may be irrelevant altogether.

Yet that, precisely, is where the diversity “interest” that was accepted in *Grutter* and assumed by Justice Anthony Kennedy in *Fisher* becomes problematic. In some way or at some level it *requires* admissions officers to focus not simply on forbidden grounds but on irrelevant grounds—and to treat applicants other than as abstract individuals. And note that it isn’t simply, as under current law, that public officials must avoid certain class-based *forbidden* grounds—grounds that may vary from jurisdiction to jurisdiction—but that they must rest their decisions only on truly *relevant* grounds if equal protection is to be fully achieved, if even the appearance of arbitrariness is to be avoided. Barbara Grutter and Abigail Fisher applied to their respective institutions expecting to be judged behind a veil of ignorance, taking into account only those factors *most relevant* to the core function of those institutions. If it violates equal protection for

Lady Justice to lift her blindfold when deciding guilt or punishment, why is it any better for her to do so here?

If “social justice” is our concern, it would be far better, of course, if all universities were private and if they were free to discriminate as they wished. That would also solve the reverse-welfare problem, where below-cost legal education is provided, partly through taxation, to the mostly better off at the expense of those who never apply to such schools—for many reasons—or, if they do, are unable to get in. That remains the fundamental equal protection problem. And just to be clear, that is not a mere “political” problem. It is a constitutional and hence a legal problem as well, its roots in the rise of the redistributive state the Constitution was meant to guard against, the failure of which has unleashed the dynamic that public-choice economists have explained in so many domains, public higher education being only one, but an especially pernicious one given the economics of the matter.

On remand, therefore, one hopes that the court below reaches beyond Justice Kennedy’s narrow-tailoring instruction: “The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.” Far better it would be if that court turned instead to Justice Thomas: “The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. ‘At the heart of the [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups’”—or as members of *any* group, one might add. Were the court to require the university to treat applicants as abstract individuals, our errant class-based equal protection jurisprudence would be headed toward a more principled course.

### *Shelby County v. Holder*

*Shelby County* raised a very different equal protection issue. Arising from a long and complex history, it posed something of an equal protection puzzle: how to protect both the equal rights of citizens to vote and the equal sovereignty of states—where the power to regulate elections traditionally rests—when some of those states have a history of abusing the voting rights of some of their citizens. In the end, the puzzle was easily solved by the facts.

To end egregious racially motivated voting restrictions, largely in the South, Congress enacted the Voting Rights Act of 1965. Section 2 of the Act forbids states from enacting any standard, practice, or procedure that would abridge the right to vote on account of race or color. Section 5 requires states to get “preclearance” from federal officials in Washington before making even minor changes in voting procedures. And Section 4(b) provides a “coverage formula” that applies the preclearance requirements to only certain states or political subdivisions, mostly in the South. Thus, in the name of equal protection for voters, the VRA raises serious federalism questions about equal sovereignty regarding the states.

Recognized at the time it was passed as an extraordinary measure and “a drastic departure from basic principles of federalism,” the Act’s coverage formula and preclearance requirement were initially set to expire after five years. But Congress has reauthorized the VRA several times. And in 2006 it did so for an additional 25 years, piling more requirements on in the process—notwithstanding that much on the ground has changed since 1965.

And therein lies the problem. As Chief Justice John Roberts demonstrated, writing for the Court’s majority, the covered jurisdictions today, if anything, have better voting records concerning minorities than the jurisdictions not subject to the requirements. Because section 4 has not been updated in more than 40 years, the Court held it unconstitutional, effectively rendering section 5 unenforceable unless Congress updates the coverage formula (which is not likely at this point in time).

Thus, the equal protection issue here turns out to be straightforward. As the Court held six years ago in *Northwest Austin v. Holder*, the Voting Rights Act “imposes current burdens and must be justified by current needs.” Because current needs no longer justify the law’s extraordinary measures, the Court held that it could no longer tolerate a situation whereby “one State waits months or years and expends funds to implement a validly enacted law, [while] its neighbor can typically put the same law into effect immediately.”

### *United States v. Windsor*

We return now to the more common applications of the equal protection principle, as in *Fisher*, though in a most uncommon context. Except perhaps regarding the related case of *Hollingsworth v. Perry*,

no decision was more anxiously awaited this term than *United States v. Windsor*. It was understood by all that the Court might duck *Perry* on standing grounds, as in fact it did. It could have done so in *Windsor* too, but that was less likely, both on the facts of the case and because two appellate courts had already ruled that the 1993 Defense of Marriage Act provision at issue in the case was unconstitutional.

As noted earlier, in finding DOMA's Section 3 unconstitutional Justice Kennedy invoked federalism, due process, and equal protection principles, all wrapped around a core concern with the congressional animus he saw behind the statute. In truth, he could have grounded his argument on federalism alone, for under our federal system, as he went on to show at length, "[b]y history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States"—indeed, "as a virtually exclusive province of the States." He could have stopped right there with what would have been an argument resting essentially on the Tenth Amendment, because by intruding on the province of the states to define marriage, DOMA "disrupts the federal balance." Instead, finding it "unnecessary" to decide DOMA's constitutionality on federalism grounds, he argued next that whereas the state's decision to recognize same-sex marriages conferred "dignity and status" on this class of persons, DOMA imposes "injury and indignity" on them, depriving them "of an essential part of the liberty protected by the Fifth Amendment." Finding "strong evidence" that the very purpose of DOMA was to stigmatize those in same-sex marriages, Kennedy concluded that so injuring such "politically unpopular" groups "violates basic due process and equal protection principles applicable to the Federal Government" under the Fifth Amendment.

Among the questions Kennedy's opinion has left us, one stands out: Why did he think it necessary to find animus behind DOMA? Perhaps we find the answer here: "In determining whether a law is motivated by an improper animus or purpose, '[d]iscriminations of an unusual character' especially require *careful consideration*. DOMA cannot survive under these principles." (emphasis added) His analysis colored by modern scrutiny theory (in *Turner Broadcasting v. FCC* (1994) he found no fewer than four levels of judicial scrutiny), Kennedy seems to have signaled that "heightened" scrutiny is required when animus is suspected. Whatever his thinking, or the wisdom of charging DOMA's supporters with animus, an analysis grounded on

First Principles, federalism aside, would have been far more straightforward, as outlined above, simply by compelling the federal government to justify denying benefits to same-sex married couples that it was already providing for opposite-sex married couples. Having no reasons sufficient to overcome not only federalism but liberty and equal protection principles, that would have settled the matter, without resort either to motive or to some arbitrary level of judicial scrutiny, a judicial device nowhere to be found in the Constitution.

Still, however “unnecessary” it may have been to decide *Windsor* on federalism grounds, it should not go unnoticed that Kennedy gets to due process and equal protection *through* federalism—through the power of the states, not the federal government, to define marriage. Of particular importance, by so doing he is able to limit the reach of the opinion to those states that have recognized same-sex marriages. Thus, equal protection under the Fifth Amendment requires only that all lawfully married couples *within* a state—opposite-sex and same-sex alike—be treated equally by the federal government. Federal equal protection concerning marriage does *not*—not yet, at least—reach across state borders.

That leaves open the question of how same-sex couples married elsewhere are to be treated if they live now in states that do not recognize same-sex marriages. Apparently that question was settled just after *Windsor* came down when the administration announced that in administering federal programs it would abide by the “place of ceremony” rule, not the “place of residence” rule. It would seem, however, that couples not fully “married” (civil unions, domestic partnerships) may not be so protected. And of course the decision has no bearing on those same-sex couples who wish to marry and would do so but for the refusal of their states to recognize such unions. We come then to the case that might have addressed that matter, *Hollingsworth v. Perry*.

### ***Hollingsworth v. Perry* and Beyond**

Faced with a Gordian Knot—squaring federalism’s differing marital arrangements with the Fifth Amendment’s equal protection principle—Justice Kennedy unraveled it for the moment, at least, by employing federalism as his foundational principle: Federalism, coupled with equal protection, comes to the aid of married same-sex couples in states that recognize such unions. But that same principle,

federalism, stands in the path of those whose states do not recognize, or outright disallow, same-sex marriage—presently, the majority of our states. For couples in those states, relief will be found, if it is to be found, only under the Fourteenth Amendment.

Unfortunately, but perhaps understandably, the case that might have unraveled the knot completely, *Hollingsworth v. Perry*, did not do so, doubtless because it would have come with a high political price. Given that looming price, the opinion for the Court's unusual majority was written, not surprisingly, by Chief Justice Roberts. A case with surpassing procedural twists, it concerned California's Proposition 8, which amended the state's constitution to define marriage as a union between a man and a woman. After state officials declined to appeal a federal district court decision overturning the measure on due process and equal protection grounds, proponents of the measure stepped in to defend it. But Roberts held that they lacked standing to do so, having suffered no concrete and particularized injury as required under federal standing law—even though the California Supreme Court had ruled that they had sufficient standing under state law to defend the state constitutional amendment. Thus, the district court opinion stands, making same-sex marriage legal in California under a prior state Supreme Court decision.

Justice Kennedy dissented from the Court's standing decision, joined by Justices Thomas, Samuel Alito, and Sonia Sotomayor, noting among much else that the primary purpose of initiatives like Proposition 8 is "to afford the people the ability to propose and to adopt constitutional amendments or statutory provisions that their elected public officials had refused or declined to adopt," and that "this purpose is undermined if the very officials the initiative process seeks to circumvent are the only parties who can defend an enacted initiative when it is challenged in a legal proceeding." Indeed, "the Court insists upon litigation conducted by state officials whose preference is to lose the case," he later added.

Notwithstanding the Constitution's Case or Controversy Clause from which the Court's standing jurisprudence flows, this is no black-letter law. When the Court wants to duck, or step into, a controversy, it can find reasons to do so. Thus, in 1967 in *Loving v. Virginia*, a case not unrelated to *Perry*, the Court ruled anti-miscegenation laws existing at the time in 16 states unconstitutional on due process and equal protection grounds. But 12 years earlier, seeing the resistance

its *Brown v. Board of Education* ruling the year before had generated, the Court declined even to hear *Naim v. Naim*, a case on all fours, practically, with *Loving*. All of which raises the question of whether, in cases like *Perry*, federal standing law ought to allow petitioners like these their day in Court, especially since “the State’s interest,” on which Roberts repeatedly fastened, can hardly be said to be represented here by state officials. Referendum and initiative proceedings, presently available in 27 states, bring to the fore our basic theory of political legitimacy—that the people are the ultimate source of authority. In *Perry*, the “state’s interests” just are those of the people, the majority of whom voted for the proposition before the Court.

That still leaves open, of course, the question of whether the people of a state may engage such processes for ends or in ways prohibited by the *federal* Constitution, the supreme law of the land. And on that question here, setting aside the procedural irregularities that many found in the federal district court proceedings, that court got it right, I submit, when it found that Proposition 8 violated the Fourteenth Amendment’s liberty and equal protection principles. The decision leads, however, to the more fundamental question raised above in *Fisher*: Why is government involved in marriage at all?

To be sure, the state has an interest in the well being of children. But that’s a derivative issue, not the central issue here. Marriage is essentially a contract between two (or, dare I say, more—it’s already coming up) people. In a free society parties are or should be at liberty to set whatever contractual terms they wish, provided that the rights of third parties are respected. If two people of the same sex want to call their relationship a “marriage,” the government—which belongs to all of us, including those two—must have a compelling reason not to recognize that contract, a reason to treat that couple differently than opposite-sex couples who call their relationship a marriage. Conventional marriage has long taken its rationale and contours from the natural-law tradition, which proscribes certain “unnatural” acts. By contrast, the natural-rights tradition—not entirely, but for the most part—defers not to “society” but to free adult individuals to determine what is “natural,” even if that understanding has not always been found among natural rights thinkers.

None of this means, of course, that *any* relationship will count as a marriage: there will always be some requirements, beyond a couple’s mere declaration, that will enable us to distinguish between,

say, roommates and married couples—and there will always be procedural requirements. Just as our protection of religious freedom doesn't mean that anyone who declares himself a priest or a rabbi will be recognized as one for legal purposes, so too here there will be formal requirements, at least. But as in the area of protected speech, "content-based" or substantive requirements will have to be justified as reflecting more than mere disapproval—justified by the underlying theory of rights or by compelling practical considerations. Only so will individuals be treated equally. Beyond initial recognition, however, there are many other issues that will need to be addressed, especially regarding marital dissolution. For the moment, however, we await a case that will compel the Court to grasp the nettle on this threshold issue as it arises under the Fourteenth Amendment's guarantee of equal protection.