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Strictly Intersectional Scrutiny: A Recommendation for Transforming the EPC to Highlight Queer Black Women

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Abstract

The purpose of this thesis is to explore the interpretation of the Equal Protection Clause by the Supreme Court of the United States (SCOTUS) and how this interpretation can become more intersectional for Black queer women. This question is explored within the scope of two theoretical frameworks: Derrick Bell's theory of interest convergence and Kimberlé Crenshaw's theory of intersectionality. This project examines whether any factors compel SCOTUS to be more intersectional in its approach to the Fourteenth Amendment. Simultaneously, this study also considers what social contexts make SCOTUS more likely to focus on the interests of the oppressor, a demographic the Supreme Court justices are often included in. Due to the nature of this research seeking the motivations and rationale of SCOTUS in their decision-making, I utilize a mixed methods explanatory sequential research design by conducting a discourse analysis and running chi-square significance testing. My discourse analysis includes an investigation of Supreme Court cases, the justices included in the decision-making of each case, and societal contexts at the time of each case. Although there is currently an abundance of literature in the legal world about making scrutiny more intersectional, my work contributes to this discourse by making the intersectionality specific to Black queer women, a population rendered invisible by the Supreme Court and lawmakers alike.

Keywords: Intersectionality, Interest Convergence, Equal Protection Clause, Scrutiny, Supreme Court of the United States (SCOTUS)

Introduction

The Constitution of the United States was written in 1787 and has remained the foundation of law in the United States. However, very few changes have been made to the Constitution in the 237 years of its existence. Although changing the Constitution is arduous,[1] it is not impossible. Thus, one must question whether this lack of change results from the founding fathers' unparalleled genius or if there is a reluctance to change a document over two centuries old. Further, despite the document's absence of revision, interpretations of the text in case rulings authored by Supreme Court justices have fluctuated over the years. One interpretation that has varied over time includes that of the Fourteenth Amendment, specifically, the Equal Protection Clause. The Fourteenth Amendment was created during the Reconstruction Era and ratified in 1868.[2] Amendment XIV has five sections, with the first containing the Equal Protection Clause, which states,

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[3]

This clause defines who is considered a citizen in the United States and establishes that all citizens have a right to due process and equal protection of the law. However, it does *not* discuss scrutiny.

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[1] To change the constitution, an amendment may be proposed by two-thirds of both houses of Congress, or a convention can be called by two-thirds of the states for the purpose of requesting an amendment. Then, the amendment needs to be ratified by three-fourths of the state legislatures, or three-fourths of conventions called in each state for ratification. Office of the Federal Register. (2016, August 15). *Constitutional Amendment Process*. National Archives and Records Administration. https://www.archives.gov/federal-register/constitution

[2] National Archives. (2024, March 6). *14th amendment to the U.S. Constitution: Civil Rights (1868)*. National Archives and Records Administration. https://www.archives.gov/milestone-documents/14th-amendment#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.

[3] U.S. Const. amend. XIV

Scrutiny is a concept created by the Supreme Court of the United States (or SCOTUS). As understood through court case opinions over the years, scrutiny balances how much interest the government has against the interest of individuals based on three distinct levels. Said levels are assigned to classifications based on categories of identity. Classification questions whether a law is facially neutral or facially discriminatory,[4] and in the situation that a law is facially neutral, examines discriminatory intent and impact. The three levels of scrutiny are strict, intermediate, and rational basis. Strict scrutiny is the highest level, and race receives this after *Brown v. Board of Education* (1954).[5] If the court applies strict scrutiny, the violated right has been deemed important enough that SCOTUS can (and should) intervene. Intermediate is the middle level of scrutiny; sex and gender identity receive intermediate scrutiny after *Craig v. Boren* (1976).[6] Rational basis is the lowest level, and identities in this level include class/poverty and disability. Discrimination is permissible at this tier if there is a "legitimate" reason.[7] Most laws are assessed at this tier.[8] Although several court cases have developed rational basis over time, many attribute its creation to *United States v. Carolene Products* (1938),[9] which will be further discussed later in this thesis.

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[4] If a law is facially discriminatory it identifies a particular class of people in the text. If a law is facially neutral it does not identify a particular class of people but does have discriminatory intent and impact. Impact can be proven by utilizing things like statistics and temporal proximity; however, intent is much more difficult to prove.

[5] Brown v. Bd. of Educ., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 1954 U.S. LEXIS 2094, 38 A.L.R.2d 1180, 53 Ohio Op. 326 (Supreme Court of the United States May 17, 1954, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JD90-003B-S3RR-00000-00&context=1516831.

[6] Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397, 1976 U.S. LEXIS 183 (Supreme Court of the United States December 20, 1976). https://advance-lexis-com.hollins.idm.oclc.org/api/document?collection=cases&id=urn:contentItem:3S4X-9MB0-003B-S4RM-00000-00&context=1516831.

[7] Fitzpatrick, B. T., & Shaw, T. M. (2024). The Equal Protection Clause. National Constitution Center – constitutioncenter.org. https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702

[8] See previous footnote.

[9] Shelton, A. (2021, February 10). *The Rational Basis Test: A story*. Institute for Justice. https://ij.org/cje-post/the-rational-basis-test-a-story/#:~:text=The%20rational%20basis%20test%20developed,1938%20decision%20in%20Carolene%20Products

While scrutiny may seem like a win for marginalized communities, it leaves more to be desired and has several critiques. One such critique stresses the lack of intersectionality within SCOTUS' interpretations of scrutiny. Intersectionality is a term coined by Kimberlé Crenshaw, which the Oxford dictionary defines as "the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and interdependent systems of discrimination or disadvantage."[10] In other words, all facets of someone's identity are interconnected; one cannot just choose which identity they want to live as for the day. Thus, if SCOTUS continues to interpret scrutiny as it does now by dividing facets of an individual's identity into separate categories, massive groups of people with intersectional identities will continue to fall between the cracks left by our nation's leaders.

With the intent to acknowledge some of the identities most negatively impacted by the interpretations of SCOTUS, this thesis questions how the interpretation of the Equal Protection Clause by SCOTUS can become more intersectional for Black queer women. Further, I explore how SCOTUS can be convinced to include intersectionality in their interpretation of the Equal Protection Clause utilizing interest convergence theory coined by Derrick Bell. This thesis also considers how the levels of scrutiny can be re-imagined in a way that benefits (or, at minimum, acknowledges) Black queer women. The levels of scrutiny as they are currently implemented will never be able to be adequately intersectional because they separate facets of identity into categories rather than recognize that these identities work together to form someone's experience. Thus, it is essential to contemplate what the levels of scrutiny *should* look like or whether there should be levels at all.

[10] Oxford English Dictionary, July 2023 "intersectionality (n.)," https://doi.org/10.1093/OED/7276681610.

Intersectionality is a comprehensive and overarching frame. Thus, it would be nearly impossible to discuss all marginalized groups that fall into intersectionality. As a result, I have decided to narrow my thesis to one marginalized intersectional group: Black queer women. I chose to evaluate the Equal Protection Clause through the lens of this group because I am a Black queer woman. However, I also chose this group because it is one of, if not the best, groups to target for a bottom-up approach, as I do not believe in taking a trickle-down approach or an "add and stir approach"[11] to social justice.

I find it imperative to make a disclaimer about my identity as a queer Black woman that is authoring a thesis about my own community. My identity does not negatively impact my research or make me too biased to execute my investigation properly. As standpoint theory explains, my social location enhances my research because I bring knowledge and experience to this topic that individuals outside of this social group will never fully understand or comprehend.[12] Further, because I have been directly impacted by the oppression that is specific to Black queer women, I can recognize what said oppression can look like easier than a non-Black queer woman can. As proclaimed by Immanuel Kant, "Experience without theory is blind, but theory without experience is mere intellectual play."[13] With my social location providing me with the experience of queer Black women and my research providing me with the theory, I can confidently say that my identity is not a liability but, rather, an asset for this thesis.

My thesis is executed in seven chapters excluding the abstract and this introduction. This will begin with the literature review that, as previously discussed, includes two theories: interest

[11] The "add and stir approach" is one that treats race, class, and gender separately. It is comparative rather than relational.
[12] Bowell, T. (n.d.). *Feminist Standpoint Theory*. Internet Encyclopedia of Philosophy. https://iep.utm.edu/fem-stan/
[13] Immanuel Kant Quotes. (n.d.). BrainyQuote.com. Retrieved December 10, 2024, from BrainyQuote.com Web site: https://www.brainyquote.com/quotes/immanuel_kant_121324

convergence coined by Derrick Bell and intersectionality coined by Kimberlé Crenshaw. Then I discuss my methodological approach, which employs a mixed-methods research design including a discourse analysis and quantitative analysis utilizing chi-square significance testing. Next, I provide a historical background of scrutiny by exploring four separate court cases. Once the historical background for scrutiny is established, I dive into my four case studies that consider the three tiers of scrutiny. In analyzing these court cases, I consider the several contexts that potentially impacted the decision of the court, including the sociopolitical climate at the time the case was decided and some of the justices involved in the opinion and their personal philosophies and/or precedent. After my case analysis, I transition to my quantitative analysis that considers the opinions of queer Black women and the rest of the population. Once all of my analysis has been established, I provide a recommendation to the Supreme Court for how a more intersectional jurisprudence for queer Black women can be achieved as well as why that should be a goal in the first place. Finally, I conclude my thesis with a call to action and consideration of the viability of my argument.

Chapter 1: Literature Review

Theory

This thesis uses the lens of Derrick Bell's interest convergence theory and Kimberlé Crenshaw's theory of intersectionality. Interest convergence theory can be used to consider how SCOTUS could be convinced to interpret the Equal Protection Clause in a more intersectional way. Further, interest convergence theory provides essential background for some of SCOTUS's precedent for the Fourteenth Amendment, which informs what social contexts the court is persuaded by when making decisions. The intersectionality theory is integral to this thesis and is the foundation upon which everything else is built. For historical continuity, I discuss the theories in my framework in the order in which they were coined. Looking at the theoretical framework chronologically, interest convergence theory is the first theory established in 1980. Nine years later, Kimberlé Crenshaw coined the term intersectionality. The intersectionality theory builds on some of Derrick Bell's teachings, thus making it more productive to discuss his beliefs before discussing Crenshaw's.

Interest Convergence Theory

Derrick Bell was a lawyer, professor, and activist who created critical race theory (CRT) and detailed many of the realities within the U.S. legal system. One of these realities was interest convergence theory, first described in his 1980 article, *Brown v. Board of Education and the Interest-Convergence Dilemma.* He posits,

> "Translated from judicial activity in racial cases both before and after *Brown*, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a

> judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites."[14]

Bell goes on to discuss how interest convergence theory played a role in *Brown*, pointing out several reasons why it was within the interest of whites to desegregate. This includes the context of the US boosting its soft power and proving to other countries its morality, post-World War II conditions with Black men realizing that they went to war for the U.S. and still had to come home to racism and violence from the people they fought for,[15] and the economic benefit that would come from desegregation. Further, Brown was a foreign policy decision as much as it was a domestic one, as the Supreme Court needed to keep in mind the hypocrisies of the United States in the midst of the Cold War.[16] While it was in the interest of whites to desegregate, a vocal group of white people opposed the decision. Bell asserts that much of this disdain came from poor white people, who felt betrayed by elite and upper-class whites as they thought that their race would still gain them status above Black people despite their being poor (i.e., whiteness as property). Bell also details the fleeting alignment of interests seen by how SCOTUS managed rulings after *Brown*. The court made it increasingly difficult to achieve the forms of racial balance it previously affirmed. The burden of proof became much higher, with plaintiffs having to prove that segregation was intentionally discriminatory. However, there were still

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[14] Bell, D. A. (1980). Brown v. Board of Education and the Interest-Convergence Dilemma. *Harvard Law Review*, *93*(3), 518–533. https://doi.org/10.2307/1340546

[15] A prime example of this sentiment comes from Malcolm X, who explains, "If violence is wrong in America, violence is wrong abroad. If it is wrong to be violent defending black women and black children and black babies and black men, then it is wrong for America to draft us, and make us violent abroad in defense of her. And if it is right for America to draft us, and teach us how to be violent in defense of her, then it is right for you and me to do whatever is necessary to defend our own people right here in this country." EasyBib. (2024, January 1). Malcolm X Quotes, Facts, and Biography. https://www.easybib.com/guides/quotes-facts-stats/malcolm-x/#:~:text=%E2%80%9CA%20man%20who%20stands%20for,t%20make%20you%20a%20diner

[16] Dudziak, M. L. (2011). *Cold War Civil Rights: Race and the Image of American Democracy* (Ser. Politics and Society in Modern America). Princeton University Press.

many cases where evidence was shown of decades of racist policies, which led the court to desegregate many institutions.

