

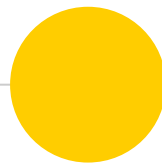
# **Equality before the law**

Zhang.tu@mail.shufe.edu.cn

## Contents

- Right to abortion: The intersection between liberty and equality
- The value of equality
- From *Brown* to Affirmative Action: Equality of what? And why equality?

# Right to abortion: The intersection between liberty and equality



## Debate about liberty:

- ☉ From *Griswold* (1965) to *Roe* (1973) to *Casey* (1992) to *Dobbes* (2022)
- ☉ Right to privacy, right to bodily integrity, right to self-determination?

In *Casey*, Justice O'Connor, Justice Kennedy, and Justice Souter, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

## **From liberty to equality: a better way to protect Roe?**

☉ Justice Ginsburg's dissenting opinion in *Gonzales v. Carhart* (2007),

“Women, it is now acknowledged, have the talent, capacity, and right to participate equally in the economic and social life of the Nation. Their ability to realize their full potential, the Court recognized, is intimately connected to ‘their ability to control their reproductive lives.’ Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature... ‘States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.’ Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.”

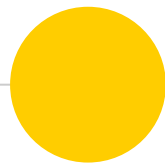
## **Equality of what?**

- Equality of welfare?
- Equality of resource?
- Equality of relations?

## Why equality?

- The presumption of equality: equality does not need any justification, but only inequality does. Every just distribution has to be equal, unless one is able to justify the reasons concerning the unequal distribution to all people.
- justice and equality are (closely) connected with each other: equality is important as a by-product for the fulfilment of absolute standards (i.e., human dignity); relational equality is one aspect of justice among others, one needs relational equality in order to yield e.g. legal equality or antidiscrimination laws; equality is indispensable in being a joint starting point of political autonomy or social membership; equality is (also) a result of political autonomy insofar as there seem to exist special cases according to which an equal distribution is rightly demanded.
- Equality and Sufficiency

# From *Brown* to Affirmative Action





## Constitutional ground

### ☉ 14<sup>th</sup> amendment, Section 1:

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.

## **From Plessy to Brown**

- ☉ Justice Warren, “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does... To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone... We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”

## **Affirmative action**

- “Affirmative action” means positive steps taken to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded. However, when those steps involve *preferential* selection—selection on the basis of race, gender, or ethnicity—affirmative action generates intense controversy.
- To what extent may racial classifications be used to aid rather than disadvantage minorities? May race preferences be used to remedy the effects of past purposeful state discrimination/ compensate for past societal injustices?

**Affirming affirmative action without quotas: *Regents of the University of California v. Bakke* (1978)**

- Justice Powell argued, the Fourteenth Amendment's promise of "equal protection of the law" must mean the same thing for all, black and white alike. Only if it served a compelling interest could the government treat members of different races differently.
- "To obtain the educational benefits that flow from an ethnically diverse student body" is legitimated by the First Amendment's implied protection of academic freedom. This constitutional halo makes the interest "compelling." However, the Medical School's use of a racial and ethnic classification scheme was not "precisely tailored" to effect the School's interest in diversity.

## ***Grutter v. Bollinger* (2003)**

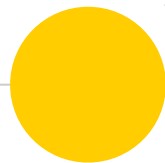
- Concurring *Regents of the University of California v. Bakke*, which allowed race to be a consideration in admissions policy, but held that quotas were illegal.
- Justice O'Connor held, The [Law School's] policy aspires to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law class stronger than the sum of its parts.”...The policy does not restrict the types of diversity contributions eligible for substantial weight in the admissions process, but instead recognizes “many possible bases for diversity admissions.”...The policy does, however, reaffirm the Law School’s longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against.”

## **Affirmative action: From diversity-basis to integration-basis**

- What might be problematic of the SCOTUS's diversity-basis approach?
- an alternative approach: the integrative model:

“The integrative model of affirmative action offers an alternative rationale for race-sensitive admissions that unites educational with democratic and social justice concerns. It begins with a recognition that Americans live in a profoundly segregated society, a condition inconsistent with a fully democratic society and with equal opportunity. To achieve the latter goals, we need to desegregate—to integrate, that is—to live together as one body of equal citizens (Elizabeth Anderson, “Integration, Affirmative Action, and Strict Scrutiny,” *New York University Law Review* 77 [2002] (November): 1222).

“The integrative model has several legal advantages over the diversity and compensation models of affirmative action. It makes sense of the scope and weight that educational institutions actually give to race in the admissions process. It thus closes the gap between theory and practice that makes affirmative action programs so vulnerable under strict scrutiny. It also shows how race can be directly relevant to a compelling state interest, rather than merely a proxy for something else, such as diversity of opinions.”(Elizabeth Anderson, “Integration, Affirmative Action, and Strict Scrutiny,” 1226).



## **The overturn of affirmative action: Students for Fair Admissions v. Harvard (2023)**

- Majority opinion by Justice Roberts, “Harvard’s and UNC’s admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. ”
- Justice Clarence Thomas concurring, “[A]ll forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution...”