

**CITIZENSHIP AND SOLICITUDE:  
HOW TO OVERRULE *EMPLOYMENT DIVISION V. SMITH*  
AND *WASHINGTON V. DAVIS***

CHRISTOPHER R. GREEN

ABSTRACT

*This article looks to the original meaning of the Fourteenth Amendment's provisions on equal citizenship to defend an approach to the free exercise of religion distinct both from *Employment Division v. Smith* and the Sherbert-Yoder regime it replaced. Members of all religious groups are equally citizens: in the first Justice Harlan's words in *The Civil Rights Cases*, a "component part of the people for whose welfare and happiness government is ordained." Such citizens are entitled to equal solicitude from their state regarding even indirect costs of that state's laws. Just as trustees must affirmatively promote the interests of their beneficiaries, not merely avoid purposely harming them, states must affirmatively promote the interests of their citizens, not merely avoid targeting them for ill treatment. This obligation applies to all citizens no matter their religion or race. Contrary to *Smith*, therefore, the Fourteenth Amendment requires more than a no-religious-targeting rule. And contrary to *Washington v. Davis*, it requires more than a no-racial-targeting rule.*

*The Court was right in both *Smith* and *Washington*, however, that strict scrutiny for any law significantly affecting racial or religious groups would threaten chaos. A refusal to countenance any impact on religious practices, no matter how socially harmful, would allow religious citizens to be laws unto themselves. A refusal to countenance any disparate impact on racial groups would require racially discriminatory quotas that would themselves undermine equal citizenship. The Fourteenth Amendment requires a more nuanced assessment of the arbitrariness of the distinctions*

*in state law and the costs they impose than a one-size-fits-all “compelling state interest” framework can supply. Instead of focusing solely on explicit or purposeful classifications, the Court should focus directly on the existence of adequate explanations for policies causing particular harms. Such a focus would mirror the manner in which the Court assesses “arbitrary and capricious” agency action in cases like Citizens to Preserve Overton Park v. Volpe and Motor Vehicle Manufacturers’ Association v. State Farm Mutual Automobile Insurance Co. The trigger for such an inquiry would not be the nature of the classification at issue, but simply the existence of the impact on particular citizens’ interests, including economic interests. The Fourteenth Amendment requires states to offer an adequate explanation of why other citizens’ interests matter more than the interests of those suffering the burden, and it requires states to present their actual reasons for decisions, rather than hiding behind post-hoc judicial rationalizations as approved in Williamson v. Lee Optical. Such a requirement for reasoned attention to different interests fits how the law of trusts has long required trustees to explain themselves when they deal with multiple beneficiaries. Trustees need not always treat all of their beneficiaries precisely the same, but they must give “impartial attention” to all beneficiaries’ welfare, which in turn requires an adequate explanation of both differential treatment among, and differential impacts on, a trustee’s beneficiaries.*

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INTRODUCTION

Change is coming soon to the free exercise of religion. Five justices in *Fulton v. City of Philadelphia*<sup>1</sup> indicated disagreement with the rule of *Employment Division v. Smith*<sup>2</sup> that unintentional burdens on religious exercise from general laws receive no special scrutiny. These justices differed, however, on what alternate rule to adopt. Justices Thomas, Alito, and Gorsuch would go back to the *Sherbert-Yoder* regime<sup>3</sup> that *Smith* itself replaced.<sup>4</sup> That regime required that laws unintentionally burdening religious practice—in *Sherbert*, the denial of unemployment compensation to those with religious objections to Saturday work, and in *Yoder*, compulsory schooling for the Amish—be justified by a compelling state interest. Justices Barrett and Kavanaugh, however, expressed dissatisfaction in *Fulton* with both *Smith* and *Sherbert-Yoder*.<sup>5</sup>

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\* Jamie L. Whitten Chair in Law and Government, University of Mississippi School of Law. Thanks to Will Berry, Steve Crampton, Mike Rappaport, Ron Rychlak, and Lee Strang for discussions.

1. 141 S. Ct. 1868 (2021).

2. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

3. *See generally* *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

4. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring in judgment). Justices Thomas and Gorsuch joined Justice Alito's opinion. *Id.*

5. *Id.* at 1883 (Barrett, J., concurring) ("In my view, the textual and structural arguments against *Smith* are more compelling. As a matter of text and structure, it is difficult

This article argues that the original meaning of the Fourteenth Amendment's guarantee of equal citizenship supports Justices Barrett and Kavanaugh's position.<sup>6</sup> Equal citizenship requires states to do more than cease explicit or purposeful discrimination against less-favored religious or racial groups; states must display equal *solicitude* for such groups' interests. Members of all religious groups are equally citizens of the United States and of their respective states: in the first Justice Harlan's words describing different racial groups, they are a "component part of the people for whose welfare and happiness government is ordained."<sup>7</sup> Citizens of less-favored religious groups—as well as groups or individual citizens who receive less favor because of their *lack* of religion—are entitled to equal consideration from their state regarding even indirect costs of that state's laws. Like trustees, states are required affirmatively to promote the interests of their citizens, not merely avoid targeting them for ill treatment. The same principle governs burdens on different racial groups. Contrary to *Smith*, therefore, the Fourteenth Amendment requires more than a no-religious-targeting rule. And contrary to *Washington v. Davis*,<sup>8</sup> it requires more than a no-racial-targeting rule. However, the Court was right in both *Smith* and *Washington* to worry that strict scrutiny for any law significantly affecting racial or religious groups would threaten chaos. A refusal to countenance *any* disparate impact on religious practices or racial groups would allow religious citizens to be a law unto themselves and would require racially discriminatory quotas that themselves undermine Fourteenth Amendment equal citizenship. The