Although *Brown* is widely understood as a case that made great strides toward racial equality, Bell also works to dispel this misconception. In his book, *And We Are Not Saved,* Bell details his dissatisfaction with the narrative that legal victories akin to *Brown* bring about genuine progress for racial equality. He states,

> "But the task of equal-justice advocates has not become easier simply because neither slavery's chains, nor the lyncher's rope, nor humiliating Jim Crow signs are any longer the main means of holding black people in a subordinate status. Today, while all manner of civil rights laws and precedents are in place, the protection they provide is diluted by lax enforcement, by the establishment of difficult-to-meet standards of proof, and worst of all, by the increasing irrelevance of antidiscrimination laws to race-related disadvantages, now as likely to be a result as much of social class as of color."[17]

Bell asserts that this narrative makes achieving true change even more difficult, as "the discrepancy between the nation's deeply held beliefs and its daily behavior add a continuing confusion to racial inequalities that undermine effective action. Thus, we take refuge in the improbable and seek relief in increasingly empty repetitions of tarnished ideals."[18]

Bell continues this discussion of symbolic victories by comparing the U.S. government to Bluebeard, who continues to find new wives in hopes that each one will free him from the burden of his past. Instead, the brides are rebellious, and all end up either condemned to death or sent to a dark chamber. Bell asserts that analogously, the U.S. takes measures such as the Civil War or *Brown v. Board*:

> "America produced symbols of redemption in the form of civil rights measures seemingly intended to rectify past racial cruelties and expunge the dark stain of slavery. But, after a brief period of hope, compliance with these measures has

[17] Bell, D. (1987). Introduction. In *And We Are Not Saved: The Elusive Quest for Racial Justice* (p. 5). story, Basic Books Inc.
[18] See previous footnote.

> impeded other goals and, like Bluebeard's brides, they have been abandoned, leaving the blacks' social subordination firmly entrenched."[19]

From Bell's deductions, we can conclude that even when supposedly making societal change, such change is not radical or an avenue for actual progress, but rather, a method of keeping marginalized citizens satiated enough to continue their participation in democracy. With these deductions in mind, it becomes possible to understand why rulings that propose potential change take place and why said changes are not enough to achieve justice.

Although I utilize Bell's conclusions, it is necessary that I acknowledge his belief that the government is not sufficient for achieving adequate social change. While I understand this perspective, part of why I utilize the frames of Derrick Bell is because I believe that a mutually beneficial approach to achieving social change is a possibility in a society wherein social progress is only achieved with a converging of interests. I recognize that the argument I make is likely one that would be critiqued by Bell himself; however, what I seek to achieve from an intersectional jurisprudence is just one component of what I believe should be a multi-pronged approach to achieving justice. Thus, I do not believe the argument I make is one that is entirely contradictory to Derrick Bell's assertions, as the government, let alone one single branch, should not be the only method by which justice is attained.

Theory of Intersectionality

In her article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* Crenshaw discusses the court case *DeGraffenreid v General Motors* (1976) to assert the importance of law

[19] Bell, D. (1987). Introduction. In *And We Are Not Saved: The Elusive Quest for Racial Justice* (p. 6). story, Basic Books Inc.

having intersectional frames.[20] In the case, five Black women filed a suit against General Motors because of the employer's seniority system, which they argued continued the perpetuation of past discrimination. Since the employer did not hire Black women before 1964, all of the Black women who were hired after 1970 lost their jobs because of seniority. Their claim was brought on the grounds not on behalf of Black people or women, but *Black women*. The court did not find the plaintiff's claim convincing and responded:

> "[P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. The Court's own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both."[21]

In her TEDtalk, *The Urgency of Intersectionality,* Crenshaw discusses this case and calls it "Emma's Dilemma."[22] Crenshaw then explains that while it may have been true that the employer hired both Black men and white women, Emma fell into the intersections: there may have been Black people, but they were still *men*, and there may have been women, but they were still *white*. Crenshaw describes intersectionality as various roads, each having their own marginalized identity. Those with multiple marginalized identities fall into the gaps, which are the "intersections" in the road. Unfortunately, the court was unconvinced by the idea that Black

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[20] Crenshaw, K. (n.d.). "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." University of Chicago Legal Forum: Vol. 1989: Iss. 1, Article 8. Retrieved from http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8?utm_source=chicagounbound.uchicago.edu%2Fuclf%2Fvol1989%2Fiss1%2F8&utm_medium=PDF&utm_campaign=PDFCoverPages

[21] Degraffenreid v. General Motors Assembly Div., 1975 U.S. Dist. LEXIS 15938, 11 Fair Empl. Prac. Cas. (BNA) 827, 10 Empl. Prac. Dec. (CCH) P10,539 (United States District Court for the Eastern District of Missouri, Eastern Division. September 30, 1975.). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4V-M6H0-0054-6408-00000-00&context=1516831.

[22] Crenshaw, K. (2016, October). *The Urgency of Intersectionality*. TED: Ideas change everything. https://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality?language=en

women need their own claim to address the unique experience of misogynoir correctly.[23] Returning to *DeGraffenreid*, after dismissing the case on the grounds of sexism, the court then advised the plaintiffs to consolidate with another case against the same employer on the grounds of racial discrimination. After telling the court that consolidating would defeat the purpose of the suit because it was meant for Black women specifically, the court responded,

> "The legislative history surrounding Title VII does not indicate that the goal of the statute was to create a new classification of 'black women' who would have greater standing than, for example, a black male. The prospect of the creation of new classes of protected minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."[24]

Crenshaw deduces that if Black women are unable to have their specific needs addressed by the court, then they will only be able to have protection from discrimination that Black men or white women also experience.

Kimberlé Crenshaw is one of many authors who have discussed the realities of intersectionality. Pauli Murray coined the term "Jane Crow" to discuss the distinct experiences of Black women. In her article with Mary Eastwood titled, *Jane Crow and the Law: Sex Discrimination and Title VII*, Murray and Eastwood argue that both Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment to the U.S. Constitution should be interpreted to prohibit discrimination against women by both private employers and the government. Further, the article discusses the similarities between racism and sexism, as the histories of both include remarkably similar arguments on why each marginalized identity (women and Black people) is deemed inferior. Murray and Eastwood also cite Dr. Montagu and state,

> "The myths essentially 'deny a particular group equality of opportunity and then assert that because that group has not achieved as much as the groups enjoying complete freedom of opportunity it is obviously inferior and can never do as well.

[23] Misogynoir is a term coined by Moya Bailey to define the oppression that is specific to Black women.
[24] See footnote 17.

> Moreover, Dr. Montagu finds the same underlying motives at work in antifeminism as in racism, 'namely, fear, jealousy, feelings of insecurity, fear of economic competition, guilt feelings and the like.'"[25]

The principle of intersectionality can also be seen within the Combahee River Collective statement, which touches on the experiences of activists with intersectional identities. As a result of being in the Civil Rights movement with Black men that believed women should remain in the background while also being involved in women's movements with white women who believed in a top-down approach, the Combahee River Collective was a group established with hopes of creating a safe space for queer Black women. When discussing their politics, they explain,

> "The most general statement of our politics at the present time would be that we are actively committed to struggling against racial, sexual, heterosexual, and class oppression, and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking."[26]

Further, the Collective serves as an excellent model for a bottom-up approach and provides the reasons, outside of my personal identity, that I choose queer Black women as the demographic that should be highlighted by the Supreme Court in their interpretations of scrutiny. While I could summarize their beliefs about why discrimination against queer Black women must be prioritized, they articulate it in a way that cannot sufficiently be replicated without citing to them directly:

> "This focusing upon our own oppression is embodied in the concept of identity politics. We believe that the most profound and potentially most radical politics come directly out of our own identity, as opposed to working to end somebody else's oppression. In the case of Black women this is a particularly repugnant, dangerous, threatening, and therefore revolutionary concept because it is obvious from looking at all the political movements that have preceded us that anyone is

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[25] Murray, P., & Eastwood, M. (n.d.). *Jane Crow and the law: Sex discrimination and title VII*. Alexander Street. Retrieved from https://documents.alexanderstreet.com/d/1000687209

[26] BlackPast, B. (2012, November 16). (1977) *The Combahee River Collective Statement*. BlackPast.org. https://www.blackpast.org/african-american-history/combahee-river-collective-statement-1977/

> more worthy of liberation than ourselves. We reject pedestals, queenhood, and walking ten paces behind. To be recognized as human, levelly human, is enough."[27]

This statement solidifies the potential for a bottom-up approach with Black women representing the bottom, as even the idea of Black women being considered at the bottom of the hierarchy is a radical notion due to everyone else's liberation being prioritized before this groups'. Like the Combahee River Collective, I seek to target the oppression of queer Black women; however, I deviate from the group by focusing specifically on the anti-intersectional jurisprudence of the Supreme Court for this thesis.

Theoretical Overview

I utilize intersectionality to discuss a specific demographic that SCOTUS should highlight and use interest convergence theory as a lens through which I consider why the Supreme Court has *not* been intersectional for queer Black women and why they *should* be interested in making scrutiny more intersectional for this group. By discussing interest convergence theory and intersectionality, I extrapolate methods for convincing the Supreme Court to be more intersectional in its approach to interpreting scrutiny. Further, I seek to fill in gaps in previous literature by examining the "how" as well as the "why" of transforming scrutiny and expanding the "who" specifically to Black queer women.

[27] See previous footnote.

Chapter 2: Methodology

This thesis utilizes a mixed methods explanatory sequential research design. The first qualitative phase of study conducts a discourse analysis to explore the justification and reasoning of SCOTUS in its decisions and understand why intersectionality is not considered in its interpretations of the Equal Protection Clause. The second phase of the study is a quantitative analysis that includes chi-square significance testing to compare the opinions of Black queer women to straight white men and the rest of the population about discrimination against queer people, Black people, and women.

Beginning with my qualitative analysis, discourse for Michel Foucault is, according to Stuart Hall,

> "A group of statements which provides a language for talking about - a way of representing the knowledge about - a particular topic at a particular historical moment… discourse is about the production of knowledge through language. But… since all social practices entail meaning, and meanings shape and influence what we do - our conduct - all practices have a discursive aspect."[28]

My analysis considers discourse that takes place within texts. Linguist M.A.K. Halliday asserts, "'A language speaker's ability to discriminate between a random string of sentences and one forming a discourse, is due to the inherent texture in the language and to his awareness of it.'"[29] Based on this reasoning, Rodney H. Jones deduces that two crucial things make a text a text: one has to do with things like grammatical rules that help understand the relationship between words and sentences within one text. The next relates to the relationship between words within a particular text and the relationship between texts that need to be understood and, at times, referenced to make sense of one text. This relationship between texts is also known as

[28] Jones, R. H. (2018). Section A: Introduction: Key Topics in the Study of Discourse Analysis. In *Discourse Analysis: A resource book for students* (2nd ed., pp. 6–7). essay, Routledge.
[29] See previous footnote.

intertextuality, which I incorporate into my discourse analysis by examining the rulings of several court cases that have developed scrutiny over time, particularly cases related to the rights of Black queer women.

To understand the court's rationale, I consider some of the judges who contributed to each decision by analyzing their philosophies and social locations. Each decision includes a discussion of the author of the opinion and one other justice. I examine their legal precedent and personal background to investigate their philosophies. Additionally, I evaluate the social contexts at the time each case was decided to consider what sociocultural phenomena could have influenced the outcome of each case. Part of the inspiration for assessing the social contexts of each case is interest convergence theory. By considering what was going on in society during each decision, I hope to determine if there is an underlying interest for the Supreme Court, and by extension, the oppressor, to make decisions as it does. Examining what social contexts persuade SCOTUS can be beneficial when determining what can encourage the court to incorporate intersectionality into their understanding of the Equal Protection Clause.

For conciseness, only some Supreme Court cases involving scrutiny can be discussed within this thesis. Thus, I chose landmark court cases that address homophobia, anti-Black racism, and misogyny. While some may argue that utilizing multiple different court cases to discuss each individual identity that comes with being a queer Black woman could be counterintuitive to my argument, it is necessary to do so because there are no SCOTUS cases that adequately address all three attributes at once. This fact alone solidifies the necessity of my thesis.

I begin my analysis with *Brown vs. Board of Education* (1954) due to the importance of the case in defining strict scrutiny.[30] This case also poses an essential conversation for interest convergence theory since Bell utilizes *Brown* as an example of how interest convergence manifests in the legal world. Next, I consider *Shelby County v. Holder* (2013) for its continued consideration of affirmative action regarding the Equal Protection clause and its application of strict scrutiny.[31] *United States v. Virginia* (1996) is the next SCOTUS case up for analysis for its expansion of intermediate scrutiny.[32] I end the discussion with *Obergefell v. Hodges* (2015) for its ruling regarding queer identities.[33]

Transitioning to my quantitative analysis, I pull data from the 2016 and 2020 waves of the American National Election Surveys (ANES).[34] Questions from the survey that I consider are the amount of discrimination against women, discrimination against queers, and discrimination against Black people that is believed to exist by queer black women, straight white men, and the rest of the population. I delve further into my methodological process of this chi-square significance testing in chapter five.

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[30] See footnote 5.

[31] Shelby County v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651, 2013 U.S. LEXIS 4917, 81 U.S.L.W. 4572, 24 Fla. L. Weekly Fed. S 407, 2013 WL 3184629 (Supreme Court of the United States June 25, 2013, Decided). https://advance-lexis-com.hollins.idm.oclc.org/api/document?collection=cases&id=urn:contentItem:58RJ-V331-F04K-F07T-00000-00&context=1516831.

