Privilege, Gender, and the Fourteenth Amendment: Reclaiming Equal Protection of the Laws

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PRIVILEGE, GENDER, AND THE FOURTEENTH AMENDMENT: RECLAIMING EQUAL PROTECTION OF THE LAWS

by STEPHANIE M. WILDMAN

The Fourteenth Amendment to the United States Constitution states:

“No state shall... deny to any person within its jurisdiction the equal protection of the laws.”

In the wake of *Grutter v. Bollinger* and *Gratz v. Bollinger*, cases some have touted as the most important civil rights decisions of the last several decades, it is

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1. U.S. CONST. amend. XIV, § 1. This requirement to extend the equal protection of the laws also applies to the federal government under the due process clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

2. 123 S. Ct. 2325 (2003). In *Grutter*, the Court examined the University of Michigan law school admissions policy. The policy sought to achieve diversity in law school classes, recognizing many possible bases for diversity. The school sought to admit students from groups which have historically been discriminated against, including African Americans, Latinos, and Native Americans. *Id.* at 2332. Because the admissions policy considered race as one factor among many and gave substantial weight to other diversity factors, the Court found that the Equal Protection Clause of the Fourteenth Amendment did not prohibit the law school’s narrowly tailored use of race in its admissions decisions to further the compelling state interest of achieving a diverse student body. *Id.* at 2347.

3. 123 S. Ct. 2411 (2003). In *Gratz*, two white Michigan residents, denied admission to the University of Michigan’s College of Literature, Science, and the Arts, challenged the school’s admission policy. The policy utilized a point system, granting applicants points for their high school grade point average, standardized test scores, academic quality of their high school, strength of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. The policy also included a “miscellaneous” category, which awarded an applicant twenty extra points for membership in an underrepresented racial or ethnic minority group. Under this system, an applicant could score a total of 150 points, with 100 points necessary for admission. *Id.* at 2349. The Court found that the policy, which automatically distributed one-fifth of the points necessary to be admitted solely on the basis of race, did not meet the requirement of being narrowly tailored to achieve the compelling interest of educational diversity. *Id.* at 2427-28. Echoing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court held that diversity in education remains a compelling state interest, but that the University of Michigan must devise a system that considers each applicant as an individual and assesses his or her unique characteristics, including race, in light of their potential contribution to a diverse educational experience. *Id.* at 2428.

4. See, e.g., Linda Greenhouse, *Justices Back Affirmative Action by 5-4, But Wider Vote Bans a Racial Point System*, N. Y. TIMES, June 24, 2003, at A1 (stating “[t]he result of today’s rulings was that [the view that] there was a ‘compelling state interest’ in racial diversity, a position that had appeared undermined by the [Court’s subsequent equal protection rulings in other contexts ... has now been endorsed ... and placed on a stronger footing than ever before”); David G. Savage, *Court Affirms Use of*
Race in University Admissions: Justices Render Two Close Decisions Involving the University of Michigan, LOS ANGELES TIMES, June 24, 2003, at A1 (stating that “[t]his is a historic day for the achievement of civil rights in America . . .”) [the Court rejected arguments that would have turned the clock back on 50 years of civil rights progress.”); Charles Lane, Affirmative Action for Diversity is Upheld; in 5-4 Vote, Justices Approve U-Mich. Law School Plan, WASH. POST, June 24, 2003, at A01 (stating that “[t]he Supreme Court issued a qualified but resounding endorsement of affirmative action in higher education . . . [ratifying] diversity as a rationale for race-conscious admissions and [laying] out a constitutionally-acceptable means for achieving it.”).

5. The intent requirement first appeared as a creation of the United States Supreme Court in Washington v. Davis, 426 U.S. 229, 230-31 (1976). According to the Court, a plaintiff claiming discrimination in violation of the equal protection of the laws must prove that the perpetrator intended the discrimination. In Davis, plaintiffs had challenged the employment exam used by the District of Columbia police force. The test, administered generally to prospective government employees, was used to determine whether applicants had acquired a particular level of verbal skill. Plaintiffs contended that the test bore no relationship to job performance and therefore violated equal protection because it excluded four times as many African Americans as whites. These same police hopefuls, who had taken this test, had grown up in the segregated school system that had existed in the District; see Charles R. Lawrence III, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 369-76 (1987) (discussing the doctrine of discriminatory purpose established by the Supreme Court in Davis). Yet the court found that the plaintiffs challenging this facially neutral state action, an employment test, had to demonstrate that the state had acted with discriminatory purpose in order to sustain their equal protection challenge. In reaching this conclusion the court reflected on the “central purpose of the Equal Protection Clause of the Fourteenth Amendment,” which it described as “the prevention of official conduct discriminating on the basis of race.” Davis, 426 U.S. at 239. Thus the Court canonized a view of equal protection as connected to discrimination.

In Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977), an equal protection challenge to a refusal to rezone property to enable use for building low income housing, the Court revisited the intent requirement and the Equal Protection Clause. The Court explained: “Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action whether it ‘bears more heavily on one race than another,’ [citing Davis, 426 U.S. at 242], may provide an important starting point.” Id. at 266. The Court seemed aware here that discrimination may bear more heavily on one race than another. What the Court failed to see was that systemic privilege also results in a failure to equally distribute societal resources, contravening the constitutional mandate for equal protection.

Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256 (1979), involving a challenge to a veteran’s preference in employment, extended the intent requirement’s development to encompass gender cases. The Court held that a female civil service worker, passed over for numerous positions in favor of veterans, had not suffered a civil rights violation, because no discriminatory intent had been proven. Overwhelming evidence demonstrated that the statute had an inherently discriminatory impact on women in the state civil service system. Dissenting, Justice Thurgood Marshall objected to the Supreme Court’s continued construction of the Equal Protection Clause as requiring proof of intent by plaintiffs who had alleged race and gender discrimination based on the disparate impact of neutral policies and practices. Marshall wrote “[t]hat a legislature seeks to advantage one group does not, as a matter of logic or of common sense, exclude the possibility that it also intends to disadvantage another.” Id. at 283. The kernel of Justice Marshall’s idea, that neutral action may be both advantaging and disadvantaging at the same time, is at the core of the new approach to equal protection of the laws described in this article. The focus of these civil rights cases that engendered the intent requirement had been alleged invidious discrimination, cases in which intent had been hard to prove to the court’s satisfaction. In these cases the court had emphasized preventing invidious discrimination as central to the meaning of the Equal Protection Clause. But in addition to preventing discrimination, the equal
language of the Fourteenth Amendment, although the United States Supreme Court has held that a litigant, pursuing a claim of discrimination in violation of the Equal Protection Clause, must prove intent to discriminate.

The word "person" does appear in the amendment’s language, indicating the primacy of equal protection to individuals. But the Supreme Court’s development of equal protection jurisprudence, while seeking to retain that primacy, has ignored the relationship of that individual person to the significant identity groups in which that individual might be a member. This failure to recognize the individual-group interrelation has resulted in a jurisprudence that makes no sense. It has created a body of decisional law resulting in whites suing with impunity as their charge of race discrimination finds ready remedy. Yet people of color claiming race protection of the laws also precludes privileging on the basis of race or gender. The clause can be read as a doctrine against white supremacy; see infra text accompanying notes 110-15.


7. Significant identity groups have been the focus of much contemporary legal scholarship. MARTHA CHAMALLAS, INTRODUCTION OF FEMINIST LEGAL THEORY 21 (2003) [hereinafter CHAMALLAS, FEMINIST LEGAL THEORY]. Chamallas explains that the current emphasis in this literature has moved beyond "the conventional understanding of identity as an ascribed or fixed status" and instead focuses on “the dynamic or ‘performative’ dimensions of identity, specifically how an individual presents his or her difference in a variety of settings.” Id.

Iris Marion Young and Nancy Fraser have debated this concentration on identity. Fraser’s concern was that a focus on identity resulted in a neglect of material conditions in society, while Young objected to the dichotomization of culture and economy. MARTHA R. MAHONEY, JOHN O. CALMORE, & STEPHANIE M. WILDMAN, SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW 52-53 (2003) [hereinafter MAHONEY, CALMORE, & WILDMAN, SOCIAL JUSTICE] (discussing the Fraser-Young debate). See also, Richard Delgado, Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection, 89 GEO. L.J. 2279 (2001) (decrying the focus of contemporary theory away from material conditions of oppression).

8. Owen Fiss was an early proponent of the idea that the Court’s equal protection jurisprudence was too individualistic. Owen Fiss, Groups and the Equal Protection Clause, 5 PHILOSOPHY AND PUBLIC AFFAIRS 107 (1976). In this landmark essay, written in the context of seeking to justify affirmative action remedies, particularly for African Americans, Fiss urged the Court to adopt a “group disadvantaging principle” as embodying a fuller account of social reality. Id. at 108. This essay is the subject of a recent on-line symposium Legal Scholarship, The Origins and Fate of Antisubordination Theory, at http://www.bepress.com/ils/iss2/ (Aug. 2002) (last accessed Jan. 20, 2004).

9. See Martha R. Mahoney, Under-Ruling Civil Rights in Walker v. City of Mesquite, 85 CORNELL L. REV. 1309, 1309-10 (2000) (examining Walker v. City of Mesquite, 169 F. 3d 973 (5th Cir. 1999), as a case study that exemplifies the ability of whites to sue with impunity). In Walker, the Fifth Circuit held that white homeowners have a constitutional right not to have their neighborhoods selected on the basis of their whiteness, as part of a scheme for remedying longstanding discrimination against black public housing tenants. Id. at 1310 (citing Walker, 169 F. 3d at 987). According to Mahoney, the court’s version of “race neutrality” recognized white-majority neighborhoods as a natural phenomenon. Viewing white neighborhoods as natural veiled the discriminatory practices which resulted in black-majority neighborhoods and defended the concept of whiteness under this guise of neutrality. Id. at 1345; see also Darren Hutchinson, “Unexplainable on Grounds Other than Race”: The Inversion of Privilege and Subordination in Equal Protection Jurisprudence, 2003 U. ILL. L. REV. 615, 673 (2003) (describing a similar scenario in the election redistricting cases). He notes that the Supreme Court has recognized the equal protection claims of white voters in such cases, despite the fact that they were not victims of intentional discrimination and were not disenfranchised or disempowered by state action. Id.
discrimination, in a society that systemically privileges whiteness, find their pleas unheard.10

While the intent requirement has been condemned as the chief obstacle to that hearing, the Court’s own inability to understand the relation of individuals, groups, and the Equal Protection Clause surely must share some of the blame. Cognitive and social psychological literature explains human mental processes, describing the links between the conceptualization of individuals and groups and the interrelation of that conceptualization with bias.11 Yet the Court’s lack of understanding of the individual-group interrelation has led to its failure to recognize forms of bias that remain roadblocks to achieving equal protection of the laws.12 These biases are often embedded in the systemic privileging of some groups within identity categories, such as whites within the category race or males within the category sex. The Equal Protection Clause is broad enough to encompass claims based on the operation of systemic privilege as well as claims based on discrimination. An equal protection jurisprudence that examined systemic privilege would clarify the

10. “Privileged classes receive the most serious scrutiny of the equal protection claims while the Court doubts and dismisses the equal protection claims of members of protected classes.” See Hutchinson, supra note 9, at 671.


12. See, e.g., Krieger, Content of Our Categories, supra note 11, at 1174 (arguing that racial discrimination in employment is usually unintended); Wang, supra note 11, at 4.

interrelation of individuals to groups, provide an avenue for addressing biases, and sidestep the need to prove intent to discriminate in cases involving equal protection violations. Equal protection analysis needs to interrogate the structures of domination that create and maintain systemic privilege rather than merely focusing on a comparison of the treatment accorded to individuals.

Many writers have criticized the intent requirement, detailing its incompatibility with achieving the goal of ending discrimination. Rather than recreating that critique, this project seeks to chart a substitute path in equal protection jurisprudence that avoids the intent requirement without necessitating overruling it. This alternative path examines systemic privilege and claims that the dismantling of privilege, in particular white privilege, is necessary to achieving the equal protection of the laws under the Fourteenth Amendment. Thus it asserts that equal protection claims should focus on privilege rather than on discrimination.

The Court’s gender decisions illustrate two points relevant to this project. First, the current focus on discrimination is inadequate as confusion about the individual-group interrelation continues to inhibit attaining equal protection of the laws. Second, the fact patterns in key decisions reflect the presence of systemic privilege. The Court finds equal protection violations where systemic privilege is present, even though the Court does not name its decision-making method within the gender cases in this manner.

This article explains how the early gender equality cases exposed an inconsistency in judicial reasoning about the relationship between individuals and groups. The analysis in these cases of the harms that violate equal protection of the laws was hampered by their over-reliance on the comparative mode of equal protection analysis. Recent gender decisions suggest that the Court is mired in the same inconsistency. A focus on systemic privilege can aid the Court in surmounting this doctrinal impasse. The Court has delineated the idea of systemic privilege in early decisional law, without naming it as such. Thus an analysis that

13. See generally Sheila Foster, Intent and Incoherence, 72 TUL. L. REV. 1065, 1084-1100 (1998) (tracing the Supreme Court’s varied applications of the intent requirement); see also Hutchinson, supra note 9, at 664 (noting that, by utilizing the intent requirement, the Court fails to recognize “subtle and evolving” forms of discrimination); Lawrence, supra note 5 (stating that the intent requirement ignores unconscious racism, which is the real cause of racial discrimination); Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 CORNELL L. REV. 1151, 1166 (1991) (concluding that discrimination victims often decline to file discrimination claims because of the perceived difficulty of proving discriminatory intent); Barbara J. Flagg, “Was Blind, But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 980-81 (1993) (stating that the intent requirement ignores the existence of white race consciousness). For a critique of the intent requirement as it applies to Title VII, see Krieger, Content of Our Categories, supra note 11 (questioning the premise that discrimination necessarily manifests intent or motive); Chamallas, Bias, supra note 11 (discussing the debate over whether “unconscious disparate treatment” is actionable under Title VII).

14. The focus of this article is on the use of gender cases to make this argument. This article is part of a larger project that addresses the race cases and white privilege in greater detail. This path is only alternative in contrast to the past several decades of equal protection jurisprudence. The Court in an earlier era described attributes of systemic privilege in the fact patterns of both Loving v. Virginia, 388 U.S. 1 (1967), see infra notes 111-18, and Brown v. Bd. of Educ., 347 U.S. 483 (1954) (challenging segregated public schools as depriving children of equal protection of the laws).
considers systemic privilege can clarify the meaning of equal protection of the laws.

Linking gender, including the concepts of gender discrimination and privilege, with the Equal Protection Clause of the Fourteenth Amendment is a relatively new jurisprudential idea. The Amendment’s authors, much like the Constitution’s Framers, gave little serious thought to the idea of women as equal citizens in a democratic society. According to Justice Oliver Wendell Holmes, the Equal Protection Clause itself was a “last resort” of constitutional arguments. Therefore it is only recently that the Equal Protection Clause as it relates to gender has generated judicial and scholarly interest.

The well-documented change began with Reed v. Reed in 1971, when the Supreme Court found an Idaho statute that preferred men as estate administrators violated the promise of equal protection. Reed was the beginning of the evolution of a new standard of review in equal protection cases involving gender. But even as Reed marked a new era in equal protection jurisprudence, the gender cases demonstrated the Court’s inadequate understanding of the individual-group interrelationship and its bearing on equal protection.

In The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, I examined the early years of Supreme Court decisions in which litigants alleged sex discrimination in violation of the Equal Protection Clause. The article traced the confusing double message delivered by the Supreme Court decisions in which the Court asserted a desire to end sex discrimination, yet did not resolve cases in favor of women where ending discrimination meant mandating significant societal change. The cases in which the Court did find a violation of the Equal Protection Clause involved what I called the “comparison

15. See Sylvia A. Law, 13 TEMP. POL. & CIV. RTS. L. REV. 691, 691 (2004) (“As a matter of original intent it is clear that the Framers of the Fourteenth Amendment did not contemplate that it would encompass gender equality. Indeed, there is much evidence that the Framers understood that it did not reach gender discrimination.”).
17. Reed v. Reed, 404 U.S. 71 (1971) (holding that an Idaho law treating men and women differently as potential estate administrators violated the Equal Protection Clause of the Fourteenth Amendment).
18. Sylvia A. Law describes that standard as “functionally equivalent to that applied to racial classifications.” Law, supra note 15, at 695. However, equivalence was not the Court’s intent. See Gerald Gunther, The Supreme Court 1971 Term, Foreword, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 29-30 (1972) (discussing the Court’s failure to establish gender as a suspect class paralleling its treatment of race, but describing the Court as using a standard of scrutiny that seemed somewhat more exacting than rational basis). But in contemplating the desirability of a uniform standard of review, it is worth remembering Justice Stevens admonishment: There is only one Equal Protection Clause. It requires every state to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at judicial opinion that there are at least three such standards applies with the same force to a double standard.
Comparison mode cases involved a claim of sex discrimination, often by a man, whom the Court compared to a woman in a similar situation. The Court found similar situations to be present where individual actors were easy to identify, for example in cases relating to the receipt of benefits or the purchase of near beer. In these cases, the Court could evaluate treatment of an individual man by examining the corresponding treatment of an individual woman. Cases that seemed to confound the Court involved women claiming discrimination in situations unlike any men faced. Where a woman’s experience could not be compared to a man’s, such as pregnancy, or in situations women faced disproportionately to men, such as veteran’s preference or rape, the Court could not perceive an equality violation.