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to see why the Free Exercise Clause—lone among the First Amendment freedoms—offers nothing more than protection from discrimination. . . . I am skeptical about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime . . ."). Justice Kavanaugh joined Justice Barrett's opinion in full, and Justice Breyer joined it in all but the first paragraph. *Id.*

6. U.S. CONST. amend. XIV, § 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 . . .").

7. *The Civil Rights Cases*, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).

8. 426 U.S. 229 (1976).

Fourteenth Amendment requires something more nuanced than a one-size-fits-all “compelling state interest” framework can supply.<sup>9</sup> Instead of focusing solely on explicit or purposeful classifications, the Court should assess whether states can articulate adequate explanations for policies causing particular harms, the way it does in administrative-law cases like *Citizens to Preserve Overton Park v. Volpe*<sup>10</sup> and *Motor Vehicle Manufacturers v. State Farm*.<sup>11</sup> The trigger for such an inquiry would not be the nature of the classification at issue, but simply the existence of the impact on particular citizens’ interests, including economic interests. The Fourteenth Amendment requires states to offer an adequate explanation of why other citizens’ interests matter more than the interests of those suffering the burden, and so states must present their actual reasons for decisions, rather than hiding behind post-hoc judicial rationalizations as approved in *Williamson v. Lee Optical*.<sup>12</sup> Further guidance is available from another area of law: the law of trusts and its treatment of multiple beneficiaries.

Other scholars have argued that the Constitution itself is a fiduciary instrument, creating the federal government and entrusting its officers with authority to promote beneficiaries’ interests, subject to traditional limits characteristic of trustees.<sup>13</sup> This article takes a slightly different tack by arguing that the Fourteenth Amendment,

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9. See *Sherbert*, 374 U.S. at 406.

10. 401 U.S. 402 (1971).

11. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

12. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”); *Calcutt v. FDIC*, 143 S. Ct. 1317, 1318 (2023) (per curiam) (“It is ‘a simple but fundamental rule of administrative law’ that reviewing courts ‘must judge the propriety of [agency] action solely by the grounds invoked by the agency.’ . . . ‘[A]n agency’s discretionary order [may] be upheld,’ in other words, only ‘on the same basis articulated in the order by the agency itself.’” (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) and *Burlington Truck Lines, Inc., v. United States*, 371 U.S. 156, 169 (1962))).

13. See, e.g., GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION 7–8 (2017).

while neither creating the states nor entrusting them with authority, does impose upon them one of the duties of trustees. Specifically, the Fourteenth Amendment requires states to treat all citizens as equal beneficiaries. States and all their officers are entrusted with the resources of the state, not for their own benefit, and not just for the benefit of their favorite citizens, but for the benefit of all citizens. And that means that such officers are subject to the basic duty of fiduciaries with multiple beneficiaries: to give “fair and impartial attention to the interests of all the parties concerned.”<sup>14</sup> Trustees are not merely obligated to refrain from explicitly or implicitly *targeting* particular beneficiaries for worse treatment; they are affirmatively required to *pay attention to* all beneficiaries’ interests and to act fairly and impartially in light of those interests.

Administrative law offers a way to flesh out this requirement. The Department of Transportation was subject to a “searching and careful” review of whether it had given an adequate explanation as to why a particular route for I-40 was more important than the costs of that route on the Memphis Zoo,<sup>15</sup> and whether its weighing of costs and safety of air bags and automatic seatbelts was the “product of reasoned decisionmaking” about the “relevant factors.”<sup>16</sup> Though states are not directly analogous to federal administrators, such requirements offer a model for how the requirements of the Fourteenth Amendment could be implemented. States must give an adequate explanation for actions that impose impacts on racial or religious groups. Do those actions really reflect “fair and impartial attention to the interests of all the parties concerned”?<sup>17</sup> Are they products of “reasoned decisionmaking” about the “relevant factors”?<sup>18</sup>

Two preliminary comments are in order about the scope of this article. First, the Court and most commentators discussing whether

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14. THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS 500 (Sweet & Maxwell 12th ed. 1911) (1837).

15. *Overton Park*, 401 U.S. at 406, 416.

16. *State Farm*, 463 U.S. at 42, 52.