[32] United States v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735, 1996 U.S. LEXIS 4259, 64 U.S.L.W. 4638, 96 Cal. Daily Op. Service 4694, 96 Daily Journal DAR 7573, 10 Fla. L. Weekly Fed. S 93 (Supreme Court of the United States June 26, 1996, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S04-RPH0-003B-R241-00000-00&context=1516831.

[33] Obergefell v. Hodges, 574 U.S. 1118, 135 S. Ct. 1039, 190 L. Ed. 2d 908, 2015 U.S. LEXIS 618, 83 U.S.L.W. 3607 (Supreme Court of the United States January 16, 2015, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F35-9SX1-F04K-F00D-00000-00&context=1516831.

[34] American National Election Survey. 2016; 2020. www.electionstudies.org.

Chapter 3: Historical Background of Scrutiny

The concept of scrutiny does not exist anywhere in the actual Constitution. This raises the question of where exactly scrutiny came from. Many believe that the idea of scrutiny started in the court case *United States v. Carolene Products* (1938).[35] This case concerned an act in which Congress banned the interstate shipment of "filled milk" (skimmed milk mixed with fat or oil other than milk fat).[36] The court upheld the act, arguing that if Congress had to go through multiple hearings to make it a law eventually, then Congress must have found it to be necessary for public welfare.[37] What is significant about this case is the rationale behind the court's decision, which explains that rights considered higher priority could receive judicial protection. In contrast, those who were seen as less critical would not receive judicial protection to prevent government overreach. Although there is no consensus on whether this case created the test, many agree that it provided the utility to use scrutiny by categorizing which rights can be deemed as "important" enough to be provided judiciary protection.[38]

A decade after *Carolene Products*, the SCOTUS case *Goesaert v. Cleary* (1948) took place, which questioned whether a Michigan statute that did not allow women to obtain a bartending license unless they were "the wife or daughter of the male owner" was constitutional under the Equal Protection Clause of the XIV Amendment.[39] The Michigan statute stated that all bartenders must obtain a license if in a city with more than 50,000 people; however, it did not

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[35] See footnote 9.
[36] United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234, 1938 U.S. LEXIS 1022 (Supreme Court of the United States April 25, 1938,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8RX0-003B-709T-00000-00&context=1516831.
[37] See previous footnote.
[38] See footnote 9.
[39] Goesaert v. Cleary, 335 U.S. 464, 69 S. Ct. 198, 93 L. Ed. 163, 1948 U.S. LEXIS 2715 (Supreme Court of the United States December 20, 1948,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-JRH0-003B-S2W0-00000-00&context=1516831.

allow women to obtain a permit unless they were "the wife or daughter of the male owner."[40] Two female bartenders challenged the law with the Equal Protection Clause. Justice Felix Frankfurter issued the majority opinion, with SCOTUS ruling that the statute was constitutional. The court used textualism,[41] reasoning that the Constitution does not keep states from "drawing a sharp line between the sexes" or using societal and recent scientific standards.[42] The court also utilized structuralism, explaining that it is not up to the court to read the minds of Michigan legislatures. Meanwhile, the dissent argued that while the states do not have to make statutes symmetrical, this statute violated the Equal Protection clause due to those who should be in ownership. While it seems that the dissent was taking a position that supported women, the reality is that the dissent took a capitalistic and economic approach to the discussion rather than a social one.

A discussion about scrutiny development must include the SCOTUS case *Craig v. Boren* (1976) due to its creation of intermediate scrutiny and its inclusion of gender identity within this tier. This case is about Oklahoma legislation that prohibited the consumption of alcohol but had different ages for men versus women.[43] Men under twenty-one were not allowed to consume "'nonintoxicating' 3.2 percent beer," however, the age for women was only eighteen.[44] A man named Curtis Craig, aged between eighteen and twenty-one at the time of the case, filed suit with Carolyn Whitener, a licensed vendor, against the governor of Oklahoma, David Boren. The court ruled in favor of Craig and Whitener in a 7-2 decision. The majority opinion issued by Justice William J. Brennan Jr. utilized pragmatism by asserting that the statistics relied on by the state

[40] See previous footnote.
[41] "Textualism" is a method of interpreting the court's decision. There are several modes and methods of interpretation, including original meaning, precedent, pragmatism, historical practices, moral reasoning, national ethos, and structuralism. Textualism refers to SCOTUS focusing on the plain meaning of the text.
[42] See footnote 39.
[43] See footnote 6.
[44] See footnote 6.

prove a substantial relationship between the law and traffic safety.[45] Further, the court also pointed out that the application of Amendment XXI does not change how the Fourteenth Amendment needs to be applied.[46]

The next and final background court case provides another example of the development of strict scrutiny. *Regents of the University of California v. Bakke* (1978) is a court case wherein the plaintiff, Allan Bakke, was rejected twice by the University of California Medical School at Davis.[47] At the time, the university had an affirmative action program with sixteen spots reserved per one hundred incoming students (essentially sixteen percent of the class) for "qualified" minorities. The program had the intention of addressing the unfair exclusion of minorities in the medical profession; however, Bakke argued that this meant he was excluded solely based on race due to his application materials exceeding the scores of all sixteen qualified minorities that were placed into the school each year he applied. The court overwhelmingly decided in favor of Bakke with an 8-1 decision (Justice White was the only dissent).[48] While it may seem that the bench mostly agreed, the decision had a plurality opinion. Four justices argued that any racial quota system supported by the government violated the Civil Rights Act of 1964. Justice Powell argued that using a racial quota the way the university used it violated the Equal Protection clause. However, he did agree with the remaining four judges that the consideration of race in the admissions process of higher education is constitutional, contending that it can be used amongst other criteria. The court found in favor of Bakke to be admitted into the university.

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[45] See footnote 6.
[46] See footnote 6.
[47] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750, 1978 U.S. LEXIS 5, 17 Fair Empl. Prac. Cas. (BNA) 1000, 17 Empl. Prac. Dec. (CCH) P8402 (Supreme Court of the United States June 28, 1978, Decided). https://advance-lexis-com.hollins.idm.oclc.org/api/document?collection=cases&id=urn:contentItem:3S4X-8PY0-003B-S1BW-00000-00&context=1516831.
[48] See previous footnote.

This discussion of the historical background of scrutiny directly leads me to my four case studies. It was necessary to establish the development of scrutiny to provide a basic understanding of the court's rationale for scrutiny as it currently exists, which is anti-intersectional. Further, a consideration of the precedent that created scrutiny is imperative to comprehend how my case studies continue this development.

Chapter 4: Case Studies

Brown vs. Board of Education (1954)

One of the most significant cases that defined scrutiny was *Brown vs. Board of Education* (1954). This court case is widely known for overturning *Plessy vs. Ferguson*'s "separate but equal" doctrine and ending segregation in public schools. *Brown* started due to similar cases brought by Black plaintiffs in four states (Kansas, Delaware, South Carolina, and Virginia).[49] The defendants were the Boards of Education in the respective areas. The goal of the plaintiffs was to eliminate de jure segregation. However, as discussed previously, *Brown* did not achieve desegregation as quickly as anticipated. In fact, in the lesser-known *Brown II* that took place so that the court could issue directions on implementing the *Brown* ruling, SCOTUS ruled that desegregation should happen "with all deliberate speed."[50] SCOTUS is typically intentional with its vagueness, but this ambiguity is especially calculated.

Further, it supports Bell's argument that SCOTUS made its previous *Brown* ruling much more difficult to achieve. Nevertheless, the ruling significantly impacted the interpretation of the Equal Protection Clause. In this case, the court decided that there are rights necessary enough that SCOTUS can step in to ensure their protection. Part of this rationale included textualism, with the court asserting that the literal text of the Equal Protection clause did not include reference to educational institutions. The court remained unconvinced by the defendant's emphasis on the historical context of the Fourteenth Amendment, stating:

> "Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial

[49] See footnote 5.
[50] *Brown v. Board of Education of Topeka (2)*. (n.d.). Oyez. Retrieved August 11, 2023, from https://www.oyez.org/cases/1940-1955/349us294

> segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."[51]

Although the defendants were not persuasive, the plaintiffs influenced the court. In its opinion, the court incorporated national ethos to explain the importance of education to the United States. Additionally, the court used moral reasoning combined with pragmatism to describe the adverse psychological effects that segregation has on minority children despite equal "tangible factors," which therefore equates to inequality.

Other factors, excluding points already made by Bell, were also likely influential to the court's decision. One such factor is the timing of *Brown,* which occurred when Chief Justice Earl Warren joined the Supreme Court and made several progressive decisions. Further, Warren got the court to vote unanimously to overturn *Plessy*. While this feat is impressive, it opens the conversation about why this goal was sought in the first place. What interest would Earl Warren have in having this be a unanimous decision? Moreover, what interest did the bench have in agreeing, aside from the sociopolitical climate?

A potentially simple answer to why Warren would want a unanimous court is the regard that would come with persuading an entire bench to rule unanimously. Considering this was his first case as Chief Justice, it is understandable that he would want to establish his reputation. He proved he did, as his time on the bench got its own name: The Warren Court Era. However, who

[51] See footnote 5.

he is as a person could also help demystify what motivated him to make this ruling the way he did.

Earl Warren

Earl Warren joined the Supreme Court in 1954 as Chief Justice following a nomination from Dwight D. Eisenhower.[52] Before this, Warren gained several years of experience in law enforcement and public service. Ten years after his admittance to the California bar, he was appointed district attorney of Alameda County in 1925 when the incumbent resigned.[53] Warren went on to be re-elected to the position three times.[54] In his fourteen years as district attorney, he garnered a reputation for being a crime fighter, with occasional accusations that he was heavy-handed in his methods. Despite this, he never had a conviction reversed by a higher court.

Although his time as district attorney earned him the reputation of being a crime fighter, his time as Chief Justice went quite differently, in fact, there were even complaints that he was biased against the police due to several of his rulings,[55] including *Mapp v. Ohio* (1961),[56] *Gideon*

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[52] Earl Warren. (n.d.). *Oyez*. Retrieved May 10, 2024, from https://www.oyez.org/justices/earl_warren

[53] UC San Diego. (2024). *Earl Warren (1891-1974)*. Earl Warren College. https://warren.ucsd.edu/about/biography.html

[54] He was reelected in 1926, 1930, and 1934. See previous footnote.

[55]Kamisar, Y. (2005). *Earl Warren: Law Enforcement Leads to Defendants' Rights*. University of Michigan Law School Scholarship Repository. https://repository.law.umich.edu/lqnotes/vol47/iss3/9?utm_source=repository.law.umich.edu%2Flqnotes%2Fvol47%2Fiss3%2F9&utm_medium=PDF&utm_campaign=PDFCoverPages)

[56] Established the exclusionary rule, which prohibits the use of illegally obtained evidence in court. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 1961 U.S. LEXIS 812, 84 A.L.R.2d 933, 86 Ohio L. Abs. 513, 16 Ohio Op. 2d 384 (Supreme Court of the United States June 19, 1961, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-HFP0-003B-S2P6-00000-00&context=1516831.

v. Wainwright (1963),[57] and *Miranda v. Arizona* (1966).[58] With his background of close proximity to law enforcement, it seems that he became enlightened to the criminal justice system's failings. This introduces an interesting discussion for potential interests: is it possible for a converging of interests to happen simply because the oppressors' social philosophies align with that of the oppressed? A deduction such as this one is undoubtedly optimistic, however, it is something to consider.

Hugo Black

Outside of Warren, another justice, Hugo Black, raises questions when considering the motivations for the ruling. Justice Hugo Black's background is quite simple: he was born in 1886 as the eighth and last child in his family and spent his first three years living on a farm.[59] He grew up to be a great student and went to medical school, but then opted to attend a two-year law program and eventually graduated with honors and was admitted to the bar. These facts alone are not incredibly important, but what *is* essential is Black's history post-admittance to the bar, which included his membership in the KKK.[60] This fact alone tremendously complicated his possible motivations for ruling to overturn *Plessy*, a case decided when he was only ten years old. How could a former KKK member have an interest in desegregation?

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[57] Established a right to counsel for criminal defendants in state court. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 1963 U.S. LEXIS 1942, 23 Ohio Op. 2d 258, 93 A.L.R.2d 733 (Supreme Court of the United States March 18, 1963,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H520-003B-S350-00000-00&context=1516831.

[58] Ruled that law enforcement is required to recite the rights of a suspect, including the right to remain silent and the right to obtain legal counsel. This is where the phrase "Miranda Rights" originates. Miranda v. Ariz., 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 1966 U.S. LEXIS 2817, 10 A.L.R.3d 974, 36 Ohio Op. 2d 237, 10 Ohio Misc. 9 (Supreme Court of the United States June 13, 1966,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G470-003B-S2VW-00000-00&context=1516831.

[59] Hugo L. Black. (n.d.). *Oyez*. Retrieved January 7, 2024, from https://www.oyez.org/justices/hugo_l_black

[60] See previous footnote.

Black joined the KKK on September 11, 1923, in hopes of gaining political advancement after considering the decision for over a year.[61] Despite believing that entering the KKK would provide him political advancement, he resigned before starting his campaign for senator:

> "Even as the Klan's numbers grew to more than 5 million nationwide, Black knew that he could only get so much political leverage from associating with the KKK and that public knowledge of his Klan membership could sink any chances of his winning a Senate seat. So as he readied his Senate campaign, he sent a letter of resignation to the Klan in order to officially cut ties with the organization, while still maintaining their support."[62]

He resigned in 1925 and was elected to the Senate in 1926. A little over a decade later, Black was nominated by Roosevelt and became a member of the Supreme Court. Allegedly, many did not know that he was in the KKK before he was confirmed and only realized it after it was released in the newspaper.[63] Several senators were angry and argued that they would have voted differently had they known he was a member of the KKK; however, rumors of his membership were discussed during the confirmation.[64] Despite the rumors, the main topic of discussion was his passing of legislation that would benefit him once he became a Supreme Court justice. In the aftermath of this revelation, Justice Black only needed a PR statement about how he had many friends of color and government actors were appeased enough not to call for his impeachment, thus cementing his membership in the Supreme Court for many years.[65]

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[61] See footnote 59.
[62] Morgan, T. (2023, March 28). *How an ex-KKK Member Made His Way Onto the U.S. Supreme Court*. History.com. https://www.history.com/news/kkk-supreme-court-hugo-black-fdr
[63] See previous footnote.
[64] See footnote 62.
[65] See footnote 62.

Several sources consider Hugo Black a liberal justice. However, he voted to keep Japanese internment camps in *Korematsu*,[66] dissented in *Griswold*[67] – the case that serves as the foundation for a right to privacy and dissented in *Katz*[68] – the case that established the reasonable expectation of privacy. Further, one of the decisions that could technically allow him to be considered liberal is *Brown*, which has already been established as a case with a high level of interest convergence. However, outside of the interest that already existed for the *Brown* ruling, one could argue that Black also had a personal interest in joining the already unanimous decision, especially considering his not-so-clean record as a former KKK member.

***Shelby County v. Holder* (2013)**

The next SCOTUS case up for discussion is *Shelby County v. Holder* (2013). This case concerns the Voting Rights Act of 1965 and calls explicitly two sections of the act into question: section 4(b) and section 5.[69] The purpose of the Act was to prohibit racial discrimination in voting.[70] Thus, section 5 of the Act keeps eligible districts from changing their election laws without official authorization. This section was only meant to last five years but was continuously renewed. The eligible districts mentioned in section 5 are defined in section 4(b) as

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[66] Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194, 1944 U.S. LEXIS 1341 (Supreme Court of the United States December 18, 1944, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2R70-003B-7017-00000-00&context=1516831.

[67] Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, 1965 U.S. LEXIS 2282 (Supreme Court of the United States June 7, 1965, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-GMB0-003B-S0YC-00000-00&context=1516831.

[68] Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576, 1967 U.S. LEXIS 2 (Supreme Court of the United States December 18, 1967, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FS40-003B-S29Y-00000-00&context=1516831.

[69] See footnote 31.

[70] National Archives. (2022, February 8). *Voting Rights Act (1965)*. National Archives and Records Administration. https://www.archives.gov/milestone-documents/voting-rights-act

districts with voting tests as of November 1, 1964, and less than 50% turnout for the 1964 presidential election.[71] If a district is eligible, it "must prove to the Attorney General or a three-judge panel of a Washington, D.C. district court that the change 'neither has the purpose nor will have the effect' of negatively impacting any individual's right to vote based on race or minority status."[72] Shelby County, the plaintiff, asserted that both sections are unconstitutional due to the Tenth Amendment and the Fourth Article of the Constitution.[73] In a 5-4 decision, the court ruled in favor of Shelby County that section four was unconstitutional. In their justification, the majority reasoned, "the formula for determining whether changes to a state's voting procedure should be federally reviewed is now outdated and does not reflect the changes that have occurred in the last 50 years in narrowing the voting turnout gap in the states in question."[74] Although the court only ruled section four unconstitutional, Ginsburg pointed out that section five cannot be utilized if section four is deemed unconstitutional. She also asserted that Congress could create legislation akin to the Voting Rights Act to enforce the Fourteenth and Fifteenth Amendments. Meanwhile, Justice Thomas concurred, arguing that both sections should have been deemed unconstitutional.

When discussing the Voting Rights Act throughout *Shelby*, the majority opinion essentially argues that section four is of its time and that it (as of 2013) could be considered too outdated. However, one must question why it is that SCOTUS felt this way. The majority posits that the changes made in the last fifty years have narrowed the voting turnout gap for the states in question. However, utilizing interest convergence theory, one could argue that there are other

[71] See previous footnote.
[72] See footnote 31.
[73] The Tenth Amendment leaves any power not already delegated to the federal government to the states and, by extension, the people. The Fourth Article includes the Full Faith and Credit Clause, which requires states to respect other states' laws and court decisions.
[74] See footnote 31.

reasons. It needs to be considered that the court has discretion in the cases it chooses. Thus, out of the thousands of court cases received, this was one of the few SCOTUS wanted to hear. This alone reveals that the bench found it necessary to deliberate on the utility of the Voting Rights Act above several other potential challenges in 2013.

Additionally, an essential facet of this case is that the court, in essence, lowered the standard of scrutiny compared to when the Voting Rights Act was first passed. If the court felt that the government's actions were necessary and legitimate when the Act was passed, that was certainly not the sentiment in 2013. The majority felt that although there may have been a time when the government needed to intervene in state voting practices, that time was no longer. Thus, the scales were tipped toward limited government when balancing government interests versus citizen interests. Even so, the question remains of why SCOTUS gutted the Voting Rights Act despite its ability to be used today. Although the court argued that the Act did not have much utility today, it kept states accountable for ensuring their election laws were not racist. Something that could help explain the actions of SCOTUS relating to interest convergence is the sociopolitical climate that existed in 2013 compared to that of 1965. When the Voting Rights Act was passed in 1965, there was a Democratic supermajority in both chambers of Congress,[75] and with Lyndon B. Johnson as president, there was a federal trifecta.[76] The Civil Rights Act was also passed a year prior in 1964. The US was becoming significantly involved in the Vietnam War within the same period. With these observations, it can be deduced that when the Voting Rights Act was passed, there was a higher level of interest convergence, therefore creating stricter scrutiny for race than in 2013 when this case was decided.

[75] A democratic supermajority means both the senate majority and house majority were democratic.
[76] The Great Society Congress. (n.d.). *The 89th Congress*. The Association of Centers for the Study of Congress. https://acsc.lib.udel.edu/exhibits/show/89th-congress

This then raises the question of how strict the scrutiny of race is. *Brown's* scrutiny was much more stringent, but as discussed previously, this was also a high point of interest convergence. The interests that existed during the time of *Brown* did not exist in 2013 (at least regarding post-World War II sentiment and the boosting of soft power in the context of the 1950s). However, this led to the consideration of precise interests in 2013. There were high racial tensions in this period. In fact, 2013 was the same year the Black Lives Matter movement was started in response to several instances of police brutality (and brutality in general) against the Black community.[77] Further, this case was decided not even a month before the Trayvon Martin decision was made in which the teenager's murderer, George Zimmerman, was acquitted of second-degree murder (July 13, 2013).[78] This is not to claim that the two cases were connected; however, it is a testament to the era's racial climate and whose rights were emphasized. Despite these racial tensions, many were incorrectly under the assumption that the U.S. became a "post-racial society" after Barrack Obama was re-elected for the presidency the year prior, supposedly curing the country of its anti-Black tendencies.[79] This inappropriate line of reasoning was absolutely a factor in the court deciding voting rights no longer needed security, with the court assuming voting rights were not a priority if a Black man could achieve the presidency.

John Roberts

Outside of social contexts, there are essential contexts for who participated in the ruling. One of the more obvious contributors to the ruling is the author of the opinion, Chief Justice John Roberts. Roberts attended Harvard as an undergraduate and continued his education there at

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[77] Black Lives Matter. (n.d.). *Herstory - Black Lives matter*. https://blacklivesmatter.com/herstory/

[78] Zimmerman v. State, 114 So. 3d 446, 2013 Fla. App. LEXIS 8986, 38 Fla. L. Weekly D 1204, 2013 WL 2449591 (Court of Appeal of Florida, Fifth District June 3, 2013, Opinion Filed). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58KR-5T51-F07Y-1004-00000-00&context=1516831.

[79] A New, "Post-Racial" Political Era in America. (2008, January). *NPR/All Things Considered*. broadcast. Retrieved from https://www.npr.org/2008/01/28/18489466/a-new-post-racial-political-era-in-america.

Harvard Law.[80] It was not until he was already at Harvard Law that he realized his passion for the legal field. His acquaintance with the Supreme Court started early, as he clerked with Justice William Rehnquist in 1980, one year after clerking with Judge Henry Friendly upon graduating from Harvard Law.[81]

In his time on the Supreme Court, Roberts has written several Year-End reports as the Chief Justice of the bench. The intent of these reports is to discuss the state of the federal courts at the time the report is written. Each report discusses an issue that the Chief Justice believes should be prioritized in the next year. For several Year-End reports, the issue Roberts is interested in prioritizing is raising judicial pay.[82] In fact, this particular issue is one discussed by Roberts in his reports more often than not. Thus, it can be deduced that the primary interest Roberts would like to be associated with is monetary, specifically judiciary funding. However, the true interest of Roberts is his allegiance to his political party, as he voted for a conservative outcome in 14 out of 15 precedent-overturning cases with partisan implications (93%).[83] In this support, he has scaled back on several protections previously made possible by precedent, such as "campaign finance, reproductive health, workers' rights, gun safety, affirmative action, and procedural justice."[84] At the same time, he has voted against overturning precedent for cases that would work to expand rights, such as marriage equality.[85] This makes it clear that despite his assertions that he is devoted to preserving precedent, this is not his interest at all. In actuality, Roberts is more concerned with the precedent of his partisan interests than he is the precedent of

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[80] John G. Roberts, Jr. (n.d.). *Oyez*. Retrieved May 8, 2024, from https://www.oyez.org/justices/john_g_roberts_jr
[81] See previous footnote.
[82] Supreme Court staff. (n.d.). *Chief Justice's Year-End Reports on the Federal Judiciary*. Supreme Court of the United States. https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx
[83] Take Back the Court. (2021). *Chief justice Roberts Almost Always Votes to Overturn Precedent*. Take Back the Court Action Fund. https://www.takebackthecourt.today/chief-justice-roberts-almost-always-votes-overturn-precedent
[84] See previous footnote.
[85] Roberts was one of the dissenting justices in *Obergefell*.

the court (i.e., himself). The next justice up for discussion is one that will be revealed to have similar interests to Roberts.

Clarence Thomas

Another interesting justice to consider in this opinion is Clarence Thomas. Based on Bell's deductions, one would assume that Thomas would have had more interest than anyone else on the bench in preserving the Voting Rights Act; however, that is not how he landed in the opinion. What about his personal life could help explain Thomas' long precedence of opinions in rulings that often align with that of the oppressor?

Clarence Thomas had a tumultuous upbringing. Thomas, his older sister, and his mother were abandoned by his father when he was only two years old. After this, a fire left him and his family homeless, resulting in him moving in with his grandparents. This housing arrangement also ended after his grandfather kicked him out for leaving his seminary.[86] Thomas had dreams of becoming a Catholic priest but gave up on this dream after Martin Luther King Jr.'s assassination. His passion for the priesthood transformed into a passion for civil rights, and this led him to attend Yale Law "as one of the first students to benefit from the open admissions program that offered positions to black students in all-white colleges."[87] During Thomas' education, he was an activist, leader of the Black Student Union, and attended Vietnam war rallies. This commitment to civil rights may surprise those who know Thomas from his time on the bench, as he became a staunch conservative with predictable rulings as the most right-leaning justice in the current court. This turn-around likely came from his time post-law school, working with Missouri Attorney General John Danforth in 1974 after his admittance to the Missouri Bar.

[86] Thomas left his seminary due to fatigue from dealing with racism and his waning faith because of the Roman Catholic Church's lack of leadership regarding racial justice. Clarence Thomas. (n.d.). *Oyez*. Retrieved January 7, 2024, from https://www.oyez.org/justices/clarence_thomas

[87] See previous footnote.