That article urged a “participatory perspective” in reviewing equal protection claims, stating that “any stigmatizing conduct which inhibits the full participation of women in society” should be held to violate the Equal Protection Clause. The idea of a participatory perspective sought to emphasize that ensuring equal participation in democracy was a core component of equal protection of the law and the Fourteenth Amendment.

At the same time, Sylvia A. Law, in *Rethinking Sex and the Constitution*, argued that an equality doctrine that denies the reality of biological difference in relation to reproduction reflected an idea about personhood that is inconsistent with people’s actual experience of themselves and the world. That article also traced the confusing messages from the Supreme Court regarding the Court’s view of gender, especially in cases relating to biological difference.

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20. *Id.* at 270-72.
22. *See* Craig v. Boren, 429 U.S. 190, 210 (state statutes prohibiting the sale of low-alcohol content beer to males between the ages of 18 and 20, but allowing its sale to females of the same age, discriminated on the basis of gender and were therefore unconstitutional under the Equal Protection Clause).
23. *See* Elizabeth Schneider, *The Synergy of Equality and Privacy in Women’s Rights*, 2002 U. CHI. LEGAL F. 137, 145-52 (2002) (arguing that the concepts of privacy and equality are informed by each other and should be examined together in women’s rights cases).
24. *See* WILDMAN, supra note 19, at 268.
27. Law states:

Present constitutional equality doctrine does not encompass concern with laws that regulate real biological difference. This failure has undermined strong equality analysis in cases challenging explicit sex-based classifications. The Craig standard, condemning explicit sex based classifications based on inaccurate stereotypical views of men and women, collapses
presented situations in which the comparison between women and men, necessitated by the comparison mode of equal protection review, prevented the Court from comprehending the equality violation.  

Both of these early articles saw an inconsistency in the Supreme Court's Fourteenth Amendment jurisprudence relating to gender. In cases not implicating biological difference, cases in which a comparison between women and men demonstrated two individuals receiving different treatment, the Court was able to perceive the presence of sex discrimination. But in cases involving any biological difference between women and men, the Court seemed unable to view the problem as imposing on the equal protection of the laws. So, for example, the Court decided *Roe v. Wade*, the challenge to the criminalization of abortion, on privacy grounds, not on the basis of an equality violation. Similarly, the Court found no equal protection violation in *Michael M. v. Sonoma County*, involving a statutory rape law that criminalized only male conduct.

Gender jurisprudence has evolved since those judicial decisions. The Court has recognized the harm of sexual harassment and found sex discrimination in when applied to explicit sex-based classifications that are arguably related to real biological differences. *Id.* at 988.

Both articles explain that male plaintiffs claiming sex discrimination fared better than female plaintiffs. Law also points out that the Court decided recent cases of sex discrimination, arguably dealing with reproductive biology, brought by men without any regard to biological differences. *Id.*; see also Wildman, *supra* note 19, at 299, stating:

Ironically, most cases in which the Court has combated sex discrimination by striking down gender-based classifications have involved discrimination against men. As a result of the decision in *Califano v. Goldfarb*, a man could now get AFDC survivor benefits; in *Caban*, a father of an illegitimate child could now block an adoption; in *Orr*, men have won the right to receive alimony from women; in *Wengler*, a man became entitled to receive workers compensation death benefits when his spouse died; and in *Hogan*, a man could attend a previously all-female graduate nursing program.

28. The need for making a comparison between women and men under equal protection theory led to a debate about the meaning of equality. This debate, often characterized as between "equal treatment" or "special treatment," surfaced in cases involving pregnancy. Martha Chamallas, summarizing this debate observed "both camps renounced the male norm and disagreed as much about strategy as fundamental theory." *CHAMALLAS, FEMINIST THEORY*, *supra* note 7, at 43. See *id.* at 39-44 for a description of this debate.

29. 410 U.S. 113 (1973) (holding that a woman's right to have an abortion is within the scope of personal liberty guaranteed by the constitutional right to privacy).

30. 450 U.S. 464 (1981) (holding that statutory rape law, which only made men criminally liable for having sexual intercourse with women under the age of 18, and not vice versa, did not violate the Equal Protection Clause of the Fourteenth Amendment because it was sufficiently related to the state's interest in preventing teenage pregnancy).

31. The Supreme Court first recognized sexual harassment as a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-68 (1986) (providing that a claim of "hostile work environment" is a form of sex discrimination actionable under Title VII). Subsequent sexual harassment cases decided by the Court include: *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (finding that a plaintiff can bring a sexual harassment claim without necessarily showing psychological harm); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998) (holding that harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-808 (1998) (concluding that an employer is subject to vicarious liability for a hostile environment created by
cases involving the workplace.\textsuperscript{32} The workplace setting has been the context in which the Court has been most able to perceive both a need for equal access and the history of differential treatment of women as a group. Thus it is in the workplace context that equality claims based on allegations of discrimination have been most effective. Hindsight makes clear that the easy cases for the Court, in equal protection analysis, involved an individual woman treated differently from an individual man.\textsuperscript{33}

Two recent cases, United States v. Morrison\textsuperscript{34} and Nevada Department of Human Resources v. Hibbs,\textsuperscript{35} suggest that the Court still faces the same myopia, stemming from the use of the comparison mode and the failure to understand the individual-group interrelation, about how to analyze gender cases involving equality. While the Court does seem better able to comprehend gender inequality in the workplace, viewing women and men as potentially co-equal actors in that setting like Hibbs, the Court still fails to see a violation of equal protection in situations where women and men cannot be easily compared. That was the situation in Morrison where the record indicated overwhelming evidence of violence against women.

In Morrison, the Court struck the portion of the Violence Against Women Act (VAWA) that created a private right of action for women who had been the victim of male violence.\textsuperscript{36} In Hibbs, the Court upheld the Family and Medical Leave Act (FMLA)\textsuperscript{37} which allows employees a total of twelve weeks of unpaid leave to care for immediate family members.\textsuperscript{38} Both cases involved the question whether

\begin{itemize}
  \item a supervisor, unless the employer can show that he exercised reasonable care to prevent and correct any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventive or corrective measures; Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765-66 (1998) (determining that an employer is subject to vicarious liability for an actionable hostile work environment created by a supervisor with authority).
  \item See United Auto Workers v. Johnson Controls, 499 U.S. 187, 198-201 (1990) (holding that an employer’s fetal-protection policy explicitly discriminated against women on the basis of their sex). See also Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 631-32 (1987) (holding that it is not a violation of Title VII for a public agency to take sex into account as one factor when making promotions in jobs in which women were significantly underrepresented); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that it is sex discrimination to require a female candidate for partnership in an accounting firm to “walk more femininely, talk more femininely, dress more femininely and wear make-up”).
  \item In the workplace the differential treatment of an individual woman often corresponded with differential treatment of women, as a group. Thus, while not recognizing systemic privilege in the workplace, the Court found arguments of equal protection violations compelling in the presence of privilege. See STEPHANIE M. WILDMAN with contributions by MARGALYNE ARMSTRONG, ADRIENNE D. DAVIS, & TRINA GRILLO, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 25-41 (1996) [hereinafter PRIVILEGE REVEALED] for a discussion of privilege in the workplace.
  \item 529 U.S. 598 (2000).
  \item The Court struck 42 U.S.C. § 13981, which provided a civil remedy for victims of gender-motivated violence, as unconstitutional on the ground that Congress lacked authority to enact the statute under either its Commerce Clause or Section Five power. Morrison, 529 U.S. at 601-02.
  \item See Family and Medical Leave Act, 29 U.S.C.S. § 2612(a)(1)(C) (Lexis 1993).
\end{itemize}
Section Five of the Fourteenth Amendment empowered Congress to redress a substantive violation of constitutional equality norms. Yet the fact patterns upon which the decisions were based reveal the inadequacy of a focus on discrimination in the contexts that gave rise to the litigation. The contexts underlying these cases demonstrate the Court’s continuing myopia about equality. The call to examine context in litigation, long a backbone of common law jurisprudence as well as this Symposium, has been emphasized by a widely varied audience, including critical race scholar John O. Calmore,39 feminist theorist Reva Siegel,40 and Justice Sandra Day O’Connor.41 This examination of context reveals the operation of systemic male privilege. The recognition of unnamed privilege could lead the Court out of its equality predicament.

*Morrison* considered the claim of Ms. Christy Brzonkala, a student at Virginia Polytechnic Institute, who was repeatedly raped and assaulted by two male students within thirty minutes of their meeting.42 She pursued her remedy through the campus sexual assault policy, but this effort resulted in no punishment of her attackers.43 Ms. Brzonkala dropped out of school and later sued under the Violence Against Women Act.44

*Morrison* marks a continuation of the Court’s assault on Congressional authority.45 At issue was Section 13981 of the Violence against Women Act

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41. Justice O’Connor wrote:

Context matters when reviewing race-based governmental action under the Equal Protection Clause . . . . [n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.

*Grutter*, 123 S. Ct. at 2338 (citations omitted).
42. 529 U.S. at 602.
43. Id. at 603.
44. Id. at 603-04.
45. See *Mahoney, Calmore, & Wildman, Social Justice*, supra note 7, at 726-65; United States v. Lopez, 514 U.S. 549 (1995) (limiting congressional power under the Commerce Clause). For other Court decisions limiting congressional power under Section Five of the Fourteenth Amendment, see Bd. of Trustees of Univ. of Ala. v. Garret, 531 U.S. 356, 360 (2001) (holding that suits by state employees are barred by the Eleventh Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 67 (2000) (holding that the Age Discrimination Employment Act’s abrogation of state immunity exceeds Congress’ power under Section Five of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 511 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeds Congress’ power). *See also* Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441, 444 (2000) [hereinafter Post & Siegel, *Equal Protection*] (analyzing Congress’ Section Five power within the terms of these decisions, questioning the court-centered model of constitutional interpretations assumed by them, and examining the relationship between courts and Congress that has shaped the meaning of the Equal Protection Clause); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (discussing the implications of the Court’s recent decisions invalidating federal civil rights legislation enacted under Congress’ Section Five power); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power:*
PRIVILEGE, GENDER, AND THE FOURTEENTH AMENDMENT (VAWA), which created a federal civil remedy for gender-motivated violence. The Court found Congress had exceeded its authority under either the Commerce Clause or under Section Five of the Fourteenth Amendment by enacting Section 13981.46

Rejecting the Commerce Clause-based argument that Congress had authority to address gender-motivated violence, the Court relied upon the decision in United States v. Lopez,47 which held that Congress lacked power to adopt the Gun-Free School Zones Act of 1990.48 That act made it a federal crime "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."49 Following the Lopez reasoning, the Court emphasized the noneconomic, criminal nature of the conduct that Congress sought to regulate. The court rejected arguments about the "costs of crime" and "national productivity" for fear that Congressional power would be too expansive, obliterating any distinction between federal and local authority.50 Ultimately the Court concluded that the harm targeted by Section 13981, violence against women, was too attenuated from commerce to warrant exercise of Congressional power on that basis. Yet, in Ms. Brzonkala’s case the violence against her was tragically economic—she dropped out of school.

The dismissal of the Commerce Clause argument trivializes the harm to women that results from the prevalence of gendered violence. Martha Mahoney uses this teaching exercise to highlight the economic nature of the conduct Congress sought to regulate. She asks male students, "How much time do you spend avoiding being raped?" Avoiding rape has no impact on male students time commitments. She asks women students, "How much money do you spend avoiding being raped?" The women students generate an extensive list of costs, with items ranging in price from a few cents to hundreds of dollars each month.

Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943, 1945 (2003) (arguing that Section Five is a structural device that fosters the democratic legitimacy of constitutional order, as it provides a voice for the American people, as expressed through their chosen representatives).

46. For a critique of the Court’s analysis in Morrison, see Post & Siegel, Equal Protection, supra note 45, at 441-43. See also Catherine A. MacKinnon, Disputing Male Sovereignty: On United States v. Morrison, 114 HARV. L. REV. 135, 135, 139 (2000) (urging that the Court failed to realize that violence against women does indeed have economic impact, leading them to leave women completely out of their analysis of the Violence Against Women Act); Sally F. Goldfarb, The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism, 71 FORDHAM L. REV. 57, 61 (2002) (arguing that the VAWA civil rights provision was a valid exercise of Congress’s power under the Commerce Clause and § 5 of the Fourteenth Amendment and examining Morrison’s detrimental implications for federalism); Jennifer R. Johnson, Comment: Privileged Justice Under Law: Reinforcement of Male Privilege by the Federal Judiciary Through the Lens of the Violence Against Women Act and U.S. v. Morrison, 43 SANTA CLARA L. REV. 1399, 1402 (2003) (analyzing the occurrence and reinforcement of male privilege and gender discrimination in the federal court system and suggesting Commerce Clause based legislation compelling the federal judiciary to avoid reinforcing gender discrimination through the courts).


48. Id. at 551.


50. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 1003-04 (2000) (chronicling the Court’s concern that federal jurisdiction would be too expansive, generating a greater workload for judges).
The women students mentioned costs such as unlisted phones, cell phones, gated communities, self-defense classes, gym membership (to avoid jogging or working out in public spaces), cars rather than public transportation, and residing on rather than off campus. *Morrison*, though recognizing the cost of rape, does not identify the cost of avoiding rape.

It is in this cost of avoiding rape that both the Commerce Clause and Fourteenth Amendment aspects of the case are linked. As to Section Five of the Fourteenth Amendment, the Court appeared unpersuaded by the extensive evidence introduced into the Congressional record as to the pervasiveness of violence against women. The Court's reasoning seemed to fault Congress for not targeting more narrow state action, almost as if the prevalence of violence against women meant that violence could not be remedied under the Fourteenth Amendment. But the avoidance of rape impacts women's commercial activity on a daily basis. Because males do not incur that avoidance cost nor change their behaviors, women's avoidance conduct is unnoticed. Men are privileged in relation to activity required to avoid rape in a culture where rape is both prevalent and largely unpunished. Maleness and male behavior is the dominant norm, a behavior in which individuals do not spend time thinking about avoiding rape. But this behavior is not gender neutral: not thinking about rape avoidance is male behavior. The behavior of individual men and women, their differential responses to the avoidance costs, is linked to their membership in the group "women" or the group "men".

The states are actors in this dynamic because rape laws are so ineffective. Thus Congress, acting under its Section Five power, sought to create a remedy to compensate women for the equal protection violation. By creating Section 13981, Congress followed the Court's articulation of the Equal Protection Clause, recognizing sex as a category where an exceedingly persuasive justification must be demonstrated for government conduct. States' conduct in relation to rape, devoid of such justification, has created this disparity in treatment based on sex.

Rehnquist's opinion in *Morrison* concluded by stating that if the allegations were true, "no civilized system of justice could fail to provide [Brzonkala] a

51. In the majority opinion, Chief Justice Rehnquist wrote:

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime ... to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

*Morrison*, 529 U.S. at 615.

52. See CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 146 (1989) (discussing "rape's pervasiveness and permissibility, together with the belief that it is both rare and impermissible.").

53. For a discussion of the invisibility of the state as actor in other contexts, see Kenneth M. Casebeer, THEEMPTYSTATEANDNOBODY'SMARKET:THEPOLITICALECONOMYOFNON-RESPONSIBILITYANDTHEJUDICIALDISAPPEARINGOFTHECIVILRIGHTSMOVEMENT, 54 U. MIAMI L. REV. 247, 250 (2000) (suggesting that the Rehnquist Court has changed the role of the judge from non-partisan interpreter of the Constitution to that of a political activist).
remedy... But under our federal system that remedy must be provided by the Commonwealth of Virginia..."\(^54\) Yet Congress had reviewed the difficulties that rape victims found in bringing successful rape claims in state courts. Prosecutors might be reluctant to file charges. State laws on consent and past sexual conduct could be further obstacles, resulting in rape victims being traumatized a second time in court proceedings. The so-called civilized state justice systems fail to provide a remedy in the majority of rape cases. As the dissent noted, citing Congressional findings: "'An individual who commits rape has only about 4 chances in 100 of being arrested, prosecuted, and found guilty of any offense.'... 'Almost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is 11 months.'\(^55\) As these facts illustrate, although rape is a crime "on the books," the widespread freedom men have to engage in that conduct unpunished means rape is in effect sanctioned.\(^56\)

Significantly absent from the Court's discussion of Section Five was any evidence that the Court saw a connection between the prevalence and sanctioning of rape and an equal protection harm to women. Robert Post and Reva Siegel characterize the decision as a failure of the Court to see Section 13981 as an antidiscrimination statute.\(^57\) But that failure represents an example of why a focus on discrimination cannot adequately protect women from equal protection violations. The Court was unable to utilize a comparison mode, comparing the treatment of a woman to that of a man, in this fact pattern. Women, as a group, are threatened by rape in a way that men are not. It is an individual's membership in the group "women," not her individual identity, that makes her a target. This decision exposes the poverty of the comparison mode and the consequences of the Court's failure to grasp the individual-group interrelation.

The Court seems more able to grasp the individual-group interrelation where an individual man is harmed by stereotypic views of the group "males." Hibbs involved a suit against the state of Nevada for alleged violations of the Family and Medical Leave Act of 1993 (FMLA).\(^58\) William Hibbs, the respondent in the Supreme Court, had sought leave from his employment at the state's Department of Human Resources in order to care for his ailing wife. He requested both paid "catastrophic leave" and unpaid leave under the FMLA.\(^59\) His employer informed

\(^{54}\) Morrison, 529 U.S. at 627.
\(^{55}\) Id. at 633-34.
\(^{56}\) As Catharine MacKinnon has explained, "the systemic failure of the state to enforce the rape law effectively or at all excludes women from equal access to justice, permitting women to be savaged on a mass scale, depriving them of equal protection and equal benefit of the laws." MACKINNON, supra note 52, at 245-46. The Court's failure to acknowledge Brzonkala's claim suggests either a failure to recognize the significance of the issue, a failure to respect Congressional judgment, or both. For a discussion of the Court's view of itself in relation to Congressional decisionmaking, see Bradley W. Joondeph, Bush v. Gore, Federalism, and the Distrust of Politics, 62 OHIO ST. L.J. 1781, 1781 (2001) (emphasizing the role of Court in deciding questions of constitutional meaning).
\(^{57}\) Post & Siegel, Equal Protection, supra note 45, at 524-25.
\(^{58}\) Hibbs, 123 S. Ct. 1972. See also Family and Medical Leave Act, 29 U.S.C.S. § 2612(a)(1)(C) (entitling eligible employees to take up to twelve work weeks of unpaid leave per twelve working months for the onset of a "serious health condition" in the employee's spouse).
\(^{59}\) Hibbs v. HDM Dept. of Human Resources, 273 F.3d 844, 848-49 (9th Cir. 2001).
him that his paid leave would be counted against the twelve weeks of unpaid leave allowed by the FMLA. 60 Hibbs pursued his grievance avenues, believing that "his unpaid FMLA leave should begin to run after his paid catastrophic leave ended, not concurrently with it." 61 He ultimately filed suit in the federal district court. 62 The district court held that the claim was barred by the Eleventh Amendment, which provides immunity to states from suits by private parties unless that immunity is validly abrogated or expressly waived. 63

In Hibbs, the Court dismissed any concern over whether Congress had been "unmistakably clear" 64 in the statutory language expressing the intent to abrogate the states' immunity from suit. The Court then turned to consider Congress's constitutional authority to do so. Examining the FMLA in the context of employment, the Court noted that it: "aims to protect the right to be free from gender-based discrimination in the workplace." 65 The Court traced problems women have faced in the workplace related to leave policies, including stereotypes about women's appropriate domestic role and "parallel stereotypes presuming a lack of domestic responsibilities for men." 66 Quoting Congressional findings, the Court observed:

Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be. 67

The Court noted that these stereotypes are mutually reinforcing, perpetuating a cycle that forces women to continue acting as primary family caregivers, thereby perpetuating employer attitudes which question not only women's commitment to their work, but also their actual value as employees. 68 The Court acknowledged that these perceptions "lead to subtle discrimination that may be difficult to detect on a case-by-case basis." 69 The Court further observed the weighty "record of unconstitutional participation in, and fostering of, gender-based discrimination in

60. Id.
61. Id. at 849.
62. The FMLA creates a private right of action to seek both equitable relief and money damages against "any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 2617(a)(2). This right of action may be invoked should the employer "interfere with, restrain, or deny the exercise of" rights provided for under the FMLA. 29 U.S.C. § 2615(a)(1).
63. Hibbs, 273 F.3d at 850.
64. Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under Section Five of the Fourteenth Amendment. Hibbs, 123 S. Ct. at 1977 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).
66. Id. at 1982.
67. Id.
68. Id.
69. Id.
the administration of leave benefits" by the states. The Court concluded that Congress was justified in enacting the FMLA as remedial legislation.

Thus in Hibbs, a case brought in the workplace context, the Court could perceive women and men as part of groups receiving treatment based on biased stereotypes. Perhaps the fact that the individual plaintiff was a man brought the presence of these stereotypes into stark relief. Male plaintiffs’ claims for equality violations have fared well.

In reaching the conclusion that the Congressional action enacting the FMLA was justified, the Court contrasted the Hibbs facts with the holdings in Board of Trustees of the University of Alabama v. Garrett and Kimel v. Florida Board of Regents, in which the Court found Congress’s statutory enactments to have exceeded the scope of Congressional authority. What is shocking about the Court’s opinion in Hibbs is its failure to even mention Morrison, where the Court had also found Congress had exceeded its authority in passing the Violence Against Women Act.

Can the Court’s holdings in Morrison and Hibbs be reconciled? These cases evidence an ongoing ambivalence toward equality by the Court. In Hibbs, the Court exhibited an understanding of systemic privilege as evidenced by stereotypes in the workplace context. Yet the Court failed to see that same privilege in

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70. Id.
71. 123 S. Ct. at 1981.
72. See Mary E. Becker, Cynthia Grant Bowman, and N. Morrison Torrey, Cases and Materials on Feminist Jurisprudence: Taking Women Seriously 81 (1994) (questioning whether one should be “troubled by the fact that so many of the sex equality cases have been brought by men” and noting “[o]f the 16 cases in which a sex-based equal protection argument won, the person making the argument was a man in most (9) cases”); see also Wildman, supra note 19, at 295-300 (discussing the early Supreme Court decisions addressing sex discrimination as an equal protection claim).
73. 531 U.S. 356, 374 (2001). Patricia Garrett, a nurse at the University of Alabama, was diagnosed with breast cancer, took four months of leave, and was subsequently demoted, receiving a significantly lower salary than she had received before her diagnosis. Id. at 362. The Court considered whether an employee of the state may sue the state for monetary damages under the Americans with Disabilities Act, 42 U.S.C. § 12132 (ADA). Id. at 360. The majority found that state workers were barred by the Eleventh Amendment from filing employment-discrimination suits against their employers under the ADA because Congress did not validly abrogate the state’s Eleventh Amendment right to sovereign immunity. Id. at 379 n.9. In enacting the ADA, Congress did not identify a pattern of irrational state discrimination against disabled state workers sufficient to justify overriding Eleventh amendment immunity. Id. at 379 n.9.
74. 528 U.S. 62, 91 (2000). Kimel and other faculty members at Florida State University and Florida International University were passed over for a pay raise in favor of their younger counterparts. Id. at 69. He filed suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (ADEA). Id. The Court considered whether a clear statement of Congressional intent to abrogate a state’s Eleventh Amendment immunity appeared in the statute, and if so, whether the ADEA was a proper exercise of Congress’ constitutional authority. Id. at 71-72. The Court concluded that the ADEA indeed contained a clear statement of Congress’ intent to abrogate a state’s immunity, but that the abrogation exceeded Congressional authority under Section Five of the Fourteenth Amendment. Id. at 73, 83.
75. See Law, supra note 15, at 701 (discussing the Hibbs decision and the Court’s “selective empathy for gender discrimination claims”).
76. Hibbs, 123 S. Ct. at 1978 n.2 (stating that primary family caretaking responsibility falls on women more often than men, thus affecting women’s working life more than that of men).
operation outside that workplace setting, in *Morrison*, where biological difference was implicated by the act of rape.\(^7\) The failure of states to enforce rape laws privileged maleness; this effective sanctioning of rape led Congress to pass VAWA in the first place.\(^8\) As such these decisions reprised the same kind of split that had confused the Court in the beginning of its journey into gender and the Fourteenth Amendment. In *Hibbs* the Court understood the potential for gender discrimination in the workplace because of bias that privileged maleness.\(^9\) The Court could object to that bias by upholding the creation of the FMLA. That statute, couched in neutral terms, treated women and men the same with respect to family and medical leave, and allowed a comparison between women and men. But the Court was unable to see *Morrison* as a case about gender and an equal protection violation, even in the face of overwhelming Congressional findings about violence against women. Where an outcome treating women and men the same as a result of a comparison was not a possible solution, the Court failed to connect the disparate treatment of women to a failure of equality.

Can a focus on privilege help the Court out of this doctrinal impasse? A focus on systemic privilege rather than discrimination could help the Court to understand the nature of an equal protection violation in those circumstances that do not invite an easy comparison. A focus on ending discrimination attacks only one portion of the system of privilege and subordination that makes maintenance of the status quo of gender hierarchy possible. Equality is not achievable without dismantling structural systems of privilege.\(^8\)

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\(^7\) Men, not only women, may be raped. However, most rapes are committed on women. See, e.g., Mustafa K. Kasubhai, *Destabilizing Power In Rape: Why Consent Theory in Rape Law is Turned on Its Head*, 11 Wis. Women's L.J. 37, 53 n.72 (1996) ("Rape overwhelmingly involves male perpetrators and female victims"). The idea of rape most often connotes the rape of a woman by a man.

\(^8\) *Morrison*, 529 U.S. at 633-54. Congress cannot interpret the Constitution more expansively than the Court does: only the judicial branch may “say what the law is.” Marbury v. Madison, 5 U.S. 137, 177 (1803). Conversely, under Section Five, Congress only has the power to “enforce” provisions of the Fourteenth Amendment, not to create new substantial rights. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”

\(^9\) *Id.* But it is the Court that has determined that classifications based on gender require heightened scrutiny. See *supra* text accompanying notes 17-33. Thus, Congressional action to remedy gender inequality would not create a new right.

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\(^8\) As Adrienne Davis has noted, subordination and privilege are like twin heads of a Hydra, whose heads grow back unless all heads are slain. PRIVILEGE REVEALED, supra note 33, at 19-20. Brave antidiscrimination advocates bravely attack the subordination head, which keeps growing back as long as systemic privilege is ignored. *Id.* A rich literature describing white privilege continues to develop. See, e.g., MAURICE BERGER, WHITE LIES: RACE AND THE MYTHS OF WHITENESS 164-68 (1999) (comparing white people's failure to acknowledge the privilege that society confers on them due to their skin color with Black people's continued recognition of the lower status society gives them because of their skin color); David Wellman, *Minstrel Shows, Affirmative Action Talk, and Angry White Men: Marking Racial Otherness in the 1990s, in Displacing Whiteness: Essays in Social and Cultural Criticism* 311-31 (Ruth Frankenberg, ed., Duke University Press 1997) (discussing the persistence of white male advantage from the 1980s through the 1990s); BARBARA J. FLAGG, WAS BLIND, BUT NOW I
help litigators better explain to the Court the nature of the equal protection violation.

So what is privilege? As I have explained, privilege is a “systemic conferral of benefit and advantage,” resulting from “affiliation, conscious or not and chosen or not, to the dominant side of a power system.” Unlike liberal legalism which posits all individuals as equal, an acknowledgment of systems of privilege recognizes that individuals are members of groups, which are situated differently in relation to power. “Affiliation with the dominant side of the power line is often defined as merit and worthiness. Characteristics and behaviors shared by those on the dominant side of the power line often delineate the societal norm” or standard. In the context of gender, male privilege enables the holder to avoid the consequences of male power and choose whether even to combat that form of oppression.

Privilege may seem easy to identify from this explanation, but several aspects of privilege make it hard to capture in words. One difficulty in defining privilege stems from the interaction of multiple systems of privilege. Identity categories like race and sexual orientation, status categories like class and law graduate, and other aspects of personhood all intertwine with gender so that each individual possesses


81. PRIVILEGE REVEALED, supra note 33, at 29.

82. The power line divides those privileged from those not privileged based on socially significant identity categories. PRIVILEGE REVEALED, supra note 33, at 29. “[P]eople situated differently in relation to the power line have very disparate experiences of daily reality. For example, walking into a bank to cash a check may be a racial experience for people of color who face requests for extra identification and even curious stares, while their white counterparts do not.” Id. at 173.

83. Id.

84. Id. at 16. “Depending on the number of privileges someone has, she or he may experience the power of choosing the types of struggles in which to engage.” Id.
aspects of both privilege and non-privilege as part of his or her identity. So one aspect of systemic privilege is that systems of privilege interact with each other, creating a non-static, context-based target, and language, grounded in the permanent, fights the possibility of description.

Another problem in trying to talk about privilege, identified by John Powell, is that no word exists for "not privileged." The absence of "vocabulary limits dialogue and action." Language does not provide an easy word to capture the person who is not privileged. The opposite of privileged or "not privileged" is not "discriminated against." Thus the jurisprudential focus on discrimination has meant that the larger landscape of equal protection violations relating to "not privileged" remains unnoticed and unaddressed by law.

Understanding privilege requires thinking about individuals as part of groups. As Powell explains, "our personal relationships are mediated through power and institutional structures; privilege cannot be addressed at only the

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85. Recently, writers have tried to illuminate the complexity of intersecting strands of privilege. See Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL. F. 139 (contrasting the multidimensionality of black women's experiences with the "single-axis analysis" which distorts them and arguing that feminism must include race analysis to meet the needs of all women). The intersecting strands of privilege may be likened to a Koosh ball. Each strand is present, but the shape changes, depending how one looks at the ball, or whether it is tossed in the air. This metaphor suggests the interlocking nature of systems of privilege. What they create is greater than the sum of their parts in how they affect communities. These privileging dynamics, which are often unspoken or hard to label, affect the potential for creating community. For a discussion of the Koosh ball metaphor, see PRIVILEGE REVEALED, supra note 33, at 22-24. See also Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 2 (1999) (arguing that many anti-racist scholars often exhibit a misunderstanding of the relationship between racial oppression and other forms of subordination, particularly heterosexism and patriarchy, and that they often perpetuate heterosexism and marginalize gay, lesbian, bisexual and transgendered people of color in their work); Peter Kwan, *Bridging Divides: A Challenge to Unify Anti-Subordination: Complicity and Complexity: Cosynthesis and Praxis*, 49 DEPAUL L. REV. 673, 684 (2000) (arguing that societies must rethink notions of ethnic identity in terms of cultural, class and gender differences, rather than presume similarities); Devon W. Carbado, *Straight Out of the Closet*, 15 BERKELEY WOMEN'S L.J. 76, 79 (2000) (arguing that, in light of the everyday ways in which men, especially heterosexual men, experience gender privileges, men should take on a feminist political ideology, and work towards ameliorating gender subordination of women).

86. PRIVILEGE REVEALED, supra note 33, at 22-24 uses the metaphor of a koosh ball to suggest the changing interactions of systems of privilege:

The Koosh ball is a popular children's toy. Although it is called a ball and that category leads one to imagine a firm, round object used for catching and throwing, the Koosh ball is neither hard nor firm. Picture hundreds of rubber bands, tied in the center. Mentally cut the end of each band. The wriggling, unfirm mass in your hand is a Koosh ball, still usable for throwing and catching, but changing shape as it sails through the air or as the wind blows through its rubbery limbs when it is at rest. It is a dynamic ball.

Id. at 22-23.


88. Id. at 449 (criticizing court decisions that "decontextualiz[e] people and groups of people, portraying them as self-created individuals who live outside of any social, historical, or political context").
personal level." Yet the interrelation of individuals and groups within traditional Fourteenth Amendment jurisprudence and scholarship has been complicated and confusing. Schizophrenia about individuals and groups characterizes legal liberalism, where the focus shifts from individuals to groups and back again almost as if by sleight of hand. Rights, such as the right to remain silent or the right to speak freely, inure to individual actors. The Court’s focus on discrimination as embodying the meaning of equal protection further emphasizes the individual actor, both as an evil perpetrator of discrimination and as the innocent victim of that harm.

But individuals are harmed by discrimination both in their status as individuals and because they are members of a targeted group. This group membership is acknowledged by anti-discrimination laws, which protect the individual from discrimination, when that individual is a member of a specific, named, identity group. Title VII names as protected categories race, color, religion, sex, and national origin. So, for example, an employment discrimination law says an employer may not discriminate against an individual man, based on race, because he is a member of the group “African Americans” or against an individual woman, based on sex, because she is part of the group “women.” When a restaurant refuses service to an African American man, that refusal is made because of that individual’s group membership, not because the restaurant knows anything personal about the individual.

This clash between individuals and groups is exacerbated by the central tension of the Equal Protection Clause. Early commentators on the equal protection doctrine, Joseph Tussman and Jacobus TenBroek discussed the dilemma of the Equal Protection Clause as requiring treating likes alike, but permitting classification made by law. Tussman and TenBroek articulated the meaning of the clause as requiring equal treatment for those similarly situated, but society has privileged women and men quite differently. Differential privileging means by definition that women and men cannot have been similarly situated. Women and
men's status as members of their identity groups has impacted their functioning in society. Understanding this difference and its impact on the aspiration for equal protection implicates the concept of systemic privilege.

In the gender realm, privilege is most understandable through Marilyn Frye's observation that when a child is born, the common question asked is, "Is it a boy or a girl?" The necessity of asking this question reflects society's difficulty in relating to individuals without knowing to which identity group to assign them, within the gender privilege system. The question, "Is it a boy or a girl?" is directed at identifying the individual's group membership. The very need to ask the question implicitly recognizes that a reality of group treatment coexists with the aspiration for individual treatment.

An individual woman deserves the equal protection of the laws. But it is only an individual's status as a member of the group "women" or the group "men" that makes the Court notice the need for that protection, because the Court has recognized sex as a salient identity characteristic. Thus the individual is inextricably intertwined with the group. Because legal liberalism has regarded the groups "women" and "men" as the same, the Court's legal analysis has been hampered.

The following example illustrates the dilemma in legal analysis for the Court. A married woman's family was not protected by automatically receiving social security survivor's benefits upon her death. The family of a married man who died under the same circumstances would receive the survivor's benefits. Martha Chamallas explains that the Court in this fact pattern faced a doctrinal dilemma about "how to characterize the discrimination at issue in the case."

From the perspective of the social security beneficiaries, the statute seemed clearly to favor women (i.e., widows) and to discriminate against men (i.e. widowers). After all, it was men who suffered direct economic loss by the denial of government benefits. When the statutory scheme was viewed from the perspective of the now-deceased workers who had paid social security taxes, however, it looked more like discrimination against women workers. The argument was that the labor of similarly situated employed men and women yielded greater benefits to the man's family than to the woman's family.

96. The use of the terms "sex" and "gender" to delineate the salient identity characteristic could be an entire separate article. Neither judges nor feminist scholars agree about the usage of these terms. Katharine T. Bartlett, Angela P. Harris & Deborah L. Rhode, Gender and Law: Theory, Doctrine, Commentary 3d 1248-50 (2002) (describing different viewpoints); see also Stephanie Riger, Rethinking the Distinction Between Sex and Gender in Leslie Bender & Daan Braveman, Power, Privilege, and Law: A Civil Rights Reader 232-40 (1995) (explaining that gender and sex are difficult concepts to detach from each other).
97. Weinberger, 420 U.S. 636; see also Chamallas, Bias, supra note 11, at 757 (discussing this example).
98. Chamallas, Bias, supra note 11, at 757.
99. Id. at 757-58. 
Liberal legalism and the comparison mode used in antidiscrimination law placed the Court into this doctrinal dilemma forcing a choice about how to characterize the facts to enable a finding of discrimination. The Court did choose to focus on the injury to working women, providing an early example of judicial recognition of the devaluation of women’s work. But the devaluation of women’s work is a key characteristic of the systemic privileging of maleness. A privilege lens would have removed the Court from this dilemma.

In her important addition to the literature on the legal understanding of bias, Martha Chamallas outlines the narrow focus of antidiscrimination laws. The law insists on “formal or facial equality,” frowning on both “explicit classifications by legislative bodies” or formal policies that “expressly provide for different standards for minorities, women, or other traditionally disfavored groups.” The legal focus on intentional discrimination means that legal remedies miss the subtle forms of discrimination that are “often nondeliberate or unconscious.” Devaluation and biased prototypes are forms of bias that are not the product of deliberate discrimination.

Chamallas explains that bias and stereotypes impact decisionmaking. Existing equal protection doctrine is most useful for addressing the affective component of bias, including prejudice and hostility. However, the existing interpretation of equal protection doctrine fails to address the cognitive component of bias, including stereotyping, devaluation, and biased prototypes. “Stereotypes about the group infect how decisionmakers perceive and interpret events, remember facts and later make judgments.” These forms of cognitive bias involve “the

100. Id. at 758.
101. Chamallas, Bias, supra note 11, at 747.
102. Id. at 748.
103. Id. at 747-48.
104. Id. at 753.
105. See Chamallas, Bias, supra note 11, at 755 (addressing two forms of bias: devaluation and biased prototypes). Chamallas uses “devaluation” in those situations which do not present a clear-cut case of disparate treatment. Id. at 756. Devaluation has the following features, according to Chamallas:

(1) Devaluation does not operate at the individual or group level. Rather, it operates to affix a “gender” or “race” label to a neutral activity, while also placing a hierarchy of value to that activity.
(2) Devaluation often has material effects resulting from the judgment of value given to the activity.
(3) Devaluation is often selective in its operation. Some members of the disfavored groups are able to escape the effects of devaluation. Other group members may even benefit from the devaluation that is harmful to the majority.
(4) The devaluation of a disfavored group is often masked.
(5) While devaluation has a number of features making it distinct from disparate treatment, “at its core devaluation is nevertheless comparative.”

Id. at 772-75. The other form of cognitive bias that Chamallas addresses is biased prototypes in which stock images, mental portraits, schemas, or cultural scripts all work to limit the protection of the law for marginalized groups. Id. at 778. Biased prototypes provide a “cognitive shortcut” for classification, infecting “the process of judgment in a systematically biased way.” Id. at 778-79.

106. Id. at 754.
107. Id.
108. Id.
largely unconscious processes of selective noticing, remembering, and processing information about social groups.\textsuperscript{109} A focus on privilege in equal protection claims would provide an avenue for addressing the impact of these biases.\textsuperscript{110}

The idea that systemic privileging is relevant to equal protection inquiries is not a new idea. The Court recognized systemic privilege in early equal protection litigation before it began interpreting the Fourteenth Amendment as focusing on discrimination. \textit{Loving v. Virginia}\textsuperscript{111} supports the proposition that the Fourteenth Amendment was passed to strike down white supremacy, the definitive racial privilege.\textsuperscript{112} In \textit{Loving}, a challenge to a state anti-miscegenation statute, the Court declined to use the comparison mode of formal equality theory,\textsuperscript{113} comparing the treatment of blacks to whites.\textsuperscript{114} One argument made to uphold the statute had urged that both groups were treated equally under the statute since both groups were forbidden from interracial marriage.\textsuperscript{115} Responding to this comparison mode argument, the Court reasoned that prior decisions upholding the constitutionality of these anti-miscegenation provisions had “concluded that the State’s legitimate purposes were ‘to preserve the racial integrity of its citizens,’ and to prevent ‘the corruption of blood,’ ‘a mongrel breed of citizens,’ and ‘the obliteration of racial pride.’”\textsuperscript{116} The Court commented that these reasons were “obviously an endorsement of the doctrine of White Supremacy.”\textsuperscript{117} This restriction of citizens’ rights on account of race indicated to the Court that the Virginia measure at issue had been enacted to maintain white supremacy.\textsuperscript{118} Thus in its reasoning striking the

\begin{itemize}
  \item \textsuperscript{109} \textit{id.} at 754 n.35.
  \item \textsuperscript{110} Understanding the linkage between the treatment of individuals and the role that group membership plays in cognitive processes is central to understanding systemic privilege and closing the gap in equal protection jurisprudence. The literature on bias and mental processes sheds light on the individual-group interrelation and why equal protection analysis cannot ignore that dynamic. The larger project will explore this fruitful avenue for further examination.
  \item \textsuperscript{111} 388 U.S. 1 (1967) (holding that Virginia’s anti-miscegenation statute violated the Equal Protection Clause of the Fourteenth Amendment).
  \item \textsuperscript{112} \textit{id.} at 7, 11.
  \item \textsuperscript{113} Under the comparison mode of formal equality theory, the Court considers whether a complainant is similarly situated to other individuals. See Wildman, supra note 19, at 270. Comparison of the plaintiff to others is essential to this analysis. \textit{id.} Though the comparison mode is not mandated by the Fourteenth Amendment, it dominates equal protection review. \textit{id.} at 272. The comparison mode perpetuates sex discrimination and allows courts to maintain an ambivalent attitude toward ending it. \textit{id.} at 305-06. The fact that men and women are not similarly situated must be acknowledged as a starting point for any meaningful equal protection review. \textit{id.}
  \item \textsuperscript{114} \textit{Loving}, 388 U.S. at 8.
  \item \textsuperscript{115} \textit{id.} at 7-8.
  \item \textsuperscript{116} \textit{id.} at 7.
  \item \textsuperscript{117} \textit{id.}
  \item \textsuperscript{118} See \textit{Loving}, 388 U.S. at 11 (stating, “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy”). The \textit{Loving} Court did describe, in the same passage, the Fourteenth Amendment as aimed at ending discrimination. The Court said:

At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the “most rigid scrutiny,” and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.

\end{itemize}
statute, the *Loving* Court also demonstrated support for a view that the Equal Protection Clause should combat white supremacy and the white privilege implicit within racial classifications designed to maintain that supremacy.\(^{119}\) Read as such, the Equal Protection Clause sustains challenges to systemic privilege that perpetuates the subordination of non-white racial groups to whites.

Two recent gender cases provide support for the idea that systems of privilege are relevant to equal protection, even though the Court has not used the term "privilege" in its analysis. These decisions further support the view that participation in democracy remains a key goal of equal protection, evidencing how systemic privilege violates the equal protection of the laws.

*J.E.B. v. Alabama*,\(^ {120}\) involved a determination of paternity and assessment of child support.\(^ {121}\) The state used its peremptory challenges to strike male jurors from the pool, resulting in the selection of an all female jury.\(^ {122}\) That jury found that the petitioner had fathered the child and the Alabama court ordered him to pay support.\(^ {123}\) On the appeal from that decision, the Supreme Court stated its holding forcefully:

> Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.\(^ {124}\)

In finding unconstitutional the use of gender as a proxy for juror competence and impartiality, the Court recognized the existence of bias based on group membership, although it characterized the conduct taken in reliance on those biases as discrimination.\(^ {125}\) However, those biases are also related to the systemic privileging of maleness that fostered male democratic participation in the form of jury service. This privileging resulted in the historic exclusion of females from juries.\(^ {126}\)

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\(^ {119}\) The view of *Loving* as an anti-subordination decision is consistent with this idea. See e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich. L. Rev. 2062, 2256 (2002) (interpreting Loving as an anti-subordination decision) and Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 Fordham L. Rev. 1753, 1763 n.25 (2001) (similarly interpreting Loving as an anti-subordination decision); see also, Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 4-5, 22-26 (1976) (supporting the view that the Equal Protection Clause has been used to combat practices that are facially neutral but that disproportionately impact members of a certain race); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harv. L. Rev. 493, 562-63 (2003) (supporting a vision of Equal Protection aimed at ending racial hierarchy).

\(^ {120}\) 511 U.S. 127 (1994).

\(^ {121}\) *Id.* at 129.

\(^ {122}\) *Id.*

\(^ {123}\) *Id.*

\(^ {124}\) *Id.* at 130-31.

\(^ {125}\) *Id.* at 129.

\(^ {126}\) *J.E.B.*, 511 U.S. at 131 (explaining that "[g]ender-based peremptory strikes were hardly
The Court’s reasoning in support of this holding, that gender could not be used as a proxy for juror competence, recounted the exclusion of women from juries until the twentieth century. The absence of women hearkened back to the English common law exclusion based on “the defect of sex.” This so-called “defect” was not shared equally by men and women; the referent of defect was women. As the Court explained, women’s fragility, timidity, and delicacy had been cited historically as characteristics that demonstrated women’s lack of juror qualifications. Women’s paramount role as wife and mother lent further support to the argument for their exclusion. The Court characterized these arguments as “outdated misconceptions” about the role of women in the world. The Court acknowledged that “the two sexes are not fungible.” At the same time the Court condemned gross generalizations based on gender, as it had condemned those based on race.

The Court’s opinion described the privileging of men in jury service and the systemic exclusion of women. The Court objected to the use of gender as a proxy for exclusion, both historically as applied to women, and in the present case, as applied to a man. Thus the Court was denying the legitimacy of action taken based on group identity, while recognizing the saliency of that group identity. This thread of the Court’s reasoning, resistance to thinking about individuals as parts of groups, was not the only possible reaction to the realization of the existence of group identity. Recognizing that linking individuals to group identities is part of systemic privilege would be another response. Viewing individuals as unconnected to groups merely veils systemic privilege. Thus privilege remains invisible until the individual-group interrelation is considered. Only by viewing the treatment of the individual as part of the salient identity group can systemic privilege and disadvantaging be revealed.

In J.E.B., the Court described the systemic privileging of maleness that led to women’s exclusion from juries and condemned that exclusion. The Court applied its condemnation to any group-based, gender stereotyping eliminating an individual juror based on sex. The Court could see the operation of the individual-group interrelationship in the context of a male plaintiff protesting the exclusion of men from his jury. The Court did not describe its holding that gender not serve as a proxy for juror competence as striking privilege, in this case privileging women, but that was its effect.

The Court further exhibited its comprehension of the connection between

practicable during most of our country’s existence, since, until the 20th century, women were completely excluded from jury service.”); see Hoyt v. Florida, 368 U.S. 57, 58 (1961) (upholding juror registration statute exempting women from mandatory jury service); but see Taylor v. Louisiana, 419 U.S. 522, 525 (1975) (striking a similar statute).

128. Id. at 131-32.
129. Id. at 135.
130. Id. at 133 (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)).
131. Id. at 139.
132. Interestingly, Justice Scalia, in dissent, found the Court’s discussion irrelevant to a finding of discrimination in jury selection. It is that discussion, describing the systemic privileging of maleness, to which Scalia objected. He would have found discrimination against the male petitioner. Id. at 156-57.
equal protection and democratic participation, stating:

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy . . . . When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.133

Thus the Court upheld the importance of democratic participation and recognized that the reality of group membership should not hinder individuals from that participation.

In United States v. Virginia,134 the Court reiterated the significance of full, democratic, societal participation.135 The Court said: "[W]omen . . . today count as citizens in our American democracy equal in stature to men."136 Again, the Court stated the aspirational ideal of equal citizens, in the context of noticing that the group women had been historically denied that opportunity.

The Virginia Military Institute (VMI) had boasted a long tradition as Virginia's only exclusively male, public undergraduate institution of higher learning.137 Contending that the male-only admissions policy violated the Equal Protection Clause, the United States brought suit against VMI, as well as the state of Virginia.138 In response to the Fourth Circuit's finding that the admissions policy was unconstitutional, the state of Virginia proposed to create the Virginia Women's Institute for Leadership (VWIL) as a parallel program to VMI.139 This proposal was approved by the Fourth Circuit as providing substantively comparable educational opportunity.140 However, the Supreme Court held that VMI's male-only admissions policy violated the Equal Protection Clause and that VWIL could not offer the same benefits to women as VMI had offered to men.141

In reaching this result the Court reported on the history of higher education for women beginning in 1839 when VMI was founded and "[h]igher education . . . was considered dangerous for women."142 Virginia did not provide many educational

134. 518 U.S. 515 (1996) (holding that the state of Virginia failed to satisfy its burden of providing an exceedingly persuasive justification for its sex-based admissions policy at the Virginia Military Institute, or that the policy was substantially related to the achievement of such objectives).
135. Id. at 545.
136. Id.
137. Id. at 520-21.
138. Id. at 523.
139. Id. at 526.
140. 518 U.S. at 527-28.
141. Id. at 551. The Court announced a "heightened intermediate scrutiny" standard for analyzing gender discrimination cases: in order to pass muster under an Equal Protection inquiry "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Id. at 531.
142. Id. at 536.
opportunities for women and did not introduce coeducation at the University of Virginia until 1970. The Court characterized the historic record relating to women’s education in Virginia as “first, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation.”\textsuperscript{143} As was the case in \textit{J.E.B.}, which involved jury exclusion, the Court in \textit{VMI} demonstrated its awareness of the privileging of maleness that hampered women’s equal participation, here in an educational setting. In finding an equal protection violation in this exclusion, the Court utilized the Equal Protection Clause to combat systemic privilege, without naming its reasoning as being about privilege.

The dynamic of privilege, when examined along with the individual-group interrelation, provides a better way of understanding equality and the equal protection of the law that the Fourteenth Amendment was enacted to ensure. The democratic ideal envisions participation in societal decisions that affect one’s life, liberty, and pursuit of happiness. Systems of privilege maintain hierarchies of inequality, adversely impacting the possibility of full societal participation. Examining equal protection through a privilege lens will ensure that the vision of democratic participation, central to the meaning of the Equal Protection Clause, can become reality.

A privilege analysis helps to explain decisions that appear contradictory as the Court moves between a focus on individuals and a recognition of group identity. Systemic privilege denies equal protection of the laws and impedes democratic participation. The existence of systemic privilege is a way to name the subordinating understandings that Neil Gotanda described in this symposium.\textsuperscript{144} Of course, if all legal argument really is nothing more than a part of “the political,” as many symposium speakers suggested,\textsuperscript{145} then the use of a privilege argument alone may not matter. Ted Shaw, in his keynote address, persuasively suggested that claiming and reclaiming equal protection means an ongoing battle.\textsuperscript{146} The language of arguments, specifically making privilege visible in those arguments, is one way to engage that battle.

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143. \textit{Id.} at 538.
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