17. LEWIN, *supra* note 14.

18. *State Farm*, 463 U.S. at 42, 52.

and how to overrule *Smith* have focused on what the words “free exercise of religion” expressed in 1791.<sup>19</sup> This Article focuses instead on the Fourteenth Amendment, rather than the First. Why? Briefly, because the first word of the First Amendment is “Congress,” and the first Justice Jackson and the second Justice Harlan were right to be skeptical that the Fourteenth Amendment applied the Bill of Rights, as such, against the states. A total-incorporation approach to the rights of citizens takes insufficient account of the different responsibilities of the federal and state governments. As Justice Jackson’s dissent in *Beauharnais v. Illinois* explains, governments with different responsibilities are properly subject to different sorts of rights-based constraints.<sup>20</sup> For example, states which have a broader responsibility to deal with injuries to citizens’ reputations are properly subject to different limits with respect to speech than is the federal government, which has no such responsibility. This is particularly true in the case of constitutional rules governing disparate racial or religious impacts. Because the range of possible state action is far larger than the range of possible federal action, there are many more ways in which *state* officials might unwittingly impose large costs on minority racial or religious groups than there are for federal officials. This difference between federal and state functions and responsibilities might sometimes mean that the

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19. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1896 (2021) (Alito, J., concurring in the judgment) (stressing “meaning in 1791”); Eric H. Wang, *To Prohibit Free Exercise: A Proposal for Judging Substantial Burdens on Religion*, 72 EMORY L.J. 723, 757–58 (2023) (focusing on 1791 meaning and not mentioning the Fourteenth Amendment); cf. Joshua L. Johnston, *A House Built on Sand: The Qualified Immunity Case for Keeping the Smith Doctrine*, 54 ST. MARY’S L.J. 885, 886 n.3 (2023) (stressing history back to 1791).

20. *Beauharnais v. Illinois*, 343 U.S. 250, 294–95 (1952) (Jackson, J., dissenting); see also *Roth v. United States*, 354 U.S. 476, 503–07 (1957) (Harlan, J., dissenting); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–80, 683–84 (2002) (Thomas, J., concurring); but see *First Nat’l Bank of Bos. V. Bellotti*, 435 U.S. 765, 780–81 n.16 (1978) (noting the Court’s rejection of the view that Justices Jackson and Harlan had “advanced forcefully,” but not answering their arguments); *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010) (Alito, J., plurality opinion) (noting that Justice Harlan had “fought a determined rear-guard action to preserve the two-track approach” but had not persuaded the Court, and again failing to answer Justices Jackson and Harlan’s argument about the difference between state and federal responsibilities).

restrictions that the First Amendment places on the federal government can afford to be much *broader* than the restrictions the Fourteenth Amendment places on states. *Beauharnais*, for instance, concerned a group defamation law. In that case Justice Jackson rightly argued that the states' responsibility for public safety was far broader in that setting than the federal government's.<sup>21</sup> It might therefore make sense for federal defamation law to be categorically excluded by the First Amendment, but for state defamation law not to be limited in the same way by the Fourteenth. On the other hand, even if the Free Exercise Clause itself is relatively narrow, applying only to religious targeting by Congress within its relatively narrow zone of responsibility, religious citizens may need a much more robust shield against *state* callousness to their interests, because there are so many more ways in which a state might be callous. States often confront disparate racial and religious effects, for instance, in health and labor policy. *Gibbons v. Ogden* noted in 1824 that states have exclusive responsibility for "health laws of every description."<sup>22</sup> Article I section 9 clause 1's references to Congress's limited powers to ban the slave trade after 1808, and to ban slavery itself in areas that had not yet become states, confirm a lack of congressional power over even the most offensive labor practices in existing states. Religious objections to labor and health laws are, of course, legion, as are such laws' racially disparate impacts. A different rule for religious rights might be more appropriate for a federal government whose responsibilities are few and defined than for state governments with residual authority—and responsibility—to promote their citizens' health, safety, welfare, and morals. Accordingly, none of the discussions in 1791 about the meaning expressed by "free exercise of religion" can adequately address the issues that states confront. The Fourteenth Amendment, not the First, is the proper focus for the constitutional obligations of states.

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21. *Beauharnais*, 343 U.S. at 288 (Jackson, J., dissenting). *Alexander v. South Carolina Conf. of the NAACP*, 144 S. Ct. 1221, 1260 & n.3 (2024) (Thomas, J., concurring in part and concurring in judgment).

22. 22 U.S. 1, 203 (1824).



Second, within the world of the Fourteenth Amendment, this article deals with equal citizenship, rather than equal protection. “Protection of the laws” is a limited, discrete entitlement that the Fourteenth Amendment requires states to supply equally to everyone subject to their laws, non-citizens included. Unlike the Privileges or Immunities Clause or the citizenship declaration, “equal protection of the laws” is not an entitlement to equal civil rights.<sup>23</sup> Like the scholarship of John Harrison,<sup>24</sup> David R. Upham,<sup>25</sup> Randy E. Barnett and Evan D. Bernick,<sup>26</sup> Ilan Wurman,<sup>27</sup> and Kurt T. Lash,<sup>28</sup> this article focuses on citizenship, not non-literal protection, as the core of Fourteenth Amendment equality. That scholarship makes clear that equal civil rights for citizens of all races, colors, and religious or political creeds was a common trope used to explain the Fourteenth Amendment during Reconstruction. Rather than recapitulate all of this evidence, this article will instead jump right to the issue of unintended impacts on racial and religious groups.