He continued working with Danforth as his legislative assistant in 1977.[88] Thomas would go on to be appointed by Ronald Reagan as Assistant Secretary for Civil Rights in the U.S. Department of Education, and a year later, appointed by Reagan as Chair of the U.S. Equal Employment Opportunity Commission.[89]

It was Thomas' time at the U.S. Department of Education that introduced him to Anita Hill, his legal advisor, who accused him of sexual harassment during his confirmation for the Supreme Court.[90] This allegation shows intersectionality at play, as Anita Hill is a Black woman. Yet, Thomas took a racialized approach to condemn the investigation by denying all claims and deeming it a "high-tech lynching."[91] Several senators questioned Hill's sanity throughout the investigation, and Thomas would still go on to be confirmed for SCOTUS. Hill's testimony, however, was not for nothing. She inspired several women to enter politics, with a historic number of women being elected to Congress and basically doubling their seats in the Senate and House to 6 and 47, respectively.[92] Further, 1992 was deemed the "Year of the Woman" and likely created the atmosphere that would lead to the appointment of Ruth Bader Ginsburg that very next year, a justice who will be considered further for discussion of *United States vs. Virginia* (1996).

Returning to Thomas, there is much to consider when deliberating his potential interests in rulings. For one, Thomas is an outlier to the justices considered in this thesis, as he is the only Black justice on the Supreme Court bench in any of the cases included in my research. This alone makes him an intriguing topic for interest convergence, as he should technically be more

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[88] See footnote 86.
[89] See footnote 86.
[90] Tikkanen, A. (2024, May 2). *Anita Hill. Encyclopedia Britannica.* https://www.britannica.com/biography/Anita-Hill
[91] See previous footnote.
[92] See footnote 90.

aligned with the oppress*ed* than the oppress*or*. He seemed to be on this trajectory in his formative years, with his interests changing after working with conservative leaders. However, considering the tenets of intersectionality, it begins to make sense when considering all of his other identity axes, none of which are marginalized. He is a heterosexual man who grew up with Catholic beliefs. This does not take away the injustices he has faced as a racial minority, but it does contextualize his priorities for equality. Additionally, the (likely true) allegations from Anita Hill of sexual harassment further display his lack of dedication to Black women, let alone queer Black women. Beyond Anita Hill, Thomas' sister came under his fire when he described her and her children as dependent on welfare, stating, "She gets mad when the mailman is late with her welfare check… That is how dependent she is. What's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation."[93] It was eventually revealed that his comments were untrue, as the only time his sister was not working was when she was caring for an ill elderly aunt. Although it was true that she received welfare checks, they were not enough to maintain a lifestyle in which she did not work.[94] His lack of dedication to queer Black women is further solidified by his concurrence in *Dobbs,*[95] in which he explained he would reconsider and overrule "all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[96] Thomas is the only one who took the concurrence this far, with the majority asserting that this decision would not

[93] Blake, J. (2023, September 11). *Analysis: Here's Why Many Black People Despise Clarence Thomas. (It's not because he's a conservative.) | CNN politics*. CNN. https://www.cnn.com/2023/09/11/politics/clarence-thomas-black-people-blake-cec/index.html
[94] See previous footnote.
[95] *Dobbs v. Jackson Women's Health Organization* (2022) ruled that there is no constitutional right to abortion. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545, 2022 U.S. LEXIS 3057, 29 Fla. L. Weekly Fed. S 486, 2022 WL 2276808 (Supreme Court of the United States June 24, 2022, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:65S9-1N11-JYYX-652W-00000-00&context=1516831.
[96] See previous footnote.

impact previous cases relating to substantive due process, ensuring the rights guaranteed in those cases remain.[97] Despite its applicability to his argument, *Loving v. Virginia* (1967)[98] goes without mention in Thomas' concurrence. However, he never would have mentioned it due to his personal connection to the ruling, as he has a white wife.

With these observations, we can conclude that Thomas' social interests are extended to himself alone. Despite his comments toward his sister and stance against affirmative action, Thomas has a long history of benefiting from white proximity and wealth, as detailed in a ProPublica report.[99] This fact, in combination with his lack of mentioning *Loving* in his concurrence, shows that Thomas has no problem with laws providing benefits as long as he is the one benefiting. With *Shelby* being a case about voting rights, Thomas has little to no interest in ensuring their security when he is already in such an elite position and has a limited number of elections remaining that he will be alive for.

The two justices discussed for this case study were both revealed to have interests that were primarily for themselves. This is not entirely surprising considering the tenets of interest convergence theory. However, the next case up for analysis provides a deviation from this expectation due to the social location of the authoring justice. Further, it makes the discussion for how representation can be implemented on the Supreme Court bench more complex.

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[97] See footnote 95.

[98] The court ruled that banning interracial marriage is a violation of the Fourteenth Amendment. Holds that marriage is a fundamental right in regard to race, which is afforded strict scrutiny. Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010, 1967 U.S. LEXIS 1082 (Supreme Court of the United States June 12, 1967, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-FV50-003B-S3VW-00000-00&context=1516831.

[99] This report details the 38 vacations provided to Thomas by billionaires over his 3 decades on the bench. Murphy, B., & Mierjeski, A. (2023, August 10). *The other billionaires who helped Clarence Thomas Live A luxe life*. ProPublica. https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court

***United States v. Virginia* (1996)**

The next case relevant to the discussion of scrutiny for queer Black women is *United States v. Virginia* (1996). Leading up to this case, the Virginia Military Institute (VMI) had a male-only public undergraduate institution. As a result, the United States filed suit, asserting that VMI's exclusively male admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[100] When the policy was deemed unconstitutional in court, Virginia's response was the creation of the Virginia Women's Institute for Leadership (VWIL) to make a comparable program for women to continue its male-only academy.[101] The court was not convinced that this parallel program was adequate for the all-male academy not to violate the Equal Protection Clause. For one, the two academies differed significantly, with VMI's benefits far exceeding VWIL's.

The court remained unmoved by either of the two arguments posed by the state of Virginia. One of these arguments was Virginia's assertion that VMI contributed to the diversity of education in the state by being the only exclusively male public institution for higher learning. In response, the court argued that this so-called "diversity" needed to do "more than favor one gender" to count as diversity.[102] Ruth Bader Ginsburg, the authoring judge of this opinion, then discussed the precedent of women being successfully discriminated against in court.

Analogous to the Oklahoma legislation in *Craig*,[103] the second argument provided by Virginia is rooted in biological determinism. The state asserted that if VMI were to become co-educational, some of the institution's practices would have to change to sufficiently accommodate women due to the inherent differences between men and women. Ginsburg

[100] See footnote 32.
[101] See footnote 32.
[102] See footnote 32.
[103] See footnote 6.

responded to this notion: "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[104] Ginsburg goes on to explain that women are not a monolith, and overgeneralizations about "the way women are" are not sufficient enough to justify segregation.[105] As such, the court ruled that public institutions cannot segregate based on sex or gender, and sex and gender receive the standard of intermediate scrutiny. An important thing to note from this opinion is how it is written. Ginsburg deliberately wrote the opinion in a way that would be accessible to lay citizens, ensuring that even those not well-versed in law could understand the decision and justification for the ruling.

When deliberating the social contexts that may be relevant to how the justices came to their decision, there are multiple things to consider. For one, 1996 was an election year, making the atmosphere politically charged by default. Further, 1995 was a year of significant events, including Operation Storm[106] and the OJ Simpson trial, also known as the "trial of the century."[107] While it is possible to discuss the potential influences of these events, none of these contexts matter as much as the context of the court in this case, with Ruth Bader Ginsburg authoring the opinion.

Ruth Bader Ginsburg

Ginsburg is set apart from other authoring justices in my case studies, as she is the only author who is part of the marginalized group she is making the decision about. Thus, the conversation for interest convergence in this case is a bit different, as it is logically within her

[104] See footnote 32.
[105] See footnote 32.
[106] Whittingham, K. (2021, November 2). *Complete 1995 Events Timeline*. Historic Newspapers. https://www.historic-newspapers.co.uk/blog/1995-timeline/
[107] See previous footnote.

interest to expand women's rights. Further, her personal background and legal precedence show a consistent dedication to fighting gender discrimination despite the several challenges she had to overcome. She attended Harvard Law as one of nine women in a 500-person class and consistently faced discrimination, with several telling her that she took the spot of a man.[108] To top it off, she was also a mother and taking care of her sick husband, who was diagnosed with testicular cancer during her first year of law school. During this time, she worked as the first female member of the Harvard Law Review. Once her husband recovered from cancer and graduated from Harvard, he moved to New York to work at a law firm, and Ginsburg transferred to Columbia to finish her final year of law school. She graduated top of her class in Columbia Law. Despite her academic excellence, gender discrimination caused her difficulty finding a job in the 1960s, and it was not until a professor from Columbia insisted she be hired by U.S. District Judge Edmund L. Palmieri as a clerk that she could get a position.[109] She worked there for two years, then had a string of other jobs in the legal field. Eventually, she landed a position at Columbia Law as a professor in 1972 and became the first female professor to earn tenure at the institution. During this same period, she continued fighting gender discrimination by directing the Women's Rights Project of the American Civil Liberties Union. This led her to argue six landmark cases before SCOTUS successfully.[110] Eventually, she was nominated to SCOTUS in 1993, as briefly mentioned in Clarence Thomas's discussion, and this exact case was the first she had authored.

[108] Ruth Bader Ginsburg. (n.d.). *Oyez*. Retrieved May 8, 2024, from https://www.oyez.org/justices/ruth_bader_ginsburg
[109] See previous footnote.
[110] The court cases she argued are *Frontiero v. Richardson* (1973), *Kahn v. Shevin* (1974), *Weinberger v. Wiesenfeld* (1975), *Edwards v. Healy* (1975), *Califano v. Goldfarb* (1977), and *Duren v. Missouri* (1979).

Seeing her dedication to addressing gender discrimination provides a clear reason for her ruling in this case. However, as previously mentioned, she is the only author part of the marginalized community being ruled on, thus complicating the conversation for interest convergence. Ginsburg provides a clear-cut example of what can happen when marginalized communities have a seat at the table and is arguably a foil to the actions of Thomas.

Antonin Scalia

Moving to a dissenting justice that is practically a 180 from Ginsburg, Antonin Scalia was born in 1936 in New Jersey. He comes from an Italian background, making him the first SCOTUS justice of Italian ancestry.[111] Scalia had an impressive academic record throughout his adolescence. He obtained a scholarship to Xavier High School, where he eventually graduated as the top of his class.[112] He then attended Georgetown University for undergrad, graduated as valedictorian again, and would go on to graduate as valedictorian once again from Harvard Law.[113] Following his academic career, Scalia began working with the international law firm Jones Day in 1961.[114] Six years later, he wanted to return to the academic arena and began teaching as a professor at UVA Law. He taught until 1971 when he began serving in a string of public service positions. Scalia returned to teaching from 1977 to 1982 at the University of Chicago Law School until he was nominated by Reagan for United States Court of Appeals for the District of Columbia Circuit. His time on the circuit led to his eventual Supreme Court nomination, and he joined the bench in 1986 by unanimous confirmation.[115]

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[111] Smentkowski, B. P. and Houck, . Aaron M. (2024, April 23). Antonin Scalia. Encyclopedia Britannica. https://www.britannica.com/biography/Antonin-Scalia
[112] Antonin Scalia. (n.d.). *Oyez*. Retrieved January 9, 2024, from https://www.oyez.org/justices/antonin_scalia
[113] See previous footnote.
[114] See footnote 112.
[115] See footnote 111.

Scalia is known for his unyielding dedication to originalism and textualism.[116] His goal is interpreting the Constitution as close to the original meaning at the time the document was written as possible, with the belief that this is the best way to keep justices from having their own personal beliefs involved in their judgement. This line of reasoning has been criticized by judges and legal scholars alike for valid reason. For one, no matter what method of interpretation, personal belief can still be influential in decision making. As previously established by interest convergence theory, several factors, aside from what is discussed in the ruling, are usually involved in the eventual outcome of a decision. Further, Scalia has contradicted this belief in several ways. As pointed out by David A. Strauss in his 1991 article *Tradition, Precedent, and Justice Scalia*, not many would agree with Scalia's analysis that there is "no room for doubt" that the text of the Equal Protection Clause, when it was first written, had the intent of segregation being unconstitutional.[117] Scalia's endorsement of the *Brown* decision is also one that is hypocritical, as scrutiny does not exist anywhere in the text of the Constitution, making his originalist framework impractical in his analysis. Thus, despite Scalia's interpretation being one that I would technically agree with, it is not one that is rooted in originalist thinking. If anything, this would be an interpretation more in line with the idea that the constitution is a living document that can be interpreted based on the evolving social climate. An argument with originalist thinking was actually posed in the reargument of Brown, with the majority pointing out that this line of reasoning was inappropriate for the matter at hand.[118] Scalia's goal of originalism limiting personal bias in decision-making has also failed in its application, as Scalia

[116] See footnote 111.
[117] Strauss, D. A. (1991). *Tradition, Precedent, and Justice Scalia.* Cardozo Law Review. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3005&context=journal_articles
[118] See footnote 51.

and John Paul Stevens come to two opposite opinions despite both utilizing originalist analysis in the court case *District of Columbia* v. *Heller* (2008).[119]

Consistently taking on an originalist perspective is much easier when you are part of the population the original framers had in mind. Scalia did not understand the necessity of making the constitution apply to society as it currently exists because he is no different from those that created it. The reality is that the goal I seek in this thesis would never come to fruition if an originalist interpretation was utilized. Consequently, Scalia is the complete opposite of the type of justice necessary to establish a more intersectional approach to scrutiny for queer Black women. This deduction is confirmed by his dissent in *Lawrence*,[120] opposition to affirmative action,[121] and his dissent for this very case.[122]

The two justices discussed for this case show two opposing ends of the spectrum in terms of exhibiting potential for utilizing a more intersectional approach. The next case up for analysis continues this trend, but not with as sharp a contrast.

Obergefell v. Hodges (2015)

The final case up for discussion is *Obergefell v. Hodges* (2015). This case took place as a result of multiple states' banning of same-sex marriage.[123] Due to one of these bans, James

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[119] See footnote 111.
[120] Expressly overruled Bowers, a SCOTUS case that upheld a statute criminalizing private, consensual sodomy. The banning of sodomy violates Due Process and Equal Protection. Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508, 2003 U.S. LEXIS 5013, 71 U.S.L.W. 4574, 2003 Cal. Daily Op. Service 5559, 2003 Daily Journal DAR 7036, 16 Fla. L. Weekly Fed. S 427 (Supreme Court of the United States June 26, 2003, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:48XS-PXV0-004C-100T-00000-00&context=1516831.
[121] See footnote 117.
[122] See footnote 32.
[123] Multiple same-sex couples from Ohio, Michigan, Kentucky, and Tennessee sued their respective states for their refusal to recognize same-sex marriage. The plaintiffs challenged the constitutionality of the bans under the due process and equal protection clauses. See footnote 33.

Obergefell and his spouse, John Arthur, got married in Maryland, where their marriage would be recognized in hopes that they could reap the benefits of marriage.[124] The court ended up posing two questions: whether the Fourteenth Amendment "require(s) a state to license a marriage between two people of the same sex" and whether the Fourteenth Amendment "require(s) a state to recognize a marriage between two people of the same sex that was legally licensed and performed in another state." SCOTUS ruled yes to both questions in a 5-4 decision.

The court comes to this ruling for several reasons. One of these concerns the court's consideration of original intent and textualism regarding the Tenth Amendment. Although the Tenth Amendment affords states the right to create their own law, the court clarifies that this right is not protected when the created law violates the Due Process and Equal Protection Clauses. The court also looks to precedent, considering landmark cases like *Loving, Zablocki,*[125] *Griswold,*[126] and *Lawrence.*[127] Pragmatism is also utilized in the court's argument, with the majority considering the history of the American Psychological Association and discussing the psychological damage children of married gay couples deal with because they are not seen as equal.

While the court provides these reasonings for its ruling, it is still important to consider what other factors may have been at play in its decision. One of these factors could be the political unrest in 2015, the year this ruling was made. As discussed previously, racial tensions

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[124] The specific benefit this same-sex couple desired was Obergefell's ability to be on his spouse's death certificate. They ended up marrying on a helicopter pad because Arthur was ill and dying.

[125] The court ruled that the Wisconsin statute keeping people behind on child support from marrying was unconstitutional because marriage is a fundamental right afforded strict scrutiny and the state does not have an interest in this basis. Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618, 1978 U.S. LEXIS 57, 24 Fed. R. Serv. 2d (Callaghan) 1313 (Supreme Court of the United States January 18, 1978). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9210-003B-S3Y6-00000-00&context=1516831.

[126] Struck down a state prohibition against the prescription, sale, or use of contraceptives, for married couples, based on a "right to privacy" in decisions about childbearing. See footnote 67.

[127] See footnote 120.

were high after the establishment of the Black Lives Matter movement in response to police brutality. The smoke had not yet cleared in 2015, with Freddie Gray's death in police custody sparking riots in April, the same month this case was argued in front of SCOTUS.[128] Violence from government actors was not the only concern, with consistent mass shootings creating more unrest and even more debate about gun control. Furthermore, a trend of supporting gay rights had already been established, with more than half of the states recognizing[129] gay marriage in some form before the *Obergefell* ruling. With homophobic sentiment now being in the -albeit vocal- minority of the U.S., it makes sense why the court was able to rule the way it did, especially with other political topics being more controversial at the time. An additional factor that helps is the ruling does not necessitate a relinquishment of power by heterosexual people, as gay people having the ability to marry would not actively impact a heterosexual. Something else to note is that this ruling was not just about affording queer people more rights; it was also the opportunity to solidify the importance of marriage. The right to marriage is what the court deemed as fundamental, not necessarily a *gay* right to marriage.

Anthony Kennedy

When considering the potential converging interests of the justices, the author of the opinion, Anthony Kennedy, provides an intriguing discussion due to his precedent. Despite being conservative, he was considered a swing vote for decisions split between a democratic and republican court and made several decisions in favor of individual rights. One such decision was *Planned Parenthood v. Casey* (1992), in which the court created the "undue burden" test[130] for

[128] Greenlaw, M. (2021, January 14). *Baltimore Protests and Riots, 2015.* BlackPast. https://www.blackpast.org/african-american-history/baltimore-protests-and-riots-2015-2/

[129] By "recognizing" I mean states that legalized or licensed and recognized gay marriages.

[130] State regulations can survive constitutional review under the substantive due process clause of the 14th Amendment, so long as they do not place a "substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Planned Parenthood v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 1992 U.S. LEXIS

women seeking an abortion. Additionally, multiple cases he has authored have to do with queer rights, including *Lawrence v. Texas* (2003)[131] and *Romer, Governor of Colorado v. Evans* (1996)[132]. Although these cases are conceivably progressive, there is much to be said about their utility, particularly for *Casey*. An entire conversation can be had about the lack of definition provided by "undue burden" and therefore leaving no part of the pregnancy free from government interest and interference, arguably leading to the unraveling of abortion rights that eventually led to the *Dobbs* ruling. Despite his opinions working to expand queer rights, he also limits rights for queer people in his authoring of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), which essentially rules that same-sex couples can be discriminated against as long as there is religious justification due to the Free Exercise clause of the First Amendment.[133] Kennedy attempted to take the sting away from the ruling, stating, "gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."[134] However, this statement feels hypocritical, as the ruling inherently treats gay persons and couples as social outcasts by making their discrimination permissible under the guise of religion.

4751, 60 U.S.L.W. 4795, 92 Daily Journal DAR 8982, 6 Fla. L. Weekly Fed. S 663 (Supreme Court of the United States June 29, 1992,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-KDG0-003B-R206-00000-00&context=1516831.

[131] See footnote 120.

[132] The Second Amendment of Colorado's State Constitution was ruled unconstitutional for not having a legitimate reason for discriminating against homosexual and bisexual persons. Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 1996 U.S. LEXIS 3245, 64 U.S.L.W. 4353, 70 Fair Empl. Prac. Cas. (BNA) 1180, 68 Empl. Prac. Dec. (CCH) P44,013, 96 Cal. Daily Op. Service 3509, 96 Daily Journal DAR 5730, 9 Fla. L. Weekly Fed. S 607 (Supreme Court of the United States May 20, 1996,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RHM-BW90-003B-R0KN-00000-00&context=1516831.

[133] Although the majority asserts that part of their reasoning for this ruling has to do with the conduct of the Colorado Civil Rights Commission's conduct, Ginsburg, joined by Sotomayor, points out that this is not sufficient to rule in favor of Phillips. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 584 U.S. 617, 138 S. Ct. 1719, 201 L. Ed. 2d 35, 2018 U.S. LEXIS 3386, 86 U.S.L.W. 4335, 102 Empl. Prac. Dec. (CCH) P46,050, 27 Fla. L. Weekly Fed. S 289, 2018 WL 2465172 (Supreme Court of the United States June 4, 2018,
Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SGG-7CM1-F04K-F069-00000-00&context=1516831.

[134] See previous footnote.

To be clear, Jack C. Phillips, the owner of the cake shop, is Christian. This alone explains the court's receptiveness to his claim. If he were part of a more marginalized religion, his claim would not have been taken as seriously. This deduction is not unfounded – SCOTUS proved it in 1988 with the case *Employment Division, Department of Human Resources v. Smith* (1988), wherein the state denial of unemployment insurance to someone fired for the consumption of illegal drugs that are used for religious reasons was ruled constitutional.[135] SCOTUS doubled down on this ruling seven years later in *City of Boerne v. Flores* (1997), which undid the abrogation done by Congress, as applied to the states, in the Religious Freedom Restoration Act (RFRA), a 1993 U.S. federal law that "ensures that interests in religious freedom are protected."[136]

With this precedent in mind, Kennedy's dedication to justice is rather complicated. Despite several claims that Kennedy is gay due to his expansion of queer rights and protections, he is not as progressive as is thought. Although he has done necessary work for solidifying queer rights, the reality is that more could, and should, be done to guarantee that these rights are truly implemented. Even so, out of the justices aligned with the oppressor in my case studies, Kennedy is admittedly one that is more likely to be persuaded into ruling for positive social change. Someone even *more* likely to be persuaded to rule for positive social change is Sonia Sotomayor, another justice involved in the decision of this case.

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[135] Employment Div., Dep't of Human Res. v. Smith, 485 U.S. 660, 108 S. Ct. 1444, 99 L. Ed. 2d 753, 1988 U.S. LEXIS 1984, 56 U.S.L.W. 4357, 46 Fair Empl. Prac. Cas. (BNA) 1061, Unemployment Ins. Rep. (CCH) P21,890 (Supreme Court of the United States April 27, 1988, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F6T0-003B-44CD-00000-00&context=1516831.

[136] City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 1997 U.S. LEXIS 4035, 65 U.S.L.W. 4612, 74 Fair Empl. Prac. Cas. (BNA) 62, 70 Empl. Prac. Dec. (CCH) P44,785, 97 Cal. Daily Op. Service 4904, 97 Daily Journal DAR 7973, 1997 Colo. J. C.A.R. 1329, 11 Fla. L. Weekly Fed. S 140 (Supreme Court of the United States June 25, 1997, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HXV0-003B-R16D-00000-00&context=1516831.

Sonia Sotomayor

Sonia Sotomayor was born in the Bronx, New York, in 1954 to two native Puerto Ricans.[137] Her father passed away when she was nine years old, prompting her mother to work as a nurse for six days a week to support the family and Sotomayor learned to speak English fluently. At ten years old, Sotomayor realized she wanted to be an attorney after watching an episode of "Perry Mason," a legal drama.[138] This pushed her to become valedictorian of her high school in the class of 1972, which led to her earning a scholarship at Princeton University. During her time at Princeton, Sotomayor served as co-chairman of Acción Puertorriqueña, a Puerto Rican activist group. While serving, she accused the Princeton administration of discriminatory hiring practices against Puerto Ricans. She continued her education at Yale Law, graduating in 1979.[139]

After graduating from Yale Law, Sotomayor began working as the assistant district attorney to then Manhattan district attorney Robert Morgenthau. During this time, she established herself as an assertive prosecutor, assisting high-profile cases and making significant busts. Sotomayor eventually moved onto private practice in New York City, working her way up to partner. Three years later, she was nominated to the United States District Court for the Southern District of New York on November 27, 1991, by the George H.W. Bush administration.[140]

About two decades later, Sotomayor began her time on the Supreme Court as the third woman and first Hispanic person on the bench after being confirmed in 2009. Her precedent is

[137] Sonia Sotomayor. (n.d.). *Oyez*. Retrieved January 9, 2024, from https://www.oyez.org/justices/sonia_sotomayor.
[138] See previous footnote.
[139] See footnote 137.
[140] See footnote 137.

straightforward, supporting cases that expand the rights of marginalized communities. One of her priorities is protecting affirmative action, which falls in line with her dedication to racial equality. In fact, Sotomayor vehemently disagrees with the notion that affirmative action should be done away with. According to Julia Shapero's article discussing Sotomayor's dissent in *SFFA v. Harvard* and *SFFA v. University of North Carolina (UNC),* Sotomayor recognizes that entrenched racial inequality is still the reality, not only for society as a whole, but for the two institutions involved in these court cases.[141] Sotomayor asserts, "Equality requires acknowledgement of inequality."[142] She also critiques the actions of SCOTUS, pointing out that returning to the "lost arguments" of previous dissents to continue those battles "betrays an unrestrained disregard for precedent," and "…fosters the People's suspicions that 'bedrock principles are founded … in the proclivities of individuals' on this Court, not in the law, and it degrades 'the integrity of our constitutional system of government,'"[143] This recognition of the failures of the court to adequately achieve social progress sets her apart from her counterparts. However, this does not come as too much of a shock, as she is inherently set apart from her counterparts due to being the first woman of color on the bench. This makes her the justice with the closest intersectional identity to Black queer women until the confirmation of Ketanji Brown Jackson.

Sotomayor, like Ginsburg, provides a prime example of the positive changes that can occur when marginalized communities have representation in positions of power. She further solidifies the need for intersectional identities being represented in SCOTUS.

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[141] Shapero, J. (2023, June 29). *Sotomayor's biting dissent: Ruling rolls back "decades of precedent and momentous progress."* The Hill. https://thehill.com/regulation/court-battles/4073495-sotomayors-biting-dissent-ruling-rolls-back-decades-of-precedent-and-momentous-progress/
[142] See previous footnote.
[143] See footnote 141.

Conclusion

These case studies confirm the reality that several interests, aside from what is explicitly in the ruling, are involved in the decision-making of SCOTUS. There is no doubt that the justices are influenced by the sociopolitical phenomena at the time the case is decided. Additionally, as concluded by Bell, multiple Supreme Court justices are focused on their own interests as opposed to the interests of those impacted by their rulings. However, the inclusion of marginalized communities in the court allows for a more progressive approach to achieving justice, as seen from Ginsburg and Sotomayor. Even so, the inclusion of marginalized communities alone is not enough, as evidenced by the actions of Clarence Thomas. Thus, we can conclude that a multi-pronged approach is necessary for achieving a more intersectional interpretation of scrutiny.

Chapter 5: Quantitative Analysis

For the quantitative analysis phase of my study, I consider the opinions of three demographics: queer Black women, straight white men, and the rest of the population. The goal of examining these demographics is to provide more perspective from queer Black women, as an important emphasis in my thesis is this demographic's erasure. Further, I find it beneficial to include pragmatism in my methods, as this would mirror the model that I hope the Supreme Court implements.

The data for this thesis is a consolidation of the 2016 and 2020 waves of the American National Election Survey (ANES). These two waves were aggregated to ensure an adequate sample size for Black queer women would give enough statistical power for accurate results due to their underrepresentation in data. The variables in this project include sexuality, gender, race, and perceptions of discrimination levels against gays and lesbians, women, and Black people. Each independent variable (sexuality, gender, and race) is coded as a dichotomy, with "0" representing heterosexual, male, and white and "1" representing gay, lesbian, or bisexual, female, and Black. These dichotomous variables were then computed into an interaction term that represents queer Black women by computing the variable so that if each independent variable is equal to 1, queer Black women is equal to 1. Then, an interaction term was computed to represent straight white men by recoding each independent variable so that the value of "0" now represents gay, lesbian, or bisexual, female, and Black and repeating the process done for queer Black women. The category for straight white men was then recoded with the value of "0" representing the rest of the population and the value of "2" representing straight white men. Next, the interaction terms for queer Black women and straight white men were combined to compute a new variable that includes the rest of the population. The frequency variable that included

"Everybody" contained the values of "0," "1," and "2" representing the rest of the population, queer Black women, and straight white men respectively.

The discrimination in the U.S. against Gays and Lesbians, discrimination in the U.S. against Women, and discrimination in the U.S. against Black people were all computed by asking a Likert scale style question about respondents' opinions on rates of discrimination. The original question has five levels: 1=A great deal, 2=A lot, 3=A moderate amount, 4=A little and 5=None at all. This was recoded into a dichotomous variable wherein values 1-2 represent "More than a moderate amount" of discrimination and values 3-5 represent "Moderate to none" for levels of discrimination. These have been recoded into fewer categories to account for the low sample size of queer Black women due to the populations' lack of representation in data.

After the variables were recoded, a series of chi-square tests were run to calculate the differences in opinions for queer Black women, straight white men, and the rest of the population about discrimination against gays and lesbians, discrimination against Women, and discrimination against Black people. All tests calculated a significant difference between the opinions of queer Black women and the other two populations, with a p-value of less than 0.000 being calculated for every test. This tells us that there is 99% confidence in the results. The results show that queer Black women are the only demographic who, across the board, have a higher rate of believing that there is more than a moderate amount of discrimination faced by women, gays and lesbians, *and* Black people at a percentage of 55.26%, 64.86%, and 89.19% respectively. Meanwhile, straight white men show the lowest rates of perceiving discrimination against these demographics, with 57.18% believing gays and lesbians face moderate to no discrimination and 80.52% believing women face moderate to no discrimination. However, 54.95% of straight white men believe Black people face more than a moderate amount of

discrimination. The rest of the population's perception of discrimination consistently lands between queer Black women and straight white men, with percentages of those that believe more than a moderate amount of discrimination is faced by women, gays and lesbians, and Black people being 28.23%, 51.89%, and 65.95% respectively.

Perception of Discrimination Against Women

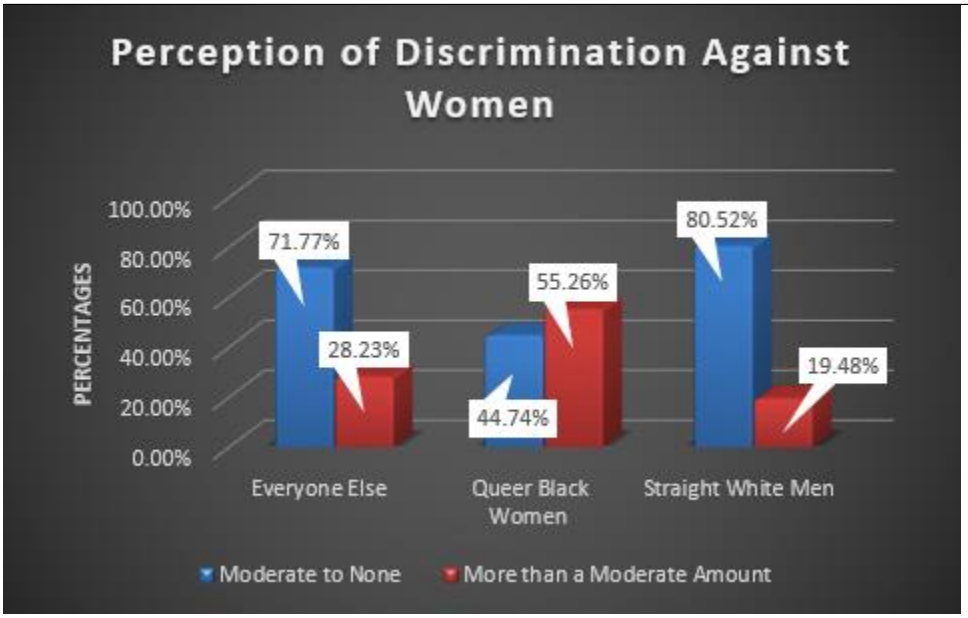
Crosstab

	Discr. Levels	Everyone E	Queer Black Wom	Straight White M	To
Discrimination against Women	Moderate to None	71.77%	44.74%	80.52%	74.51%
	More than a moderate	28.23%	55.26%	19.48%	25.49%
Total		100.00%	100.00%	100.00%	100.00%

Chi-Square Tests

	Value	df	Asymptotic Significance (2-sided)
Pearson Chi-Square	111.193[a]	2	0.000
Likelihood Ratio	111.919	2	0.000
Linear-by-Linear Association	91.531	1	0.000
N of Valid Cases	10610		

a. 0 cells (0.0%) have expected count less than 5. The minimum expected count is 9.69.



Perception of Discrimination Against Queers

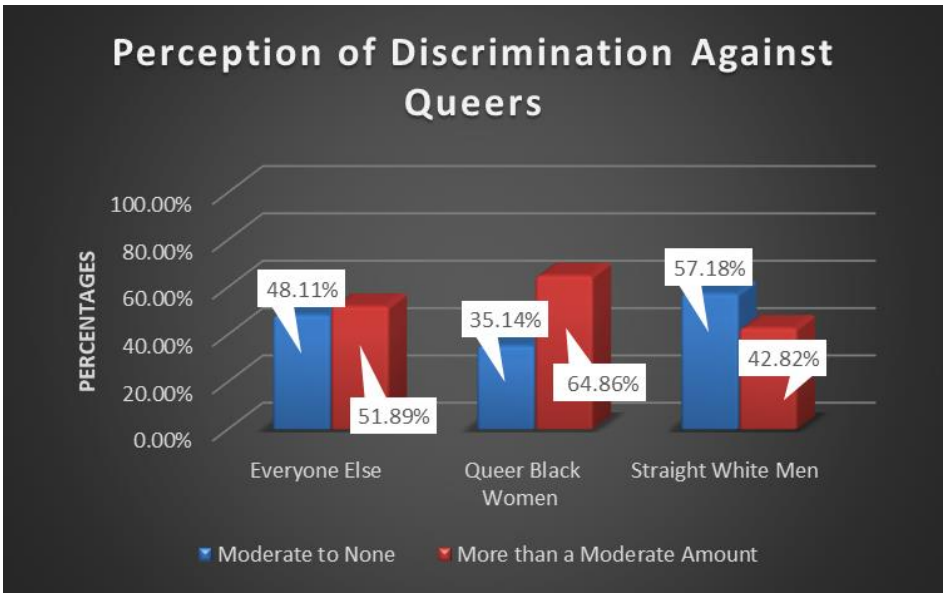
Crosstab

	Discr. Levels	Everyone El	Queer Black Wom	Straight White M	To
Discrimination against Gays	Moderate to None	48.11%	35.14%	57.18%	51.00%
	More than a moderate amount	51.89%	64.86%	42.82%	49.00%
Total		100.00%	100.00%	100.00%	100.00%

Chi-Square Tests

	Value	df	Asymptotic Significance (2-sided)
Pearson Chi-Square	79.873[a]	2	0.000
Likelihood Ratio	80.137	2	0.000
Linear-by-Linear Association	75.344	1	0.000
N of Valid Cases	10584		

a. 0 cells (0.0%) have expected count less than 5. The minimum expected count is 18.13.



Perception of Discrimination Against Blacks

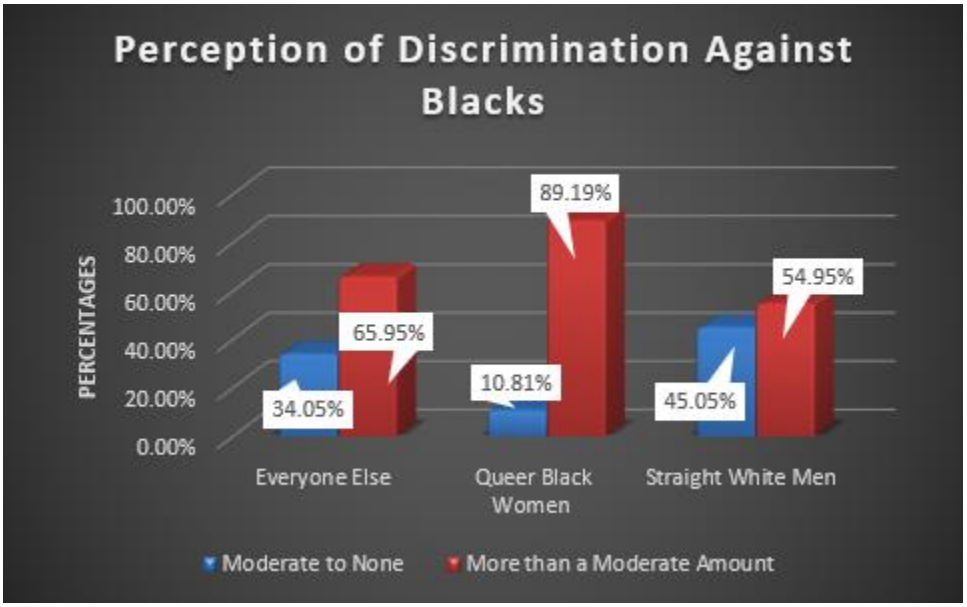
Crosstab

	Discr. Levels	Everyone El	Queer Black Wom	Straight White M	To
Discrimination against Blacks	Moderate to None	34.05%	10.81%	45.05%	37.52%
	More than a moderate amount	65.95%	89.19%	54.95%	62.48%
Total		100.00%	100.00%	100.00%	100.00%

Chi-Square Tests

	Value	df	Asymptotic Significance (2-sided)
Pearson Chi-Square	130.956[a]	2	0.000
Likelihood Ratio	131.905	2	0.000
Linear-by-Linear Association	117.960	1	0.000
N of Valid Cases	10604		

a. 0 cells (0.0%) have expected count less than 5. The minimum expected count is 13.88.



Based on the calculations, queer Black women are most likely to perceive discrimination against gays and lesbians, women, and Black people. Straight white men are the least likely to perceive these discriminations. These calculations are important, as the demographic of Supreme Court Justices has predominantly been straight white men. Thus, despite being less inclined to see the anti-intersectional jurisprudence that is inherent to scrutiny, those on the bench continue to make decisions about how much discrimination is permissible for communities they are not part of.

The calculations also give potential insight into why the tiers of scrutiny are currently implemented as they are. With each independent variable having more than half of their population feeling there is more than a moderate amount of discrimination against Black people, this could help explain why race is placed into strict scrutiny. However, the perception of discrimination against women and queers do not align with the levels of scrutiny, with every demographic perceiving more discrimination for queers than for women. This flips the interpretation of the last two levels of scrutiny (gender in intermediate and sexuality in rational

basis). Regardless of any potential justification for the current tiers of scrutiny, they, similar to the data at my disposal, do not take on an intersectional lens, therefore not addressing the needs of anyone with more than one marginalized identity axis.

Chapter 6: Recommendation

To recommend a change to the interpretation of scrutiny by the Supreme Court, I must explain why the current interpretation is inadequate. First, scrutiny should be understood as something other than three separate tiers. To elaborate, the concept of a tier system should not exist within scrutiny because it is inherently anti-intersectional to rank identities by defining strict, intermediate, and rational basis scrutiny as different classifications depending on how permissible each form of discrimination is in the eyes of the government. How discrimination against other groups of marginalized communities is placed into separate categories based on how permissible each form of discrimination can be feels akin to an "oppression Olympics."[144] Further, this has allowed SCOTUS to decide which marginalized identities the government should be more interested in protecting. This is problematic for two reasons. The first is because intersectional identities cannot be broken down into different categories for which part is more oppressed. Although one's master status may change depending on the context, one will always be every part of who they are and experience every identity at once. No matter where I go, I will always be queer, Black, and a woman at the same time. The second reason is that the identities on which SCOTUS makes these rulings are not reflected by who is on the bench. In the entire history of the Supreme Court and its 119 justices,[145] there have only been three Black justices, six women (four of whom are currently on the bench), and zero justices that have (publicly)

[144] Oppression Olympics expresses the idea of marginalized identities competing against each other to determine who is the most oppressed. By creating a ranking system for how much discrimination is justifiable for each identity axis, the Supreme Court has essentially created gold, silver, and bronze medals for permissible oppression.
[145] U.S. Senate Committee on the Judiciary. (n.d.). *Supreme Court Nominations*. The Supreme Court Of The United States | United States Senate Committee on the Judiciary. https://www.judiciary.senate.gov/nominations/supreme-court

identified as queer.[146] Despite the Court's consistent lack of justices with marginalized identities, it has continuously made rulings that decide how much discrimination can be allowed for each group. According to James Madison in Federalist 51, the people who want power the most are the people who will try their hardest to get it, and they are the least trustworthy with the power once they get it.[147] His solution was to take ambitious people and pit them against other ambitious people as a form of checks and balances. However, how can checks and balances be reached when the ambitious people who get power are, for the most part, oppressors who agree about who does and does not deserve rights?

Madison's analysis did not account for the fact that those who can attain the power they seek are frequently the ones that have access to it, and as can be seen from the demographics of those in SCOTUS, this has not been queer Black women. The historical composition of the Supreme Court perpetuates the pattern of anti-intersectional jurisprudence. Although this perpetuation is partly due to the nature of scrutiny as a historical principle, the people making these decisions will typically not be those inclined to see scrutiny's inadequacy. The best example that can be seen of successful representation within the previous case studies provided is *United States v. Virginia* (1996), in which Ruth Bader Ginsburg's experience as a woman and her history of dedication to addressing gender discrimination are clearly displayed in the case ruling. With that being said, representation, as crucial as it is, is not enough. Diversifying the most elite subsections of power in the U.S. will not provide the deeper structural change necessary for the communities that have not only been marginalized but outright ignored. This

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[146] Wilson, R., & Griggs, B. (2024, February 4). *Of the 116 Supreme Court Justices in US History, All But 8 Have Been White Men*. CNN. https://www.cnn.com/politics/supreme-court-justices-dg/index.html#:~:text=Only%20three%20African%20American%20justices,nominated%20Marshall%20%E2%80%93%20was%20in%201967.

[147] Madison, James. "The Federalist No. 51." *Independent Journal* 1788-02-06 : . Rpt. in *The Documentary History of the Ratification of the Constitution*. Vol. 16. Ed. Gaspare J. Saladino and John P. Kaminski.

can be seen from the actions of Clarence Thomas, who has failed to seek the interests of anyone besides himself in his time on the bench. Thus, a multipronged approach is imperative for addressing the changes that need to be made.

While there is an entire conversation to be had about the revisions necessary for the Constitution itself, it is not my intent to focus on the text of the document. As already established, the Constitution is incredibly difficult to change (whether that be reluctance to modify it or difficulty in the process itself). Further, scrutiny as a concept is nowhere in the Constitution. Thus, it is more productive to focus on the interpretations done by the Supreme Court due to the ease with which an understanding of the Constitution can be transformed compared to transforming the actual document. A potential critique of this reasoning is precedent; however, this endeavor does not necessitate disregarding precedent. On the contrary, already existing precedents can be utilized to further our understanding of what protection groups can have. Still, we must take advantage of the precedent in an intersectional way instead of how we see it currently implemented. Rather than using precedent to determine how much discrimination is permissible for single axes categories, it should be used to consider how these identities can work together. The most significant difference would be allowing people to bring cases on the basis of how these identities intersect rather than limiting them to bringing a case on the grounds of whichever identity has more of a chance of being recognized by the court. Thinking strategically, if I were to bring a case about being discriminated against for my identity as a queer Black woman, I would likely focus on my racial category in order to be taken more seriously in the eyes of scrutiny. However, the reality is that all of my identities work together, as is already established.

This process will, in all honesty, be a slow-going one. It would necessitate waiting for the case law to reach the bench and require the court to prioritize cases involving discrimination of this nature. Yet, it would only take one case to establish the precedent that people can bring cases on not just a single axis but how multiple identities worked together to create their experience. To be clear, this is not to say that every time a discrimination case happens, it is because discrimination against every identity axis is occurring. For example, a gay white man can still be discriminatory to a Black lesbian for her race and gender rather than her queerness. However, establishing a precedent like this opens the opportunity for cases in which multiple axes are being discriminated against to be brought forward to the court in a manner similar to *Degraffenreid*. One way to expedite the process of getting a case akin to this to SCOTUS is if one of the justices requests one of their clerks to find a case with a similar background. On the other hand, a case of this nature could be advocated for by a national civil rights organization, such as the ACLU. Even better, multiple civil rights organizations could work together to achieve more intersectionality (i.e., the NAACP,[148] Lambda Legal,[149] and National Women's Law Center[150]).

While the prior discussion emphasizes change for social reasons, interest convergence theory informs that the oppressor will not willingly give social change unless interests converge. Thus, it is necessary to examine more than social motivations to convince those in power to bring about progressive change. This concept can be seen in international law, specifically in the

[148] The primary goal of the National Association for the Advancement of Colored People is the enhancement of the civil rights of African Americans and other people of color. The Civil Rights Project. (2010). *Civil Rights Organizations*. The Civil Rights Project at UCLA. https://www.civilrightsproject.ucla.edu/resources/civil-rights-organizations

[149] This organization seeks to represent the LGBTQ+ community and everyone living with HIV. Lambda Legal. (2024, April 24). *Lambda Legal*. https://lambdalegal.org/

[150] Created in 1972, the goal of this organization is to advance the progress of women and girls in all realms of life. See footnote 148.

EU. In their article *Institutionalizing Intersectionality in Europe*, Johanna Kantola and Kevät Nousiainen discuss anti-discrimination and equality policies in Europe. The two consider some of the motivations behind such policies, such as "the aspiration to expand transnational economic exchange rather than social considerations that gave rise to the first anti-discrimination provisions during the initial phase of European integration."[151] They continue the discussion with the European Court of Justice (ECJ) and its tendency to have aims outside of combatting societal oppression and marginalization in case law on non-discrimination. They provide an example, explaining, "discrimination on the grounds of nationality is prohibited in the Union for reasons of enhancing mobility of goods, services and people rather than because of the fact that nationality often is a ground of consistent denial of rights in other respects."[152] These examples are a useful conceptualization of how social progress can be sought in conjunction with other forms of progress, thereby benefiting all parties.

While one may argue that we should focus on domestic law rather than considering international law, this is untrue. In fact, the Supreme Court itself has been persuaded by international law in the past, specifically in the case *Roper v. Simmons* (2005). The majority considers the legal actions of other countries, asserting,

> "The United States is the only country in the world that continues to give official sanction to the juvenile penalty. It does not lessen fidelity to the Constitution or pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples [***13] underscores the centrality of those same rights within our own heritage of freedom."[153]

[151] Kantola, J., & Nousiainen, K. (2009). Institutionalizing Intersectionality in Europe: INTRODUCING THE THEME. *International Feminist Journal of Politics*, *11*(4), 459–477. https://doi.org/10.1080/14616740903237426
[152] See previous footnote.
[153] Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, 2005 U.S. LEXIS 2200, 73 U.S.L.W. 4153, 18 Fla. L. Weekly Fed. S 131 (Supreme Court of the United States March 1, 2005, Decided). https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FKP-ST20-004C-000R-00000-00&context=1516831.

Now that the *how* for intersectional interpretations of scrutiny has been discussed, it is imperative to consider *why* SCOTUS should have the interest to incorporate this intersectional approach. Aside from the reasons already mentioned, an important one to note is society's emphasis on political correctness. In a way, political correctness has become a form of currency, with companies now having to prove their dedication to marginalized communities/potential customers to turn a profit. This can be observed during June alone, with countless businesses engaging in rainbow capitalism to bring out queer people (and their dollars). Further, in an era where people believe that "cancel culture" has real and lasting consequences, a commitment to anti-racism, anti-homophobia, anti-misogyny, etc., is now the expectation. It is clear that (some) politicians have noticed this- see the Democrats kneeling with kente cloths,[154] Trump's claims of being close to African Americans,[155] or even the political debate between Trump and Biden in 2020, where they argued about who was more racist than the other.[156] With that being said, many of these "efforts" are still not enough. We are in a political climate in which people are radicalized at much younger ages due to social media, and as a result, are becoming more confident about their political activity.[157] While some may argue there is not a connection between this deduction and scrutiny needing to be more intersectional for queer Black women, it connects when considering the amount of power held by SCOTUS to set the precedence for law in the country combined with the general dissatisfaction of citizens. This particular point goes

[154] Lee, A. (2020, June 9). *Congressional Democrats criticized for wearing Kente cloth at event honoring George Floyd*. CNN. https://www.cnn.com/2020/06/08/politics/democrats-criticized-kente-cloth-trnd/index.html
[155] Franke-Ruta, G. (2011a, April 14). *Donald Trump: "I have a great relationship with the blacks."* The Atlantic. https://www.theatlantic.com/politics/archive/2011/04/donald-trump-i-have-a-great-relationship-with-the-blacks/237332/
[156] BBC. (2020, October 23). Presidential debate: Trump and Biden Row over Covid, climate and racism. BBC News. https://www.bbc.com/news/world-us-canada-54654937
[157] Tufts University, T. C. (2021, October 28). *Media-making about social and political issues builds confidence in teens*. Circle at Tufts. https://circle.tufts.edu/latest-research/media-making-about-social-and-political-issues-builds-confidence-teens

back to why I use queer Black women in the first place. Aside from the fact that I am in this demographic, queer Black women are a significant demographic to consider for a bottom-up approach, as explained by the Combahee River Collective. If Black queer women can achieve liberation, this inherently means everyone else has as well. Further, this is an important population to consider regardless because although some may argue that this is not a significant population, it is, but has been rendered invisible by the Supreme Court, which is why my thesis is necessary in the first place.

Conclusion

This thesis has explored the interpretations of the Equal Protection Clause by the Supreme Court and asserted the way that these interpretations need to be intersectional to highlight queer Black women. Utilizing Derrick Bell's interest convergence theory, I consider the societal contexts of four SCOTUS cases and the personal philosophies of two justices involved, one being the author, to determine what is influential to each ruling outside of what is stated in the court opinion. Considering these contexts, in addition to other factors like international law and quantitative analysis, I recommend how the court should conduct an intersectional form of scrutiny. Although there is a plethora of literature already discussing the necessity of scrutiny being more intersectional, my work is necessary because it seeks a bottom-up approach by focusing on queer Black women.

This thesis tackles an especially important, yet incredibly extensive, topic. Although comprehensive, only so much research could be included in the final product. If I had 100% free reign, I would have included more information in various areas. For one, more quantitative research and analysis needs to be done regarding the opinions of queer Black women versus straight white men on various forms of discrimination. Limitations on time and statistical power made this specific analysis challenging to achieve. Additionally, there needs to be better data representation for marginalized communities. If I had the time and resources, I would have collected the data myself. Alas, a year is simply not sufficient for this endeavor, especially with a lack of funding. As for the case studies, if time allowed, I would have analyzed every justice involved in each case study. Further, the background cases discussed would have also been case studies to provide a more comprehensive analysis of potential interest convergence.

Additionally, I would have extended my analysis for interest convergence to the Civil Rights Act of 1964.

I find it necessary to recognize that this thesis is predicated on the notion that our legal system is one that is not broken. As explained by Audre Lorde, the master's tools will never dismantle the master's house.[158] That is why it is imperative that this recommendation be one component of a multi-pronged approach to achieving justice. Further, it is also important to note that the argument I make is not a viable one under the current Supreme Court. However, if the composition of the bench has more progressive changes over time this argument is one that could potentially be more realistic, and hopefully one day be implemented.

Although there is much more work to be done in relation to this topic, the work that *has* been done is sufficient for action to be taken. Thus, this is a call to action not only to the Supreme Court, but to any potential national civil rights organization that has the resources to bring an intersectional case and successfully establish precedence for discrimination against queer Black women being recognized in court.

[158] Lorde, Audre. "The Master's Tools Will Never Dismantle the Master's House." 1984. Sister Outsider: Essays and Speeches. Ed. Berkeley, CA: Crossing Press. 110- 114. 2007. Print.

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