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# THE ROLE OF SUSPICION IN FEDERAL EQUAL PROTECTION

Paul E. McGreal\*

Recently, Professor Jed Rubenfeld wrote an essay arguing that the Supreme Court's strict scrutiny test for equal protection works best to "smoke out" the purpose of laws to determine whether they were enacted because of racial bias or preference. Professor Rubenfeld criticized the Court's most recent affirmative action decision in *Adarand Constructors, Inc. v. Peña* for departing from this "smoking out" approach.

In this Essay, Professor McGreal explores how this "smoking out" process is applied in federal equal protection cases. Counter to Professor Rubenfeld's view, he argues that the Supreme Court did use a "smoking out" approach in *Adarand*. His Essay discusses the Court's suspicion of racial classifications, pointing out the Court's departures from Professor Rubenfeld's view, and concludes by considering when the Court should be suspicious of non-race, non-gender classifications.

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## INTRODUCTION

This Essay addresses a timely and significant issue of federal constitutional law raised in Professor Jed Rubenfeld's recent essay, *Affirmative Action*.<sup>1</sup> In that piece, Professor Rubenfeld made an important and neglected point about equal protection analysis: The Supreme Court's strict scrutiny test, the federal equal protection standard of review applied to laws that classify based on race, works best as a means of "smoking out" laws based on simple racial bias or preference.<sup>2</sup> He then criticized the Court's most recent affirmative action case, *Adarand Constructors, Inc. v. Peña*,<sup>3</sup> for departing from the "smoking out" approach.<sup>4</sup> While I agree with much of Professor Rubenfeld's analysis, I disagree with his reading of *Adarand*. This disagreement, along with my view of the logic behind the Supreme Court's affirmative action cases, are the impetus for this Essay, which offers four elaborations of the "smoking out" approach.

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\* Associate Professor, South Texas College of Law. I would like to thank Bruce Burton and Val Ricks for their comments on prior drafts of this essay.

<sup>1</sup> Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997).

<sup>2</sup> See *id.* at 428.

<sup>3</sup> 515 U.S. 200 (1995).

<sup>4</sup> See Rubenfeld, *supra* note 1, at 428. Professor Rubenfeld acknowledged that the Court's prior affirmative action decision, *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989), took a "smoking out" approach to strict scrutiny. See Rubenfeld, *supra* note 1, at 438-39.

First, I elaborate on how the Court's three tiers of federal equal protection analysis—strict scrutiny, intermediate scrutiny, and rational basis review—all use a means-end analysis to “smoke out” improper government purposes.<sup>5</sup> The Court determines first whether it is suspicious that the government has acted out of bare dislike of or prejudice against the burdened class (or bare preference for the benefitted group).<sup>6</sup> Next, the Court uses means-end analysis to confirm or dispel its suspicion. If the government's action fits poorly with its asserted purpose, the Court has confirmed its suspicion that bare dislike or prejudice (or preference) lies behind the action. This elaboration provides background for the remaining three observations.

Second, contrary to Professor Rubenfeld, I believe *Adarand* did take a “smoking out” approach to equal protection. I defend this view, arguing that Professor Rubenfeld and the Court do not disagree over the propriety of the “smoking out” approach, but rather over how that approach should be applied. In short, the Court is suspicious of *all* racial classifications, while Professor Rubenfeld is not.

Third, I explain why the Court is so much more suspicious of racial classifications than Professor Rubenfeld. The answer lies in the range of permissible purposes each recognizes for race classifications. On the one hand, the Court sees only one *permissible* purpose for racial classifications, leading it to be very suspicious of such classifications. On the other hand, Professor Rubenfeld sees only one *impermissible* purpose for racial classifications, leading him to be less suspicious of such classifications.

Fourth, I conclude that the key question for the future of equal protection analysis will be to articulate *how* the Court should determine when to be suspicious of classifications *other than* race or gender.<sup>7</sup> The Court's own opinions, as well as some legal commentary, point in possible directions.

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<sup>5</sup> For a more detailed elaboration, see Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law?*, 15 ALASKA L. REV. 209, 217-52 (1998). Professor Rubenfeld agreed that “the very purpose of equal protection means-end review—in all three varieties—is nothing other than to assist in determining a law's true purpose.” Rubenfeld, *supra* note 1, at 469; see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980).

<sup>6</sup> Professor Cass Sunstein has written about government action based on a “naked preference” for a particular group. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 33-34 (1993).

<sup>7</sup> Race and gender generally raise suspicion because both classifications are associated with a history of prejudice and because both are generally irrelevant to government action. The more difficult cases will be other classifications, which are generally not considered suspicious. See Rubenfeld, *supra* note 1, at 442 (arguing that rational basis classifications generally lack “indicia providing reason to suspect that the law's true purpose is something other than the advancement of legitimate state interests.”); see also SUNSTEIN, *supra* note 6, at 30-31, 33 (“[M]ore lenient scrutiny—typified by rational review—reflects a strong presumption that a public value is at work.”).

## I. THE "SMOKING OUT" APPROACH TO EQUAL PROTECTION

Federal equal protection doctrine uses a form of means-end analysis, asking first whether the government is pursuing a permissible end, and then whether the law in question is an adequate means to achieve the government's end. In practice, the Supreme Court uses one of three levels of means-end scrutiny, depending on the classification involved.<sup>8</sup> The strictest level of scrutiny, known appropriately enough as "strict scrutiny," applies to laws that discriminate based on race, alienage, and national origin.<sup>9</sup> Such laws are rarely upheld.<sup>10</sup> The next strictest level of scrutiny, known as "intermediate scrutiny," applies to laws that discriminate based on gender.<sup>11</sup> The Court generally strikes down such laws if it believes they reflect gender stereotypes.<sup>12</sup> The most lenient level of scrutiny, known as "rational basis review," applies to all other laws.<sup>13</sup> The Court generally upholds such laws unless it determines that the government based its decision on a desire to harm a specific group.<sup>14</sup>

While some have criticized the Court's three levels of equal protection scrutiny as a rigid three-tiered hierarchy,<sup>15</sup> the analysis really reduces equal protection claims to a single inquiry: Whether the government has some neutral, independent reason for distinguishing between groups of people, or whether the law is motivated by a bare dislike of the burdened group or a naked preference for another group.<sup>16</sup> The

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<sup>8</sup> See *infra* notes 19-29 and accompanying text.

<sup>9</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (holding that federal affirmative action programs must meet a strict scrutiny standard); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.3.2, at 550-52 (1997); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-6, at 1451-54 (2d ed. 1988).

<sup>10</sup> See TRIBE, *supra* note 9, § 16-6, at 1451; Gerald Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>11</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (ruling that Virginia's exclusion of women from Virginia Military Institute was unconstitutional); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (striking down an Oklahoma law that differentiated between the minimum ages at which males and females could purchase "nonintoxicating" 3.2% beer).

<sup>12</sup> See CHEMERINSKY, *supra* note 9, § 9.4.3, at 609-13; TRIBE, *supra* note 9, § 16-6, at 1565.

<sup>13</sup> See, e.g., *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993) (upholding a law that regulated local cable television systems, but exempted systems used by multiple dwellings with common ownership).

<sup>14</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (declaring unconstitutional a Colorado state constitutional amendment that precluded all state or local laws from protecting the status of homosexuals).

<sup>15</sup> See *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 109-10 (1973) (Marshall, J., dissenting).

<sup>16</sup> Justice John Paul Stevens has also argued that the Court's three levels of scrutiny mask the true structure of the Court's analysis:

different levels of means-end scrutiny are really tools for answering this question.<sup>17</sup>

An example should illustrate how means-end analysis can help evaluate the sincerity of an actor's asserted purpose. Suppose a neighbor with whom you are on questionable terms offers to wash your car. Given the history of your relationship, you are suspicious that her offer might be less than genuine. Nonetheless, you accept her offer. Because you are suspicious of your neighbor's motives, you watch as she begins washing your car. You notice her using water from mud puddles on the ground. At this point, you probably think (as you run out the door to stop her), "Hmm. If she *really* wanted to wash my car, she probably wouldn't use muddy water. That scoundrel probably wants to damage my car." This example is an instance in which means-end analysis has revealed a person's true end. Your neighbor *asserted* that her end was to wash your car. Yet, the means she chose (using muddy water) was so ill-adapted to the task that you concluded she must have had another purpose—damaging your car. This conclusion was bolstered by your suspicion of her motives, given your prior history of ill will. The means-end analysis "smoked out" your neighbor's true purpose.

Equal protection means-end analysis performs a similar "smoking out" function. In the typical case, the government enacts a classification and offers a reason for using the classification. Depending on the classification involved, the Court will be more or less suspicious of the government's action. This suspicion will be quite high with classifications, such as race and gender, that have a history of prejudice. Whatever the classification, the Court uses means-end scrutiny to test the government's asserted purpose and determine whether the law was really enacted out of bias, prejudice, or preference. If the classification has a poor fit with the government's asserted purpose, the means-end analysis has confirmed the Court's suspicion that the government acted on another, unspoken purpose.<sup>18</sup> If the classification has a good fit with the government's asserted purpose, the means-end analysis has dispelled the Court's suspicion.

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I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

*Craig*, 429 U.S. at 212 (Stevens, J., concurring).

<sup>17</sup> See *id.*

<sup>18</sup> As Professor Rubinfeld notes, all this talk of the government's purpose raises questions about the propriety of seeking or evaluating the government's *actual* purpose. See Rubinfeld, *supra* note 1, at 453 n.92. As is explained elsewhere, the Court is not trying to determine the government's *actual motivation*. See McGreal, *supra* note 5, at 250-52. Such an analysis would be fraught with theoretical and practical problems. See *id.* at 250-51. Rather, the "smoking out" approach identifies government actions that pose an unacceptable danger of bias or prejudice. See *id.* at 251-52.

*City of Cleburne v. Cleburne Living Center, Inc.*<sup>19</sup> is a rational basis review case illustrating how the “smoking out” approach works. In *Cleburne*, a city zoning ordinance required a special permit to operate a group home for the mentally retarded; no such permit was required to operate other facilities such as hospitals, homes for the aged, and fraternities.<sup>20</sup> The case arose out of the city’s denial of a special permit.<sup>21</sup> In support of its decision, the city argued that it “was concerned with the *negative attitude* of the majority of property owners located within 200 feet” of the proposed group home.<sup>22</sup> The Court explained that the city’s protection of private prejudice amounted to bare dislike of the mentally retarded: “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”<sup>23</sup> The Court also noted that the mentally retarded historically had suffered unjustified discrimination and oppression at the hands of the government.<sup>24</sup> Thus, based on the city’s own arguments and our society’s history, the Court became suspicious that the city had acted out of bias toward the mentally retarded.

The Court’s suspicion guided its means-end analysis of the government’s remaining purposes. The city had argued additionally that it denied the special permit because the proposed facility would be located in a flood plain and because of special liability issues relating to homes for the mentally retarded.<sup>25</sup> In the ordinary rational basis review case, in which the Court is not suspicious of the government’s motives, the Court would have deferred to the government’s judgment on these purposes and upheld the city’s action.<sup>26</sup> The Court in *Cleburne*, however, had reason to be suspicious, and it reviewed the government’s purposes with a skeptical eye. The Court explained that, for purposes of flood concerns and liability risks, it could see no relevant difference between group homes for the mentally retarded and facilities that did not need a special permit (e.g., hospitals, homes for the aged, and fraternities).<sup>27</sup> Thus, the city’s choice to place a greater burden on

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<sup>19</sup> 473 U.S. 432 (1985).

<sup>20</sup> See *id.* at 436.

<sup>21</sup> See *id.* at 437.

<sup>22</sup> *Id.* at 448 (emphasis added).

<sup>23</sup> *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

<sup>24</sup> See *Cleburne*, 473 U.S. at 446 (“Doubtless, there have been and there will continue to be instances of discrimination against the retarded that are in fact invidious, and that are properly subject to judicial correction under constitutional norms.”).

<sup>25</sup> See *id.* at 449.

<sup>26</sup> See, e.g., *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488-89 (1955) (deferring to a state judgment that sellers of ready-to-wear glasses posed a greater threat to public health and safety than other sellers of eyewear); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (deferring to a government’s judgment that advertising on automobiles for hire posed a greater threat to traffic safety than an owners advertising on their own automobiles).

<sup>27</sup> See *Cleburne*, 473 U.S. at 449.

homes for the mentally retarded was *under-inclusive* because it did not cover other facilities that similarly threatened the government's purpose.<sup>28</sup> This poor fit between the city's classification (homes for the mentally retarded) and its purpose (flood concerns and liability risk) confirmed the Court's suspicion that the city was acting out of bias against the mentally retarded.<sup>29</sup>

## II. THE BETTER READING OF *ADARAND*

Professor Rubinfeld argues that *Adarand* used equal protection analysis *not* to "smoke out" an impermissible government purpose, but rather to determine whether a concededly injurious racial classification was justified nonetheless by a sufficiently weighty government goal.<sup>30</sup> He labels the latter test the "cost-benefit" approach to equal protection analysis.<sup>31</sup> While the "smoking out" approach uses means-end review to determine the government's likely purpose, the "cost-benefit" approach uses means-end review to decide whether the cost (or injury) imposed by a racial classification is outweighed by the benefit of some government interest that the classification helps to achieve.<sup>32</sup>

Professor Rubinfeld bases his reading of *Adarand* on the following passage from the Court's opinion:

[W]henver the government treats any person unequally because of his or her race, that person *has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection*. . . . The application of strict scrutiny, in turn, determines whether a compelling governmental interest *justifies the infliction of that injury*.<sup>33</sup>

Contrary to Professor Rubinfeld's interpretation, this passage does not endorse a "cost-benefit" approach to equal protection review. Rather, it restates the

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<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 450 ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . ."). *Cleburne* stands in contrast to *Heller v. Doe*, 509 U.S. 312 (1993), which upheld another law that discriminated against the mentally retarded. *Heller* involved a statute that allowed commitment of the mentally retarded on a showing of "clear and convincing evidence," but, for commitment of the mentally ill, required a showing "beyond a reasonable doubt". *Id.* at 315-18. Unlike *Cleburne*, the record in *Heller* did not reveal any bias in the statute's history. See *id.* Thus, the Court did not approach the law with suspicion.

<sup>30</sup> See Rubinfeld, *supra* note 1, at 433.

<sup>31</sup> See *id.* at 437-43.

<sup>32</sup> See *id.* at 439.

<sup>33</sup> *Adarand*, 515 U.S. at 229-30 (emphasis added by Rubinfeld, *supra* note 1, at 438).

threshold question for equal protection analysis. Before the Court can decide whether to be suspicious of a challenged law, it must first identify the classification created by the statute. Of course, if a statute expressly uses race (or some other trait) to classify people, the Court's job is easy. A more difficult question for the Court is deciding what to do if a statute does not expressly distinguish between races, but nonetheless has a disparate impact on one race or another. Should the Court deem such facially neutral laws as classified based on race?

In *Washington v. Davis*,<sup>34</sup> the Court held that a facially neutral law classifies based on race only if the government *intended* to draw such a distinction (*i.e.*, only if the government enacted the statute because of its effect on race, not just despite that effect).<sup>35</sup> The above quoted passage from *Adarand* is best understood as addressing this issue when it refers to instances where "the government treats any person unequally *because of* his or her race."<sup>36</sup> In such cases, the government is deemed to have classified by race, and it must justify such a classification with a purpose other than bare dislike or preference (*i.e.*, "a compelling government interest"). Once this analysis is triggered, the Court uses strict scrutiny to "smoke out" impermissible (*i.e.*, non-compelling) purposes.

That *Adarand* applies the "smoking out" approach can be seen in several other passages from the Court's opinion. First, the Court quoted its own defense of the "smoking out" approach in a prior affirmative action case, *City of Richmond v. J.A. Croson, Co.*<sup>37</sup> The Court used this quote in response to the argument that the purposes of some race-based laws are so clearly benign that strict scrutiny is not required:

Absent searching judicial inquiry into the justification for . . . 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. 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. The test also ensures that the

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<sup>34</sup> 426 U.S. 229 (1976).

<sup>35</sup> See *id.* at 238-48. Professor Rubinfeld agrees with the intent requirement established by *Washington v. Davis*. See Rubinfeld, *supra* note 1, at 449.

<sup>36</sup> *Adarand*, 515 U.S. at 229-30 (emphasis added). This reading of the quoted passage is bolstered by another passage from the same paragraph. The Court wrote that finding a racial classification "says nothing about the ultimate validity of a particular law; that determination is the job of the court applying strict scrutiny." *Id.* at 230. This is the very function of the threshold test established in *Washington*—to sort classifications so that the proper means-end test can determine the law's validity.

<sup>37</sup> 488 U.S. 469 (1989) (striking down the city's requirement that prime contractors on city projects set aside 30 percent of their subcontracts for minority business enterprises).



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.<sup>38</sup>

The *Adarand* Court concurred, "[D]espite the surface appeal of holding 'benign' racial classifications to a lower standard, . . . 'it may not always be clear that a so-called preference is in fact benign.'"<sup>39</sup> The Court, however, did not need to apply the "smoking out" approach to the challenged law. Because the lower court did not apply strict scrutiny, the Court remanded the case for application of the correct test.<sup>40</sup>

The main difference between Professor Rubinfeld and *Adarand* is *not* that he applies a "smoking out" approach and *Adarand* applies a "cost-benefit" approach. Rather, the main difference, in terms of the equal protection analysis discussed in Part I, is in deciding when a judge should be suspicious of a racial classification. Under *Adarand* (and *Croson*), the Court is *always* suspicious of racial classifications, and thus the Court always uses strict scrutiny to confirm or dispel its suspicion of racial bias or preference.<sup>41</sup> Professor Rubinfeld, on the other hand, is not so suspicious:

[Strict scrutiny] makes little sense where the race-based purposes behind a law are *undisputed*. In those circumstances there is nothing to smoke out. No strict scrutiny would be necessary to invalidate a law banning blacks from taking designated jobs if the law's *professed purpose* was to maintain white supremacy. . . . Similarly, no strict scrutiny is called for when the *undisputed purpose* of a law is to assist members of one race at a cost to members of another. The sole question is whether the conceded race-based purpose is constitutionally legitimate.<sup>42</sup>

Yet, neither *Adarand* nor *Croson* concede that the Court can determine with any confidence, over the long run, whether the "undisputed purpose" of the racial classification is benign. The Court stated in *Adarand*:

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

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<sup>38</sup> *Adarand*, 515 U.S. at 226 (quoting *Croson*, 488 U.S. at 493).

<sup>39</sup> *Adarand*, 515 U.S. at 226 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).

<sup>40</sup> See *Adarand*, 515 U.S. at 239.

<sup>41</sup> See *supra* notes 34-40 and accompanying text.

<sup>42</sup> Rubinfeld, *supra* note 1, at 437 (emphasis added).

from illegitimate uses of race in governmental decisionmaking. And [the dissent] concedes that "some cases may be difficult to classify;" all the more reason, in our view, to examine all racial classifications carefully. . . . By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which "so seldom provide[s] a relevant basis for disparate treatment," is legitimate, before permitting unequal treatment based on race to proceed.<sup>43</sup>

The main disagreement between Professor Rubinfeld and the Court boils down to this question: How confident are we that judges can accurately determine whether a racial classification is benign and thus not deserving of suspicion?

### III. THE LINK BETWEEN SUSPICION AND PERMISSIBLE PURPOSES

Professor Rubinfeld's disagreement with the Court derives from the different range of purposes each would allow for race classifications. The Court has strongly suggested that government may use race for only one purpose—to compensate identified individuals or firms who have suffered race discrimination.<sup>44</sup> To the Court, any other use of race will more likely be a racial preference benefiting racial minorities who have suffered no harm while concurrently exacting compensation from non-minorities who have done no wrong.<sup>45</sup> Professor Rubinfeld, on the other hand, would allow any purpose not intended to reduce one race to an inferior social caste.<sup>46</sup>

This Essay does not now enter the debate on permissible purposes. As Professor Rubinfeld shows in his essay, this debate has many well-worn arguments. One side argues that affirmative action, however defined, is a mere racial preference.<sup>47</sup> The other side counters that affirmative action is a legitimate means for attaining non-discriminatory goals.<sup>48</sup> Whoever is correct, this difference explains why the Court is more suspicious of race classifications than Professor

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<sup>43</sup> *Adarand*, 515 U.S. at 228 (quoting *id.* at 245, and *n.4* and *Fullilove v. Klutznick*, 448 U.S. 448, 534 (Stevens, J., dissenting) (1980)).

<sup>44</sup> See *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989) (suggesting that race-based laws should be "strictly reserved for remedial settings").

<sup>45</sup> In *Croson*, the Court made clear its disapproval of statutes "motivated by illegitimate notions of racial inferiority or *simple racial politics*." *Id.* (emphasis added). "Illegitimate notions of racial inferiority" would be racial bias and prejudice; "simple racial politics" would be laws that classify based on race without identifying those harmed by race discrimination.

<sup>46</sup> See Rubinfeld, *supra* note 1, at 460-62.

<sup>47</sup> See *supra* notes 6 & 15-16 and accompanying text.

<sup>48</sup> See Rubinfeld, *supra* note 1, at 444-67.

Rubinfeld—there is more for the Court to be suspicious of. In the Court's keenly suspicious view, there are *many* impermissible reasons to use race, and only *one* permissible reason.<sup>49</sup> Consistent with this view, a race-based classification is likely to be impermissibly motivated, giving the Court much reason for suspicion. Conversely, in Professor Rubinfeld's view, there is only *one* impermissible purpose, but *many* permissible ones.<sup>50</sup> In this unsuspicious view, a race-based classification is much less likely to be impermissibly motivated, giving Professor Rubinfeld less reason for suspicion. Indeed, since today a racial majority is unlikely to place itself in an inferior caste position, Professor Rubinfeld generally is not suspicious of laws that discriminate against non-minorities.<sup>51</sup>

In sum, the main difference between the Court and Professor Rubinfeld is not whether equal protection should take a "smoking out" approach instead of a "cost-benefit" approach. Rather, the main disagreement is over how suspicious judges should be of race-based laws and thus, when judges should be aggressive in "smoking out" impermissible government purposes. This disagreement derives from an additional disagreement over the range of permissible reasons for using race classifications. One's position on this second disagreement will determine how one applies the "smoking out" approach to an equal protection analysis of race-based laws.

#### IV. THE FUTURE OF EQUAL PROTECTION

While this Essay has focused on race-based laws, it suggests, in this concluding Part, that the next horizon for equal protection analysis should be closer analysis of rational basis review. Specifically, whether a judge should be suspicious of a non-race, non-gender classification. Cases like *Cleburne* show that the Court will, and should, be suspicious of some of these classifications, using the means-end analysis to confirm or dispel its suspicion.<sup>52</sup> Questions remain, however, over what should arouse the Court's suspicion. After briefly examining this question, this Essay suggests two possible directions for future study.

##### A. *The Central Dilemma of Rational Basis Review*

As has been described above, something in the judicial record may trigger the Court's suspicion.<sup>53</sup> In *Cleburne*, the record showed that the city had denied a special permit for a group home for the mentally retarded in part because of the

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<sup>49</sup> See *Croson*, 488 U.S. at 493.

<sup>50</sup> See Rubinfeld, *supra* note 1, at 460-62.

<sup>51</sup> See *id.* Professor Rubinfeld acknowledges that "some circumstances still would exist in which affirmative action would be subject to strict scrutiny." *Id.* at 466.

<sup>52</sup> See *Cleburne*, 473 U.S. at 441-42.

<sup>53</sup> See *supra* notes 19-29 and accompanying text.

prejudiced attitudes of neighboring landowners; this evidence made the Court suspicious.<sup>54</sup> This example, however, begs an important question: Why were the neighbors' attitudes properly characterized as "prejudice" instead of "rational concern"? The question of suspicion, then, turns into the question of how to distinguish prejudice from rational concern.

This latter question explains the disagreement between the Court and the dissent in *Romer v. Evans*.<sup>55</sup> In *Romer*, the Court reviewed a Colorado state constitutional amendment that prohibited state or local government from enacting laws that protected homosexuals from discrimination.<sup>56</sup> Writing for the Court, Justice Kennedy characterized the amendment as an impermissible expression of animus toward homosexuals.<sup>57</sup> From this perspective, *Romer* was no different from *Cleburne*, and Colorado's amendment was easily struck down as an unconstitutional expression of prejudice.<sup>58</sup> Conversely, writing in dissent, Justice Scalia characterized the amendment as a permissible expression of Coloradans' disapproval of the homosexual lifestyle.<sup>59</sup> According to Justice Scalia, no prejudice or bias tainted the Colorado amendment.<sup>60</sup> Rather, the amendment expressed Coloradans' legitimate moral concerns.<sup>61</sup> As in *Cleburne*, the question was which characterization of public sentiment is correct.<sup>62</sup>

Both the Court and the dissent assumed an answer to this question. The Court did so when it chastised Coloradans for acting out of animus towards homosexuals.<sup>63</sup> Conversely, Justice Scalia did so when he accused the Court of "mistak[ing] a Kulturkampf for a fit of spite."<sup>64</sup> Both charges assume the answer to the central question of whether the Colorado law was an expression of prejudice or a legitimate moral concern. The problem, which neither the Court nor the dissent

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<sup>54</sup> See *Cleburne*, 473 U.S. at 448.

<sup>55</sup> 517 U.S. 620 (1996).

<sup>56</sup> See *id.* at 623-24.

<sup>57</sup> See *id.* at 635 ("We must conclude that [the Colorado amendment] classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else.").

<sup>58</sup> See *id.* at 635-36.

<sup>59</sup> See *id.* at 636 (Scalia, J., dissenting).

<sup>60</sup> See *id.* at 645 (Scalia, J., dissenting).

<sup>61</sup> See *id.* (Scalia, J., dissenting).

<sup>62</sup> See Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 150-51 (1998) (identifying a similar disagreement between the majority and dissent in *Romer*); see also D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 102-03 (arguing that state enforcement of morality is legitimate, because the Due Process Clause entails its own morality).

<sup>63</sup> See *Romer*, 517 U.S. at 634.

<sup>64</sup> *Romer*, 517 U.S. at 636 (Scalia, J., dissenting).

acknowledged, is that one can reasonably characterize the Colorado amendment as either one. The main challenge in *Romer* was finding *a reason for choosing one characterization over the other*. Both the Court and Justice Scalia took their characterizations as the proper starting point and built their arguments on that foundation.

### B. *How to Distinguish Prejudice from Acceptable Reasons*

One answer to the question of how to distinguish prejudice from acceptable reason might be found in Professor Lawrence Lessig's work on the *Erie* effect.<sup>65</sup> In

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<sup>65</sup> Professor Lessig's translation theory of constitutional interpretation describes the *Erie* effect, typified by the classic Supreme Court case *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). See Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1400-12 (1997) [hereinafter Lessig, *Fidelity and Constraint*]; Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995). *Erie* addressed the issue of whether federal courts in diversity cases should apply state common law or federal common law. See *Erie*, 304 U.S. at 65. About a century earlier, in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), the Court had held that general federal common law should govern. See *id.* at 22. As Professor Lessig explains, *Swift* was based on the then-prevalent view that judges *find* the common law, but do not make it. See Lessig, *Fidelity and Constraint*, *supra*, at 1400-02. Common law rules were believed to be *external* to the judge—something to be found—and were not affected by the judge's personal preferences, biases, or beliefs. See *id.* at 1403. Professor Lessig calls such a prevailing view an "uncontested discourse." *Id.* at 1393. This view of the law made some sense in the context of commercial cases like *Swift*, where the common law consisted of customary business practices that formed default rules against which parties could contract. See *id.* at 1402. *Swift*, however, was not limited to this narrow context; it was later applied to all diversity actions. See *id.* at 1402.

Over time, under the harsh criticism of the legal realists and others, *Swift*'s assumption that judges merely find the common law was openly contested by those who believed that making common law required a substantial exercise of discretion. See *id.* at 1406-08. In other words, credible arguments were voiced that common law rules were not *external* to the judges, but rather were the product of judges' unguided judgment. See *id.* at 1408 ("Whatever the view before, *today* law is not conceived except as the expression of a political will."). At this point, *Swift*'s assumption had become what Professor Lessig calls a "contested discourse."

When the view of the law expressed in *Swift* became openly contested, the Court was attacked for illegitimately making law for the states. See *id.* at 1409. As long as common law rules were viewed as *external* to federal judges, those judges were merely finding pre-existing common law principles that existed independent of who ultimately applied them, either state or federal judges. See *id.* at 1407-08. Once that view of law was openly contested, however, federal judges could be criticized as imposing their political will on the states under the guise of a general federal common law. See *id.* To avoid this criticism, the *Erie* Court returned the power to make common law to the state courts, holding that federal courts must apply state common law in diversity cases. See *id.* at 1409-11. Over time, this holding has led to a new uncontested discourse based on *Erie*.

these writings, Professor Lessig describes what he calls contested and uncontested discourses.<sup>66</sup> An "uncontested discourse" is a discourse where:

people don't, in the main, disagree about fundamentals. In the main, they don't think much about fundamentals at all. People act, or argue, instead, taking these fundamentals for granted. . . . One could conceivably question fundamentals; one could legitimately express doubt. But if one insisted upon these doubts, or was relentless in these questions, then one would mark oneself as odd; somehow outside the discourse.<sup>67</sup>

A "contested discourse," on the other hand, is "a discourse where fundamentals in that discourse appear up for grabs; that participants in that discourse acknowledge the legitimacy of disagreement about these fundamentals; that disagreement is a sign of normalcy for a participant, not oddness."<sup>68</sup>

Professor Lessig's view, no doubt oversimplified in this brief synopsis,<sup>69</sup> supports a belief that a case like *Cleburne* reflects shifting discourses on mental retardation. Whether people view discrimination against the mentally retarded as irrational prejudice or acceptable caution will depend on the prevailing discourse on mental retardation. At one time, general fear and disapproval of the mentally retarded appeared normal—it was an uncontested discourse.<sup>70</sup> At the time of *Cleburne*, however, such fear and disapproval was no longer the prevailing uncontested discourse.<sup>71</sup> Rather, a new uncontested discourse had taken its place in which mental retardation was relevant for some purposes (such as different educational requirements), but seen as the product of fear or disapproval when used for other purposes.<sup>72</sup> Under this new discourse, laws that were once unproblematic look more like impermissible discrimination.

Professor Lessig's concept of contested and uncontested discourses could be joined with a modified notion of judicial notice, the doctrine that allows judges to officially recognize certain "facts" not in evidence.<sup>73</sup> One commentator has

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<sup>66</sup> See Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1785-86 (1997); Lawrence Lessig, *Fidelity and Constraint*, *supra* note 65, at 1393.

<sup>67</sup> Lessig, *Fidelity and Constraint*, *supra* note 65, at 1393.

<sup>68</sup> *Id.*

<sup>69</sup> For example, Professor Lessig makes even finer distinctions between discourses that are in the background of legal debate (and thus, go relatively unnoticed) and discourses that are in the foreground (and thus, are the subject of overt debate). See *id.* at 1393-1400.

<sup>70</sup> See *Cleburne*, 488 U.S. at 446.

<sup>71</sup> See *id.* at 442-47.

<sup>72</sup> See *id.*

<sup>73</sup> I place the word "facts" in quotation marks because judicial notice does not only apply

suggested that it should be recognized, through the doctrine of judicial notice, that judges often bring cultural assumptions, the stuff of contested and uncontested discourses, to the task of judging.<sup>74</sup> For example, in deciding whether a police search of a suspect's belongings violated the Fourth Amendment, a judge might rely on unspoken assumptions about the demeanor and honesty of the average police officer in the community.<sup>75</sup> Recognizing this reality, the judicial process ought to allow these assumptions to be laid bare and subject to examination by the parties.<sup>76</sup>

Both Professor Lessig's approach and modified judicial notice, however, hold unsettling implications for equal protection doctrine. Both inquiries force recognition that most distinctions taken for granted in everyday life are socially

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to what courts might call scientific facts, but also includes what courts refer to as social and cultural understandings.

<sup>74</sup> See Bruce Burton, *The "O.K. Corral" Principle*, 30 N.M. L. REV. (forthcoming Feb. 2000).

<sup>75</sup> See *id.* (discussing examples of judicial decisions that explicitly relied on such assumptions, and arguing that such assumptions necessarily underlie criminal procedure decisions). An infamous recent example, discussed in Professor Burton's article, is federal District Judge Harold Baer's decision in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996). In that case, Judge Baer had to determine whether police had reasonable suspicion to stop and search the defendant and her car. See *id.* at 237. He held that a suspect's evasive behavior in the face of police presence was not unusual, and thus did not give rise to reasonable suspicion, given the reputation of some New York City police for corruption and brutality. See *id.* at 242. He wrote:

[E]ven assuming that one or more of the males ran from the corner once they were aware of the officers' presence, it is hard to characterize this as evasive conduct. Police officers, even those travelling in unmarked vehicles, are easily recognized, particularly, in this area of Manhattan. In fact, the same United States Attorney's Office which brought this prosecution enjoyed more success in their prosecution of a corrupt police officer of an anti-crime unit operating in this very neighborhood. Even before this prosecution and the public hearing and final report of the Mollen Commission, *residents in this neighborhood tended to regard police officers as corrupt, abusive and violent*. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.

*Id.* (citation omitted, emphasis added). Under considerable political pressure to do so, Judge Baer reversed his decision, relying on newly-offered prosecution evidence. See *United States v. Bayless*, 921 F. Supp. 211 (S.D.N.Y. 1996); Stephen B. Bright, *Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems*, 51 U. MIAMI L. REV. 413, 415-16 (1997) ("When federal Judge Harold Baer suppressed cocaine and heroin seized by New York City police officers, Republican presidential candidate Robert Dole called for his impeachment. Additionally, the Clinton White House suggested it would ask for his resignation if Judge Baer did not reverse his ruling. Judge Baer reversed his ruling." (citations omitted)); *CBS This Morning* (CBS television broadcast, Jan. 29, 1996) (transcript reported at 1996 WL 3475951) (interview in which Rudolph Giuliani, Mayor of New York City, criticized Judge Baer's ruling).

<sup>76</sup> See Burton, *supra* note 74.

constructed. This recognition has an important implication— if all that separates an irrational prejudice from a rational distinction is a momentary social consensus, equal protection will protect only those minorities that the majority of society (or of the educated elite, or of the lawyer class, etc.)<sup>77</sup> currently considers worthy of such protection.<sup>78</sup> From this perspective, equal protection is a majoritarian construct. Which minorities are protected will depend on the majority's view of which distinctions are acceptable and which are not. Moreover, the majority's consciousness will dictate the pace of change.

Under this majoritarian view, equal protection poses a paradox: The majority defines minority equality rights against the majority. It is the fox guarding the hen house.<sup>79</sup> The only way to escape this paradox is to find some guiding principle outside of our socially constructed discourses to distinguish prejudice from rational distinction. Undoubtedly, religion serves as one source for personal decisions on this score. However, religion cannot serve this role without violating the First Amendment. If one religion condemns homosexuality and another preaches tolerance, which one wins? The choice would require an unconstitutional

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<sup>77</sup> In other words, a majority of whomever is doing the deciding in the relevant context. Even if we see the relevant decision maker as the Supreme Court, we are still speaking about a majoritarian body in terms of the cultural assumptions that each Justice brings to the table. To the extent that the Justices (or a majority of them) act based on certain uncontested discourses, their actions will reflect the majoritarian sentiment that constructs and perpetuates those discourses. See Lessig, *Fidelity as Constraint*, *supra* note 65, at 1420 n.158 ("I tell the story from the perspective of white-boy's history, because how else does one expect constitutional law to have developed? This is winner's history, and we (or I) can do no more than tell it from the self-satisfied, morally certain, perpetually virtuous, god-chosen perspective that is the perspective of those who have articulated constitutional law.").

<sup>78</sup> Justice Scalia leveled a similar criticism at the Court's equal protection analysis in *Romer*. See *Romer*, 517 U.S. at 652 (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.").

<sup>79</sup> Of course, on one level, the majority will always define minority rights in our Constitution because that document and its amendments are the product of super-majoritarian decision making. See U.S. CONST. art. V (establishing procedures for amending the Constitution); *id.* art. VII (establishing procedures for ratification of the Constitution). To the extent that the legitimacy of our government rests on consent, we ought to be concerned about imposing legal obligations and consequences on people who neither consented to, nor were given the opportunity to consent to, the legal order. While this recognition does not relieve non-consenting citizens from their legal obligations, it ought to encourage careful attention to minority rights and, in the proper case, erring on the side of protecting the minority against the majority. Such protection of minorities would be consistent with the framers' preference for no law making over law making. See Paul E. McGreal, *Ambition's Playground*, 69 FORDHAM L. REV. (forthcoming Apr. 2000).



privileging of one religion over another.<sup>80</sup> So, is there another source to which society can appeal? This question goes to the very foundation of equal protection.

If one ultimately finds no external standard, it must be conceded that what counts as prejudice is merely the product of prevailing uncontested discourses (*i.e.*, the majority's conscious or unconscious beliefs) on the classification in question. If one must accept this reality, one also should embrace its evolutionary character, allowing legal decision makers, including judges, to update equal protection as our discourses shift over time. This has been the history of equal protection during this century, and it counsels society to reject originalist theories of equal protection if it wants to afford minorities even a modicum of equality protection. Otherwise, minorities will suffer a double indignity in our constitutional system. Not only are their equality rights defined by the majority, but those rights are frozen in time, ossified in a form even today's majority would deem unjust.

### CONCLUSION

To conclude, let's return to the question that began the preceding Part: Of what classifications should a court be suspicious? There are two ways to answer this question, each of which suggests a future direction for equal protection analysis. First, we could formulate some standard external from our cultural cocoon to distinguish prejudice from acceptable reasons. This standard would tell us when disadvantaging a group should be deemed prejudice, and when it should be deemed acceptable. Second, if we find no external standard (or until we do so), we must reconcile ourselves to the majoritarian nature of equal protection. As a consequence, we should allow the doctrine to evolve, questioning more and more classifications as time goes on, and developing analytical tools, such as Professor Lessig's contested and uncontested discourses and modified judicial notice, to guide that evolution.

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<sup>80</sup> See *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").