Part I of this article will review the arguments in *Washington v. Davis* and *Employment Division v. Smith*, especially the majority’s arguments that strict scrutiny for any impacts on religious or racial groups would lead to chaos or incoherence. The Court’s worries were well-founded, but the proper response is to reconsider the

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23. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R.L.J. 1 (2008); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219 (2009); CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015); see also *United States v. Vaello Madero*, 142 S. Ct. 1539, 1551 n.4 (2022) (Thomas, J., concurring).

24. *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

25. *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213 (2015).

26. THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT 152–155 (2021).

27. THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT 93-103 (2020).

28. *The State Citizenship Clause*, 25 U. PA. J. CONST. L. 1097 (2024), available at <https://ssrn.com/paper=4196204> [<https://perma.cc/D6UY-VBJ4>].

entire tiers-of-scrutiny approach, rather than limiting its application to explicit or purposeful discrimination.

Part II considers three reasons why we should look to fiduciary multiple-beneficiary law to explain Fourteenth Amendment citizenship. First, the Fourteenth Amendment turns the reasoning of *Dred Scott v. Sandford*<sup>29</sup> on its head. To insist on the privileges of citizenship for the freedmen is to insist that American governments are not merely for the benefit of white men and their posterity. Second, citizenship had long defined the beneficiaries of the social contract as articulated by thinkers like Emer de Vattel<sup>30</sup> and John Adams.<sup>31</sup> Third, the Fourteenth Amendment's distinction between political and civil rights, repeatedly stated by Republicans in 1866 and made very explicit in Section Two of the Amendment, is properly modeled on a trustee-beneficiary relationship.

Part III explains how fiduciary multiple-beneficiary law works. Both at the time of the Fourteenth Amendment and today, such law was and is far more flexible and cost-sensitive than modern tiers of scrutiny allow, resembling how *Overton Park* and *State Farm* operate in administrative law today. Multiple-beneficiary law would, however, impose an affirmative obligation to attend to all citizen beneficiaries' interests, not merely require the government to refrain from intentional discrimination. It would also require that states explain and defend their *actual* reasons for serving the interests of some citizens and not others, rather than allowing states to justify their decisions only after the fact.

#### I. BACKGROUND TO *EMPLOYMENT DIVISION V. SMITH* AND *WASHINGTON V. DAVIS*

The Court held in 1963 and 1972 that burdens on religiously motivated conduct caused even by generally applicable statutes triggered special judicial scrutiny. *Sherbert v. Verner* in 1963 considered

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29. 60 U.S. (19 How.) 393 (1857).

30. EMER DE VATTEL, *THE LAW OF NATIONS* 217 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797).

31. MASS. CONST. pmb1.

the denial of unemployment benefits to a plaintiff with a religious objection to working on Saturday. The Court held that a “burden on the free exercise of appellant’s religion” could be justified only by a “compelling state interest.”<sup>32</sup> *Wisconsin v. Yoder* in 1972 concerned the enforcement of a mandatory schooling law against the Amish. The Court elaborated, “A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion. . . . Where fundamental claims of religious freedom are at stake. . . . we must searchingly examine the interests that the State seeks to promote . . . .”<sup>33</sup> In 1990, however, after several earlier cases hinting that the *Sherbert-Yoder* rule was not as stringent as it initially seemed,<sup>34</sup> the Court held in *Employment Division v. Smith* that no heightened scrutiny was required for generally applicable laws. Only if regulations *target* religion are they suspect. Later cases have found purposeful targeting<sup>35</sup> and narrowed the scope of what counts as a generally applicable law,<sup>36</sup> but stopped just short of overruling *Smith*.

*Smith* analogized its rule to the holding of the 1976 case *Washington v. Davis*. In that case, the Court allowed the District of Columbia

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32. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

33. *Wisconsin v. Yoder*, 406 U.S. 205, 220–21 (1972).

34. See *Gillette v. United States*, 401 U.S. 437 (1971) (allowing the military to allow conscientious-objector status only to categorical pacifists, not to those with religious objections to the Vietnam War in particular); *United States v. Lee*, 455 U.S. 252 (1982) (allowing Social Security taxes on the Amish); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (allowing the military to refuse an exemption to dress regulation for yarmulkes); *Bowen v. Roy*, 476 U.S. 693 (1986) (allowing refusal to accommodate a religious objection to Social Security numbers); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (allowing a prison to refuse to allow exemptions from work requirements for worship); *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (allowing timber-harvesting road through land sacred to several Native American tribes).

35. See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm’n*, 138 S. Ct. 1719 (2018).

36. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (“[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

to use a disparate-racial-impact-producing test for police officer hiring without satisfying heightened scrutiny.<sup>37</sup> Justice Scalia argued for the Court in *Smith*:

[R]ace-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling interest analysis under the Equal Protection Clause. [*Washington*.] Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.<sup>38</sup>

Surprisingly, none of the opinions in *Fulton*, in which a majority of the Court disagreed with *Smith*, mentioned this analogy.

In both *Smith* and *Washington* the Court shrank back from a contrary rule because of the prospect of chaos. *Smith* relied on the 1879 approval of anti-polygamy legislation in *Reynolds v. United States*.<sup>39</sup> In *Reynolds*, the Court explained:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously

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37. *Washington v. Davis*, 426 U.S. 229, 248 (1976). Because the federal government was involved, the Court was not, strictly speaking, concerned about the Fourteenth Amendment as such, but rather about the Fifth Amendment due-process doctrines that mirror the Fourteenth Amendment in cases like *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). As Justice Thomas has compellingly explained, this doctrine should be instead rooted in citizenship, rather than due process. *United States v. Vaello Madero*, 142 S. Ct. 1539, 1544–57 (2022) (Thomas, J., concurring). The Court extended *Washington* to the Fourteenth Amendment the next year in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”). Disparate gender impacts from a veterans’ preference statute likewise receive no heightened scrutiny. *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979). This is the rule even for classifications like pregnancy that apply exclusively to one sex. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

38. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (internal citations omitted).

39. 98 U.S. 145 (1879). Specifically, the Court in *Smith* wrote that “the rule to which we have adhered ever since *Reynolds* plainly controls.” *Smith*, 494 U.S. at 882.

contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband; would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.<sup>40</sup>

The Court in *Washington* similarly shrank back from heightened scrutiny:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.<sup>41</sup>

In addition to this similarity in their rationales, *Smith* and *Washington* have also been subject to similar criticisms: chiefly, that they neglect the problem of governmental callousness or thoughtlessness toward minority religious or racial groups. District Judge J. Skelly Wright wrote a few years before *Washington* that “the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.”<sup>42</sup> In the context of disabilities, the Court has noted that the Congress that passed the Rehabilitation Act was not merely concerned with “invidious animus,” but also with “thoughtlessness

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40. *Id.* at 166–67; see *Smith*, 494 U.S. at 879 (following this reasoning).

41. *Washington*, 426 U.S. at 248.

42. *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967).

and indifference.”<sup>43</sup> Critics of *Smith* make the same point that callousness and unconcern toward the costs that generally applicable laws impose can be disastrous for religious citizens. The “arbitrary quality of thoughtlessness” is a problem in both areas that one would expect a provision for equal citizenship, like the Fourteenth Amendment, to address.

At the same time, *Smith* and *Washington* were right to reject an approach that would demand that just *any* statute producing disparate impact on religious or racial groups must be narrowly tailored to a compelling interest. The Court rightly recognized that such an approach would breed chaos. In the case of religion, the Fourteenth Amendment could become a blueprint for anarchy, allowing every religious group to be a law unto itself. In the case of disparate racial impact, the Fourteenth Amendment could be put at war with itself, requiring racial quotas that themselves conflict with a constitutional demand for racial equality. Justice Scalia was wrong, however, to see a targeting rule as the only alternative to incoherence. The Court can take impacts on religious or racial groups into account without giving those religious or racial groups a veto or near-veto over almost any governmental policy producing such impacts. As explained below, such a middle way is familiar from long-standing fiduciary law and from modern administrative law.

Many of the justices on the Court have themselves noted problems with the tiers of scrutiny the Court has assembled. Prior to 1938, the Court asked one difficult question in equality cases: whether a particular classification, in a particular context, is arbitrary.<sup>44</sup> A “classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and

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43. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

44. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 159 (1897); *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352 (1918); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923); *Schlesinger v. Wisconsin*, 270 U.S. 230, 240 (1926); *Hartford Steam Boiler Inspection & Ins. Co. v. Harrison*, 301 U.S. 459, 461 (1937).

substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”<sup>45</sup> But beginning with *United States v. Carolene Products*,<sup>46</sup> the Court gradually pieced together a new system. Some classifications get “strict scrutiny” and must be “narrowly tailored” to a “compelling state interest,”<sup>47</sup> others get “intermediate scrutiny” and must be “substantially related” to an “important state interest,”<sup>48</sup> and others get “rational basis scrutiny” and must only be “rationally related” to a (perhaps hypothetical) “legitimate state interest.”<sup>49</sup>

There are at least three strong reasons to abandon this tripartite scheme.<sup>50</sup> First, the new system replaces *one* difficult question—the arbitrariness of a particular distinction—with seven: how much scrutiny a particular distinction gets, and what counts as “narrowly tailored,” “compelling,” “substantial,” “important,” “rational,” and “legitimate.”

Second, as noted by many of the justices,<sup>51</sup> this approach treats all of the classifications in each of the three buckets as *equally* in need of justification. But the costs of such classifications are obviously

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45. *Royster Guano*, 253 U.S. at 415.

46. 304 U.S. 144, 152 n.4 (1938).

47. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Loving v. Virginia*, 388 U.S. 1 (1967); *Richmond v. Croson Co.*, 488 U.S. 469 (1989); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Graham v. Richardson*, 403 U.S. 365 (1971).

48. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996); *Nguyen v. INS*, 533 U.S. 53 (2001); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

49. See, e.g., *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *San Antonio v. Rodriguez*, 411 U.S. 1 (1973); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973); *Romer v. Evans*, 517 U.S. 620 (1996).

50. For other critiques, see, for example, Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT’L AFFS., Fall 2019, at 72; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998).

51. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring); *id.* at 460 (Marshall, J., concurring); *United States v. Windsor*, 570 U.S. 744, 793 (2013) (Scalia, J., dissenting).

quite varied. The gender-discrimination costs of male-only draft registration<sup>52</sup> and female-only 3.2 percent beer sales<sup>53</sup> are simply not on a par. The issues involved in presuppositions of male martial prowess and female moderation in alcohol consumption are very different. Likewise, the racial-discrimination costs of broader-than-necessary affirmative action<sup>54</sup> and Jim Crow segregation<sup>55</sup> are not identical. Even if affirmative action should face a significant justificatory hurdle, there seems little warrant other than blind formalism for thinking that hurdle should be precisely the *same* hurdle that segregation faced in *Brown*.

Third, Reconstruction Republicans gave the same analysis to classifications now receiving all three sorts of scrutiny—race, sex, and age discrimination, which receive strict, intermediate, and rational-basis scrutiny under current law. Republicans responded many times to Democratic charges that the Fourteenth Amendment would give the vote to the freedmen by pointing to women and children, who were citizens but not voters.<sup>56</sup> If the proper Fourteenth Amendment treatment of age or sex discrimination were categorically different from its treatment of race discrimination, this Republican argument would be a non sequitur. Women and children would have been properly denied the vote despite being citizens because of differences in the sort of classification involved, not the distinction between political and civil rights, as Republicans insisted. If the Fourteenth Amendment's adopters had thought there was a categorical difference between how the Amendment would affect racial discrimination, on the one hand, and sex or age discrimination, on the other, the door would have been left wide open for Fourteenth Amendment voting rights for the freedmen based on that different sort of scrutiny for racial classifications. Tiers of

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52. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981).

53. *Craig v. Boren*, 429 U.S. 190, 191–92 (1976).

54. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989).

55. *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

56. For a list of instances, see Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 122–24 (2015).



scrutiny thus make a hash of the way the Amendment was discussed in 1866.

## II. CITIZENS AS BENEFICIARIES: OUR FIDUCIARY FOURTEENTH AMENDMENT

The cure for the tiers-of-scrutiny scheme, and for *Smith* and *Washington's* answers to the threshold question that scheme requires, is to see states as trustees and all of their citizens as their beneficiaries. Three sorts of evidence point toward the fiduciary law of multiple beneficiaries as the best way to implement Fourteenth Amendment equality: the particular context of the Fourteenth Amendment as a response to *Dred Scott v. Sandford*,<sup>57</sup> the general social-contract background of the concept of citizenship, and the Fourteenth Amendment's separation of political from civil rights prior to the Fifteenth Amendment.

### A. *Turning Dred Scott on its Head*

Chief Justice Taney argued in *Dred Scott* that only those treated as equals by the government could be considered citizens, because government was instituted for the benefit of all its citizens. Marital racial segregation implied the inferiority of African Americans, and inferiority implied a lack of citizenship. The key term in Taney's explanation of citizenship was "for": who was the government for? Just whose interests was it designed to promote? Taney reasoned:

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else.<sup>58</sup>

The Fourteenth Amendment turned this reasoning on its head. By establishing African American citizenship and the entitlement of the freedmen to the rights of citizenship, the Fourteenth

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57. 60 U.S. (19 How.) 393 (1857).

58. *Id.* at 406.

Amendment declared that states exist for the benefit of African Americans too, not just white citizens.

In 1858, Stephen Douglas explained his opposition to African American citizenship and its privileges in terms of his desire to limit the beneficiaries of American governments:

I ask you, are you in favor of conferring upon the negro the rights and privileges of citizenship? . . . For one, I am opposed to negro citizenship in any and every form. I believe this government was made on the white basis. . . . I believe it was made by white men, *for the benefit of white men and their posterity forever*, and I am in favour of confining citizenship to white men, men of European birth and descent, instead of conferring it upon negroes, Indians and other inferior races. . . . [T]he Republicans say that he ought to be made a citizen, and when he becomes a citizen he becomes your equal, with all your rights and privileges. . . . They assert the Dred Scott decision to be monstrous because it denies that the negro is or can be a citizen under the Constitution.<sup>59</sup>

Douglas repeated his “for the benefit of white men” line at the third debate in Jonesboro,<sup>60</sup> at the fourth debate in Charleston,<sup>61</sup> and in Congress in 1860.<sup>62</sup> Other Democrats like Senator Lazarus

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59. First Debate with Stephen A. Douglas at Ottawa, Ill., in 3 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 9–11 (Roy P. Basler ed., 1953) (emphasis added).

60. Third Debate with Stephen A. Douglas at Ottawa, Ill., in LINCOLN, *supra* note 59, at 112 (“I hold that a negro is not and never ought to be a citizen of the United States . . . . I hold that this government was made on the white basis, by white men, for the benefit of white men and their posterity forever, and should be administered by white men and none others.”); see CONG. GLOBE, 40th Cong., 2d Sess. 2450 (1868) (Representative James Beck quoting Douglas).

61. Fourth Debate with Stephen A. Douglas at Charleston, Ill., in LINCOLN, *supra* note 59, at 177–78 (“I say that this government was established on the white basis. It was made by white men, for the benefit of white men and their posterity forever, and never should be administered by any except white men . . . . I declare that a negro ought not to be a citizen, whether his parents were imported into this country as slaves or not, or whether or not he was born here. It does not depend upon the place a negro’s parents were born, or whether they were slaves or not, but upon the fact that he is a negro, belonging to a race incapable of self government, and for that reason ought not to be on an equality with white men.”).

62. CONG. GLOBE, 36th Cong., 1st Sess. 915 (1860) (“I have said over and over again . . . this Government was made by white men, on the white basis, for the benefit of white

Powell,<sup>63</sup> Representative Joseph Edgerton,<sup>64</sup> Senator Willard Saulsbury,<sup>65</sup> and Joint Committee on Reconstruction member Representative Andrew Jackson Rogers<sup>66</sup> used the same language in opposition to a host of Republican proposals during Reconstruction.

Republicans during Reconstruction made clear that the scope of the government's beneficiaries—whether government was for the benefit of white citizens only or for the freedmen too—was precisely the bone of contention between the parties. Senator Henry Wilson replied to Senator Saulsbury, describing his speech while in Delaware:

I laid down the broad principle that I would give to every man of any race, color, or condition the same rights and privileges that I possessed myself, or that anybody in the country possessed . . . I regarded every man before the law of my country my peer and my equal, whether he was a white man or a black man. I certainly laid down doctrines plain and clear, which the Senator had a right

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men and their posterity forever, and should be administered by white men, and by none other whatsoever."); *id.* at 920 ("This is a white man's government, made by white men for the benefit of white men, to be administered by white men and nobody else; and I should regret the day that we ever allowed anybody else to have a hand in its administration.").

63. CONG. GLOBE, 38th Cong., 1st Sess. app. 67 (1864) ("I believe that this is a Government of white men. I believe it was made by white men and for the benefit of white men; and I still believe that a white man is better than a negro.").

64. CONG. GLOBE, 38th Cong., 2d Sess. app. 80 (1865) ("We sir, are white men, exercising the powers of a Government made by white men, and our first duty is to use those powers for the benefit of white men and their posterity forever.").

65. CONG. GLOBE, 39th Cong., 2d Sess. 42 (1866) ("[Delaware] believes that this is a white man's Government and was made by white men for the benefit of white men . . .").

66. CONG. GLOBE, 39th Cong., 1st Sess. 196 (1866) ("The wisdom of ages, for more than five thousand years, and the most enlightened Governments that ever existed on the face of the earth have handed down to us that grand principle that all Governments of a civilized character have been and were intended especially for the benefit of white men and white women, and not for those who belong to the negro, Indian, or mulatto race."); *id.* app. 136 (describing President Andrew Johnson: "We have a pure man. We have a man who came from the humble walks of life, a man who has never been bound down by the aristocracy, a man who is the embodiment of civil liberty, who believes that this Government was made for the benefit of white men and white women.").

to understand meant giving to colored men all the rights and all the privileges of citizens of the United States.<sup>67</sup>

Representative Burt Van Horn replied to Representative Rogers:

The soldier who has aided in crushing out this wicked oppression upon the rights of honest labor, under whatever skin it may be found, and thus established forever in this land by his sufferings those sacred rights, will stand as ever before by the side of every citizen of the Republic, of whatever color, in defense of the rights for which he has fought. Again, the gentleman says this is a white man's Government; that it was intended, as all Governments have been, especially and exclusively for the benefit of white men and white women, and not for those who belong to the negro, mulatto, or Indian race. Our Government is one for all who come under its protection, or of whom it asks obedience and support. The black as well as the white pay taxes to support it, and aid in the defense of its honor and the execution of its laws . . . [T]he great struggle now closed has settled the question that the black man has "rights that the white man is bound to respect."<sup>68</sup>

Senator James Dixon elaborated on why government exists for the benefit of black men too:

It was no objection to my mind that the bill was intended for the benefit of black men. The fact cannot be denied that it was so intended. Was it not called the Freedmen's Bureau? Are white men freedmen? Was it not to feed and support the wards of the nation? . . . I voted for it with that understanding that it was for the benefit of black men; and I am ready now, by my vote here and elsewhere, and so are my constituents, to do anything, as much as any other people will do, to pay their money as freely and exert themselves as earnestly for the benefit of black men as for the benefit of white men. I place them on the same ground. I know no distinction in my feelings, in my sympathies, in my charities, between black men and white men. I have no preferences in that respect. There may be subjects on which I have preferences, but in the matter of kindness, of doing them a favor,

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67. CONG. GLOBE, 39th Cong., 2d Sess. 42 (1866).

68. CONG. GLOBE, 39th Cong., 1st Sess. 284 (1866).

of saving them from suffering, I should never ask whether the suffering man was a black man or a white man. It is enough for me to know that he is a man.<sup>69</sup>

The fact that opponents attacked the idea of extending citizenship to African Americans precisely because doing so would undermine the idea that government is for white men's benefit makes clear that citizens are government's beneficiaries. Imposition of such a duty was the point of the Fourteenth Amendment. As the first Justice Harlan put it, the point was to incorporate the freedmen as a "component part of the people for whose welfare and happiness government is ordained."<sup>70</sup>

### B. *Citizens in the Social Contract*

Outside the context of the Fourteenth Amendment, states have long used citizenship as a marker of those for whom they have a particular concern. While the English legal background usually spoke in terms of subjects, rather than citizens, the idea of a state as a commonwealth promoting the interests of all of its parts is very old indeed. Cicero wrote in the middle of the first century B.C. of the duty to "watch for the well-being of [one's] fellow-citizens," to "care for the whole body politic, and not, while they watch over a portion of it, neglect other portions," and not to "take counsel for a part of their citizens, and neglect a part."<sup>71</sup> Merely refraining from purposeful, intentional harm was obviously not enough for Cicero; he insisted on the duty to pay attention—to "watch over" and "take counsel for"—all citizens' interests. A slogan of Cicero's, *salus populi suprema lex esto*—the welfare of the people should be the supreme law—was widely quoted across Europe, and particularly in English law, beginning in the sixteenth century.<sup>72</sup> It even became

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69. *Id.* at 1040–41.

70. The Civil Rights Cases, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).

71. 1 CICERO, DE OFFICIIS, § 25, at 53–54, reprinted in ETHICAL WRITINGS OF CICERO: DE OFFICIIS; DE SENECTUTE; DE AMICITIA; AND SCIPIO'S DREAM (Andrew P. Peabody trans., Boston: Little, Brown, and Co. 1887) (44 BCE), accessible at <https://oll.libertyfund.org/titles/cicero-on-moral-duties-de-officiis> [<https://perma.cc/TP2W-EX2V>].

72. For the story of Cicero's enormous influence, and the widespread use of his *salus populi suprema lex esto* maxim, see PETER MILLER, DEFINING THE COMMON GOOD:

the epigraph for Locke's *Second Treatise on Government* and the motto of Missouri. Around 1549, during Edward VI's reign, those opposed to the enclosure of common land began to be called "commonwealth men." Edward Coke in the next century often invoked Cicero, and after the English Civil War the government called itself a commonwealth, a move later copied by Massachusetts, Pennsylvania, Virginia, and Kentucky. In 1866, Charles Sumner began his argument for universal suffrage by invoking the principle of the duty to promote the general welfare; after reviewing Plato, Aristotle, and Cicero, he said, "[T]here are two principles which all these philosophers teach us: the first is justice, and the second is the duty

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EMPIRE, RELIGION, AND PHILOSOPHY IN EIGHTEENTH-CENTURY BRITAIN 21–87 (1994) (tracing late-Renaissance and early-modern obsession with Cicero to Marc-Antoine Muret's 1582 lectures on Tacitus and Cicero).

For the influence of *salus populi suprema lex esto* in English law, see, for example, Bates's Case (1606) 145 Eng. Rep. 267, 271; Lane 23, 27; Tanistry's Case (1608) 80 Eng. Rep. 516, 520; Davis 28, 32; Keighley's Case (1609) 77 Eng. Rep. 1136, 1137; 10 Co. Rep. 139 a, 139 b; Attorney General v. Griffith (1613) 80 Eng. Rep. 1028, 1028; 2 Bulstrode 155, 155; Burrowes v. High-Commission Court (1615) 81 Eng. Rep. 42, 44; 3 Bulstrode 49, 52; Cole v. Foxman (1617) 74 Eng. Rep. 1000, 1000; Noy 30, 30; SAMUEL RUTHERFORD, LEX, REX: THE LAW AND THE PRINCE 119 (Robert Ogle & Oliver & Boyd ed. 1843) (1644) (calling it "the supreme and cardinal law to which all laws are to stoop" and erroneously attributing it, as John Selden did, to Rome's twelve tables); *id.* at 137 (calling it "one fundamental rule . . . like the king of planets, the sun, which lendeth star-light to all laws, and by which they are expounded."); Rex v. Carew (1682) 36 Eng. Rep. 1016, 1017; 3 Swans. 669, 670; Grand Opinion for the Prerogative Concerning the Royal Family (1717) 92 Eng. Rep. 909, 922; Fortescue 401, 431; Low v. Peers (1770) 97 Eng. Rep. 138, 142; Wilm. 364, 373 (calling it "the common law[s] . . . favourite dominant principle."); Campbell v. Hall (1774) 98 Eng. Rep. 848, 878; Lofft 665, 707–08; British Cast Plate Mfrs. v. Meredith (1792) 100 Eng. Rep. 1306, 1308; 4 T.R. 794, 797; Mayor and Burgesses of Lyme Regis v. Henley (1832) 110 Eng. Rep. 29, 33; 3 B. & AD. 77, 87; Feather v. Queen (1865) 122 Eng. Rep. 1191, 1195; 6 B. & S. 257, 268.

For American citations of the maxim, see License Cases, 46 U.S. 504, 632 (1847); West River Bridge v. Dix, 47 U.S. 507, 545 (1848); Passenger Cases, 48 U.S. 283, 298 (1849); *Ex Parte Milligan*, 71 U.S. 2, 81 (1866); Mississippi v. Johnson, 71 U.S. 475, 487 (1867); City of Richmond v. Smith, 82 U.S. 429, 434 (1873); Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 752 (1884); United States v. