READING 11
Equality: Modern-Day Treatment

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Constitutional Law for a Changing America

Rights, Liberties, and Justice

11th Edition

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***Students for Fair Admissions v. President & Fellows of Harvard College* (2023)**
Vote: 6 (Alito, Barrett, Gorsuch, Kavanaugh, Roberts, Thomas)
3 (Jackson, Kagan, Sotomayor)
Majority Opinion: Roberts
Concurring Opinions: Gorsuch, Kavanaugh, Thomas
Dissenting Opinions: Jackson, Sotomayor

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings—a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

UNC has a similar admissions process.

Petitioner, Students for Fair Admissions (SFFA) filed separate lawsuits against Harvard and UNC, arguing that their race-based admissions programs violate… the Equal Protection Clause of the Fourteenth Amendment. Lower court judges found both programs permissible under the Equal Protection Clause and this Court's precedents.

Chief Justice Roberts delivered the opinion of the Court.

In these cases we consider whether the admissions systems used by Harvard College and the University of North Carolina, two of the oldest institutions of higher learning in the United States, are lawful under the Equal Protection Clause of the Fourteenth Amendment….

In the wake of the Civil War, Congress proposed and the States ratified the Fourteenth Amendment, providing that no State shall "deny to any person . . . the equal protection of the laws." To its proponents, the Equal Protection Clause represented a "foundation[al]

principle"—"the absolute equality of all citizens of the United States politically and civilly before their own laws.

[Nonetheless] for almost a century after the Civil War, state-mandated segregation was in many parts of the Nation a regrettable norm. This Court played its own role in that ignoble history, allowing in *Plessy* v. *Ferguson* the separate but equal regime that would come to deface much of America.

After *Plessy*, "American courts . . . labored with the doctrine [of separate but equal] for over half a century." *Brown* v. *Board of Education*. [But] By 1950, the inevitable truth of the Fourteenth Amendment had thus begun to reemerge: Separate cannot be equal.

The culmination of this approach came finally in *Brown* v. *Board of Education*. In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government. …

The time for making distinctions based on race had passed.

In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality. Laws dividing parks and golf courses; neighborhoods and businesses; buses and trains; schools and juries were undone, all by a transformative promise "stemming from our American ideal of fairness": " 'the Constitution . . . forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race.' " …

These decisions reflect the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." …

Any exception to the Constitution's demand for equal protection must survive a daunting … examination known in our cases as "strict scrutiny." Under that standard we ask, first, whether the racial classification is used to "further compelling governmental interests." Second, if so, we ask whether the government's use of race is "narrowly tailored"—meaning "necessary"—to achieve that interest.

[Under this standard], our acceptance of race-based state action has been rare for a reason. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. That principle cannot be overridden except in the most extraordinary case.

These cases involve whether a university may make admissions decisions that turn on an applicant's race. Our Court first considered that issue in *Regents of University of California* v. *Bakke*, which involved a set-aside admissions program used by the University of California, Davis, medical school.…

In a deeply splintered decision that produced six different opinions—none of which commanded a majority of the Court—we ultimately ruled in part in favor of the school and in part in favor of Bakke. Justice Powell announced the Court's judgment, and his opinion—though written for himself alone—would eventually come to "serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies."

Justice Powell [rejected most of the school's justifications] for its as policy not sufficiently compelling. [But he did write that] obtaining the educational benefits that flow from a racially diverse student body was "a constitutionally permissible goal for an institution of higher education." …

[Nonetheless] the role of race had to be cabined. It could operate only as "a 'plus' in a particular applicant's file." And even then, race was to be weighed in a manner "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant."

In the years that followed our "fractured decision in *Bakke*," lower courts "struggled to discern whether Justice Powell's" opinion constituted "binding precedent." We accordingly

took up the matter again in 2003, in the case *Grutter* v. *Bollinger*, which concerned the admissions system used by the University of Michigan law school. …

The Court's analysis tracked Justice Powell's in many respects. As for compelling interest, the Court held that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." In achieving that goal, however, the Court made clear—just as Justice Powell had—that the law school was limited in the means that it could pursue. [For example,] the school could not "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks.

[Further] … *Grutter* imposed one final limit on race-based admissions programs. At some point, the Court held, they must end. … *Grutter* thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Twenty years later, no end is in sight… Yet [Harvard and UNC] insist that the use of race in their admissions programs must continue.

But we have permitted race-based admissions only within the confines of narrow restrictions. University programs must comply with strict scrutiny… and—at some point—they must end. Respondents' admissions systems—however well intentioned and implemented in good faith—fail … these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.

Because "[r]acial discrimination [is] invidious in all contexts," we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny.

Respondents have fallen short of satisfying that burden. First, the interests they view as compelling cannot be subjected to meaningful judicial review. Harvard identifies the following educational benefits that it is pursuing: (1) "training future leaders in the public and private sectors"; (2) preparing graduates to "adapt to an increasingly pluralistic society"; (3) "better educating its students through diversity"; and (4) "producing new knowledge stemming from diverse outlooks.

Although these are commendable goals, they are not sufficiently coherent for purposes of strict scrutiny.... It is unclear how courts are supposed to measure any of these goals. How is a court to know whether leaders have been adequately "train[ed]"; whether the exchange of ideas is "robust"; or whether "new knowledge" is being developed? Even if these goals could somehow be measured, moreover, how is a court to know when they have been reached, and when the perilous remedy of racial preferences may cease? There is no particular point at which there exists sufficient "innovation and problem-solving," or students who are appropriately "engaged and productive." Finally, the question in this context is not one of *no* diversity or of *some*: it is a question of degree. How many fewer leaders Harvard would create without racial preferences, or how much poorer the education at Harvard would be, are inquiries no court could resolve….

The universities' main response to these criticisms is, essentially, "trust us." … But we have been unmistakably clear that any deference must exist "within constitutionally prescribed limits."… Universities may define their missions as they see fit. The Constitution defines ours. Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." The programs at issue here do not satisfy that standard.

For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause….

At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But… universities may not simply establish through application essays or other means the regime we hold unlawful today…. A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice.

Justice Sotomayor, with whom Justice Kagan and Justice Jackson join, dissenting.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In *Brown v. Board of Education*, the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society." For 45 years, the Court extended *Brown's* transformative legacy to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted *Brown's* vision of a Nation with more inclusive schools.

Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society. Because the Court's opinion is not grounded in law or fact and contravenes the vision of equality embodied in the Fourteenth Amendment, I dissent.

Justice Jackson, with whom Justice Sotomayor and Justice Kagan join, dissenting.

Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the "self-evident" truth that all of us are created equal. Yet, today, the Court determines that holistic admissions programs like the one that the University of North Carolina (UNC) has operated, consistent with *Grutter* v. *Bollinger*, are a problem with respect to achievement of that aspiration, rather than a viable solution (as has long been evident to historians, sociologists, and policymakers alike).

I join [Justice Sotomayor's] opinion without qualification. I write separately to expound upon the universal benefits of considering race in this context, in response to a suggestion that has permeated this legal action from the start. Students for Fair Admissions (SFFA) has maintained, both subtly and overtly, that it is *unfair* for a college's admissions process to consider race as one factor in a holistic review of its applicants.

This contention blinks both history and reality in ways too numerous to count. But the response is simple: Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally ad- vantaged its applicants fails to acknowledge the well- documented "intergenerational transmission of inequality" that still plagues our citizenry.

It is *that* inequality that admissions programs such as UNC's help to address, to the benefit of us all. Because the majority's judgment stunts that progress without any basis in law, history, logic, or justice, I dissent.

HEIGHTENED SCRUTINY AND CLAIMS OF GENDER DISCRIMINATION

Before *Brown v. Board of Education*, groups and individuals challenging practices as racially discriminatory had a major obstacle to overcome: *Plessy v. Ferguson*. Lawsuits based on claims of sex discrimination were also handicapped, and for even longer periods of time. Indeed, before the 1970s, the few sex discrimination cases that reached the Supreme Court often ended in decisions that reinforced traditional views of gender roles. In ***Bradwell v. Illinois*** (1873), for example, the Court heard a challenge to an action by the Illinois Supreme Court denying Myra Bradwell a license to practice law solely because of her sex. The Court, with only Chief Justice Salmon P. Chase dissenting, upheld the state action. Justice Joseph P. Bradley's concurring opinion, which Justices Noah Swayne and Stephen Field joined, illustrates the attitude of the legal community toward women. Bradley said that he gave his "heartiest concurrence" to contemporary society's "multiplication of avenues for women's

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Like the NAACP, women's rights organizations of the 1960s and 1970s, believed that the equal protection clause held the potential for ensuring women's rights. *Reed v. Reed* (1971) was one of the first of their cases to reach the Supreme Court. At issue was the validity of an Idaho law that used sex classifications. ACLU attorney Ruth Bader Ginsburg challenged the law as a violation of the equal protection clause.

What was not so clear was the standard of scrutiny the justices would use. In the race discrimination cases, the Court had declared strict scrutiny the appropriate standard. Under that standard, government had a heavy burden of proof if it wished to show that a law based on race was the least restrictive means to achieve a compelling state interest. Much of the success enjoyed by civil rights groups was due to this favorable legal standard. Ginsburg and other advocates of equal rights for women hoped the Court would adopt the same standard for sex discrimination claims. Did the justices go along?

Reed v. Reed

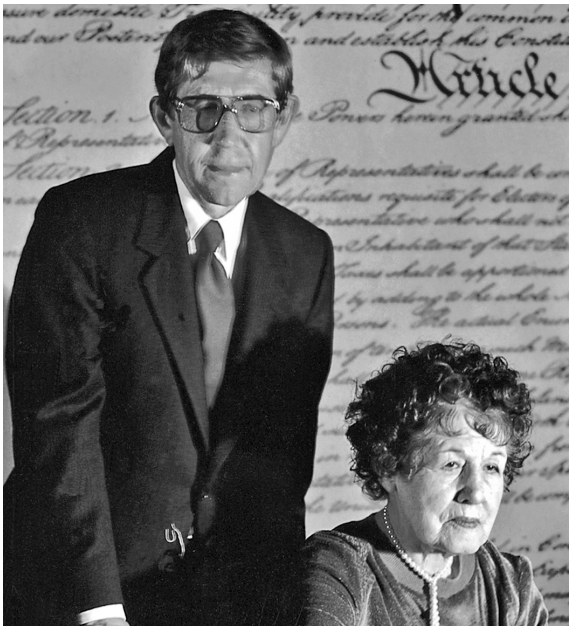
404 U.S. 71 (1971)
http://caselaw.findlaw.com/us-supreme-court/404/71.html
Oral arguments are available at www.oyez.org/cases/1971/70-4.
Vote: 7 (Blackmun, Brennan, Burger, Douglas, Marshall, Stewart, White)
0

OPINION OF THE COURT: *Burger*

FACTS:

Richard Reed was Sally and Cecil Reed's adopted son. He died in 1967 at the age of sixteen in Ada County, Idaho, leaving no will. The Reeds, who had divorced several years before Richard's death, became involved in a legal dispute over who should administer his estate. The child's property consisted of a few personal items and a savings account, with the total value less than $1,000. The probate court judge appointed Cecil Reed administrator of the estate, in accordance with Idaho law. Section 15-312 of the Idaho Code stipulated that when a person died intestate (without a will), an administrator would be appointed according to a list of priority relationships. First priority went to a surviving spouse, second priority to children, third to parents, and so forth. Section 15-314 of the statute stated that in the case of competing petitions from otherwise qualified individuals of the same priority relationship, "males must be preferred to females."

Sally Reed challenged the law as a violation of the equal protection clause of the Fourteenth Amendment. The state district court agreed with her argument, but the Idaho Supreme Court reversed.



The Idaho Statesman

Sally Reed, pictured with Boise attorney Allen Derr, who represented her in oral arguments before the Supreme Court, challenged an Idaho law that gave preference to males over females in designating administrators of estates. *Reed v. Reed* ushered in the modern era of sex discrimination litigation.

With assistance of Ginsburg and other ACLU lawyers, Sally Reed and her attorney, Allen Derr, took the case to the U.S. Supreme Court. There they asked the justices to adopt a strict scrutiny approach to sex discrimination cases, but they also suggested that the law was unconstitutional even under a less rigorous standard.

ARGUMENTS:

For the appellant, Sally M. Reed:

- The Idaho statute subordinating women to men without regard to individual capacity creates a suspect classification requiring close judicial scrutiny.
- The suspect class designation is appropriate because women, like Black people, have suffered long-standing discrimination, because sex is an easily identifiable characteristic, and because women are sparsely represented in political offices.
- Biological differences have nothing to do with the ability to be an effective administrator of an estate.
- The law is based on administrative convenience only. There is no substantial relationship between the law and any permissible government interest.

For the appellee, Cecil R. Reed:

- The statute was enacted to reduce the time, trouble, and expense of probating small estates as well as to eliminate costly contests over who should administer such estates. This case demonstrates the need for administrative efficiency. Richard's estate has an estimated value of only $745.
- The argument that the discrimination against women is comparable to the enslavement of African Americans is not valid.
- The legislators who enacted this statute recognized that on average men had higher education levels and more experience in financial affairs than women, making it rational to prefer men over women in settling small estates.

MR. CHIEF JUSTICE BURGER DELIVERED THE OPINION OF THE COURT.

Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by §15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under §15-312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by §15-312. In such situations, §15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A 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." The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§15-312 and 15-314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under §15-312, seek letters of administration and thereby present the probate court "with the issue of which one should be named." The court also concluded that where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives. . . ."

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether §15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex. . . .

By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. The judgment of the Idaho Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

The Court's unanimous decision in *Reed* applied two important principles to gender-based discrimination. First, the Court refused to accept Idaho's defense of its statute. The state had contended that it was inefficient to hold full court hearings on the relative merits of competing candidates to administer estates, especially small estates. Imposing arbitrary criteria saved court time and avoided intrafamily squabbles. The Supreme Court held that administrative convenience is no justification for violating the Constitution. Second, defenders of the Idaho law argued that the arbitrary favoring of males over females made sense because, in most cases, the male will have had more education and experience in financial matters than the competing female. In rejecting this argument, the justices said that laws containing overbroad, gender-based assumptions violate the equal protection clause.

The *Reed* case also signaled that the justices were receptive to gender discrimination claims and would not hesitate to strike down state laws that imposed arbitrary gender-based classifications. This turn of events was certainly good news for women's rights advocates, but the standard used in the case was not. Chief Justice Burger invoked the rational basis test (rather than strict scrutiny), holding that laws based on gender classifications must be reasonable and have a rational relationship to a state objective. The Idaho law was sufficiently arbitrary to fail the rational basis test, but other laws and policies might well survive it.

Gender classifications remained governed by the rational basis approach until *Craig v. Boren* (1976).

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Craig v. Boren

429 U.S. 190 (1976)
http://caselaw.findlaw.com/us-supreme-court/429/190.html
Oral arguments are available at https://www.oyez.org/cases/1976/75-628.
Vote: 7 (Blackmun, Brennan, Marshall, Powell, Stevens, Stewart, White)
2 (Burger, Rehnquist)

OPINION OF THE COURT: *Brennan*
CONCURRING OPINIONS: *Powell, Stevens*
OPINION CONCURRING IN JUDGMENT: *Stewart*
OPINION CONCURRING IN PART: *Blackmun*
DISSENTING OPINIONS: *Burger, Rehnquist*

FACTS:

In 1972, Oklahoma enacted a statute setting the age of legal majority for both males and females at eighteen. Before then, females reached legal age at eighteen and males at twenty-one.[18] The equalization statute, however, contained one exception. Males could not purchase beer, even with the low 3.2 percent alcohol level, until they reached twenty-one; females could buy beer at eighteen. The state differentiated between the sexes in response to statistical evidence indicating a greater tendency for males ages eighteen to twenty-one to be involved in alcohol-related traffic accidents, including fatalities.

Viewing the Oklahoma law as a form of sex discrimination, Mark Walker, a twenty-year-old Oklahoma State University student who wanted to buy beer, and Carolyn Whitener, the owner of the Honk-N-Holler convenience store, who wanted to sell it, brought suit in federal trial court challenging the law on equal protection grounds. While the case slowly progressed, Walker turned twenty-one and was no longer subject to the state restrictions on purchasing alcohol. To protect against the case being declared moot, eighteen-year-old Curtis Craig replaced his friend Walker as the lead party.

Craig and Whitener argued that the Oklahoma law should be evaluated on the basis of strict scrutiny. The state disagreed. It urged the trial court to apply the rational basis test. Under that test, the law was clearly constitutional, the state claimed, because statistics demonstrated that, compared to women, men in the eighteen-to-twenty age category "drive more, drink more, and commit more alcohol-related offenses."

While acknowledging that the U.S. Supreme Court decisions were murky, a three-judge district court ruled that the rational basis test was the appropriate standard to apply. In doing so the judges concluded that the statistical evidence supporting the differences in male and female drinking and driving behavior was sufficient to justify the state's sex-based alcohol policy. Craig and Whitener appealed to the U.S. Supreme Court.

The state continued to advocate for the continued use of the rational basis test, and Craig and Whitener for strict scrutiny. Craig and Whitener also opened the door to a compromise. Their brief cited a passage written by Justice Harry Blackmun in *Stanton v. Stanton* (1975), another dispute over sex differences and legal maturation. In deciding that case (and also avoiding the level-of-scrutiny issue), Blackmun wrote for the majority, "We therefore conclude that under any test—compelling state interest, or rational basis, or *something in between*—[the statute] does not survive an equal protection attack" (emphasis added). This suggested that the justices might be open to a compromise, some level of scrutiny between rational basis and strict scrutiny. An amicus curiae brief, written on behalf of the ACLU by Ruth Bader Ginsburg, also emphasized the possibility of an "in between" solution to the level-of-scrutiny standoff.

ARGUMENTS:

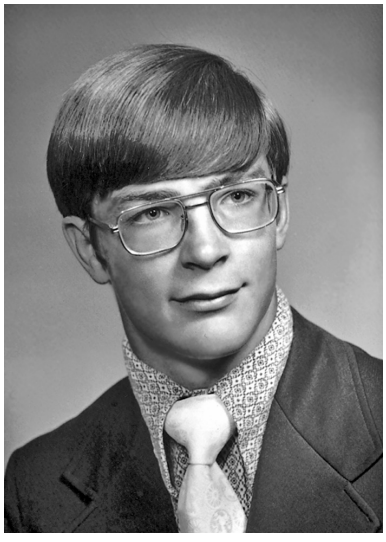
For the appellants, Curtis Craig and Carolyn Whitener:

- Based on recent decisions such as *Reed v. Reed* (1971), *Frontiero v. Richardson* (1973), and *Stanton v. Stanton* (1975), the Oklahoma statute unconstitutionally discriminates on the basis of sex.
- It is time to elevate sex discrimination to suspect-class status.
- The statistics provided by the state regarding alcohol-related offenses committed in the eighteen-to-twenty-one-year-old age group are flawed and invalid.
- The law is irrational in that it only prohibits sales to minor males by licensed vendors of 3.2 percent beer. It does not bar minor males from securing the beverage from an older male relative or even a younger female friend.

[18]For more on this case, see Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998).


Courtesy of Connie Camp Gamel


Courtesy of Carolyn Whitener


Courtesy of Curtis Craig

Mark Walker, left, an Oklahoma State University student, joined with beer vendor Carolyn Whitener, middle, to challenge the state's drinking age law that treated males and females differently. When Walker turned twenty-one and was no longer adversely affected by the law, he persuaded freshman fraternity brother Curtis Craig, right, to join the lawsuit.

For the appellees, David Boren, Governor of Oklahoma, et al.:

- The lower court correctly used the rational basis test in deciding this case.
- The Twenty-first Amendment gives the states wide latitude in regulating alcohol.
- The statistics clearly show that males under twenty-one are responsible for a disproportionately large share of alcohol-related offenses.
- The state's interest in preventing slaughter and property damage on the highways is sufficient to justify the statute.

MR. JUSTICE BRENNAN DELIVERED THE OPINION OF THE COURT.

Analysis may appropriately begin with the reminder that *Reed* [*v. Reed,* (1971)] emphasized that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause." To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Thus, in *Reed,* the objectives of "reducing the workload on probate courts" and "avoiding intrafamily controversy" were deemed of insufficient importance to sustain use of an overt gender criterion in the appointment of administrators of intestate decedents' estates. Decisions following *Reed* similarly have rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications. . . .

Reed v. Reed has also provided the underpinning for decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification. Hence, "archaic and overbroad" generalizations could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the "marketplace and world of ideas" were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy. In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.

In this case, too, *"Reed,* we feel, is controlling. . . ." We turn then to the question whether, under *Reed,* the difference between males and females with respect to the purchase of 3.2% beer warrants the differential in age drawn by the Oklahoma statute. We conclude that it does not.

The District Court recognized that *Reed v. Reed* was controlling. In applying the teachings of that case, the court found the requisite important governmental objective in the traffic-safety goal proffered by the Oklahoma Attorney General. It then concluded that the statistics introduced by the appellees established that the

gender-based distinction was substantially related to achievement of that goal.

. . . Clearly, the protection of public health and safety represents an important function of state and local governments. However, appellees' statistics in our view cannot support the conclusion that the gender-based distinction closely serves to achieve that objective and therefore the distinction cannot under *Reed* withstand equal protection challenge.

The appellees introduced a variety of statistical surveys. [An] analysis of arrest statistics for 1973, [for example,] demonstrated that 18–20-year-old male arrests for "driving under the influence" and "drunkenness" substantially exceeded female arrests for that same age period. Similarly, youths aged 17–21 were found to be overrepresented among those killed or injured in traffic accidents, with males again numerically exceeding females in this regard. . . .

Even were this statistical evidence accepted as accurate, it nevertheless offers only a weak answer to the equal protection question presented here. The most focused and relevant of the statistical surveys, arrests of 18–20-year-olds for alcohol-related driving offenses, exemplifies the ultimate unpersuasiveness of this evidentiary record. Viewed in terms of the correlation between sex and the actual activity that Oklahoma seeks to regulate—driving while under the influence of alcohol—the statistics broadly establish that .18% of females and 2% of males in that age group were arrested for that offense. While such a disparity is not trivial in a statistical sense, it hardly can form the basis for employment of a gender line as a classifying device. Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous "fit." Indeed, prior cases have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on far more predictive empirical relationships than this.

Moreover, the statistics exhibit a variety of other shortcomings that seriously impugn their value to equal protection analysis. Setting aside the obvious methodological problems, the surveys do not adequately justify the salient features of Oklahoma's gender-based traffic-safety law. None purports to measure the use and dangerousness of 3.2% beer as opposed to alcohol generally, a detail that is of particular importance since, in light of its low alcohol level, Oklahoma apparently considers the 3.2% beverage to be "nonintoxicating." . . .

There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause. Suffice to say that the showing offered by the appellees does not satisfy us that sex represents a legitimate, accurate proxy for the regulation of drinking and driving. In fact, when it is further recognized that Oklahoma's statute prohibits only the selling of 3.2% beer to young males and not their drinking the beverage once acquired (even after purchase by their 18–20-year-old female companions), the relationship between gender and traffic safety becomes far too tenuous to satisfy *Reed*'s requirement that the gender-based difference be substantially related to achievement of the statutory objective.

We hold, therefore, that under *Reed,* Oklahoma's 3.2% beer statute invidiously discriminates against males 18–20 years of age.

Reversed.

The Court's ruling in *Craig v. Boren* had little impact on the parties to the case, but the decision fundamentally changed sex discrimination law. The intermediate scrutiny test—requiring that laws that classify on the basis of sex be substantially related to an important government objective—was adopted by a nar-row margin. Nevertheless, *Craig v. Boren* established the elevated level of scrutiny standard that has been used in sex discrimination cases ever since. The battle between strict scrutiny advocates and rational basis proponents ended with neither side able to claim a total victory.

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DISCRIMINATION BASED ON SEXUAL ORIENTATION

Along with issues of race and gender, discrimination based on sexual orientation has been a subject of legal disputes in recent years.

In *Obergefell v. Hodges* (2015), the Court invalidated state bans on same-sex marriage. Recall though, that in *Obergefell*, Justice Kennedy rested his majority opinion primarily on the due process clause, not on the equal protection clause.

As a result (and despite the importance of *Obergefell*), *Romer v. Evans* remains the Court's most significant interpretation of the equal protection clause as it applies to classifications based on sexual orientation. Note that the Court applied rational basis scrutiny to determine whether Colorado's constitutional amendment amounted to unconstitutional discrimination. The majority invalidated the classification. Why?

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Romer v. Evans

517 U.S. 620 (1996)
https://caselaw.findlaw.com/us-supreme-court/517/620.html
Oral arguments are available at https://www.oyez.org/cases/1995/94-1039.
Vote: 6 (Breyer, Ginsburg, Kennedy, O'Connor, Souter, Stevens)
3 (Rehnquist, Scalia, Thomas)

OPINION OF THE COURT: *Kennedy*
DISSENTING OPINION: *Scalia*

FACTS:

This case involved a challenge to an amendment to the Colorado state constitution, which had been adopted by statewide initiative. The initiative arose in response to local laws passed by communities such as Boulder, Aspen, and Denver making sexual orientation an impermissible ground upon which to discriminate. In effect, the local laws gave sexual orientation the same status as race, sex, and other protected categories. To reverse this trend and remove the possibility of future laws, a sufficient number of citizens signed a petition to place a proposed constitutional amendment on the ballot for the November 1992 elections. Known as Amendment 2, it passed with the support of 53.4 percent of those voting. The amendment stated:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Almost immediately Richard G. Evans, a gay employee in the office of the mayor of Denver, other citizens, and several Colorado local governments sued Governor Roy Romer and the state of Colorado, claiming that the new amendment was in violation of the Fourteenth Amendment's equal protection clause. The amendment, they contended, prohibited gays from using the political process to secure legal protections against discrimination. The Colorado Supreme Court, 6–1, struck down the amendment, and the state appealed to the U.S. Supreme Court.

ARGUMENTS:

For the petitioners, Roy Romer, Governor, and the State of Colorado:

- Federal courts have uniformly rejected the claim that sexual orientation is a suspect or semi-suspect classification. Therefore, rational basis is the appropriate test to use. Thus, Amendment 2 carries a strong presumption of constitutionality.
- Amendment 2 does not infringe on the right to vote or on any other right of political participation. Opponents of Amendment 2 are free to use the same political mechanisms for its repeal (the constitutional amendment process) that amendment supporters used to secure its adoption.
- Amendment 2 advances legitimate state interests (e.g., uniformity of state civil rights laws, promotion of religious liberty, promotion of associational freedoms).
- A state may provide more protections than are required by the U.S. Constitution but may also rescind those extra protections without violating the Constitution.

For the respondents, Richard G. Evans, et al.:

- A state law that singles out gay people and intentionally denies them all effective opportunity to seek relief from discrimination through the political process requires heightened scrutiny.
- Amendment 2 prohibits gay people from seeking any relief from any level of government for any claim of discrimination against them.

- The right to equal political access belongs to all the people, not just to members of groups that courts have declared to be a suspect class.
- Amendment 2 advances no legitimate purpose, but can only be explained by antipathy toward a particular group.

JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson* (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution. . . .

Soon after Amendment 2 was adopted, this litigation to declare its invalidity and enjoin its enforcement was commenced in the District Court for the City and County of Denver. . . .

The trial court granted a preliminary injunction to stay enforcement of Amendment 2, and an appeal was taken to the Supreme Court of Colorado. . . [T]he State Supreme Court held that Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the fundamental right of gays and lesbians to participate in the political process. . . . We granted certiorari and now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.

The State's principal argument in defense of Amendment 2 is that it puts gays and lesbians in the same position as all other persons. So, the State says, the measure does no more than deny homosexuals special rights. This reading of the amendment's language is implausible. . . .

Sweeping and comprehensive is the change in legal status effected by this law. . . . Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

The change that Amendment 2 works in the legal status of gays and lesbians in the private sphere is far-reaching, both on its own terms and when considered in light of the structure and operation of modern anti-discrimination laws. That structure is well illustrated by contemporary statutes and ordinances prohibiting discrimination by providers of public accommodations. . . .

Amendment 2 bars homosexuals from securing protection against the injuries that these public-accommodations laws address. That in itself is a severe consequence, but there is more. Amendment 2, in addition, nullifies specific legal protections for this targeted class in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment. . . .

Amendment 2's reach may not be limited to specific laws passed for the benefit of gays and lesbians. It is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings. . . .

. . . [W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Amendment 2 fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Taking the first point, even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. . . . By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Amendment 2 confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons

by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .

It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. . . .

. . . [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons. Amendment 2, however, in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it. We conclude that, in addition to the far-reaching deficiencies of Amendment 2 that we have noted, the principles it offends, in another sense, are conventional and venerable; a law must bear a rational relationship to a legitimate governmental purpose, and Amendment 2 does not.

The primary rationale the State offers for Amendment 2 is respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality. Colorado also cites its interest in conserving resources to fight discrimination against other groups. The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them. We cannot say that Amendment 2 is directed to any identifiable legitimate purpose or discrete objective. It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.

We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws. Amendment 2 violates the Equal Protection Clause, and the judgment of the Supreme Court of Colorado is affirmed.

It is so ordered.

JUSTICE SCALIA, WITH WHOM THE CHIEF JUSTICE AND JUSTICE THOMAS JOIN, DISSENTING.

The constitutional amendment before us here is not the manifestation of a "'bare . . . desire to harm'" homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws. That objec-tive, and the means chosen to achieve it, are unimpeachable under any constitutional doctrine hitherto pronounced . . .

Today's opinion has no foundation in American constitutional law, and barely pretends to. The people of Colorado have adopted an entirely reasonable provision which does not even disfavor homosexuals in any substantive sense, but merely denies them preferential treatment. Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans, and is not only an appropriate means to that legitimate end, but a means that Americans have employed before. Striking it down is an act, not of judicial judgment, but of political will. I dissent.

The majority's opinion is a strong statement against laws that single out homosexuals for discriminatory treatment. But the ruling is also important for other reasons. The justices explicitly distanced themselves from the "strict scrutiny" approach of the Colorado Supreme Court and did not even engage in a full discussion of the relative merits of the three equal protection tests as applied to gay rights. Instead, the Court concluded that Amendment 2 offends even the lowest level of scrutiny (rational basis) because of the state's justifications for singling out sexual orientation for political disability, they could only infer that the amendment was driven by animus against gays and lesbians.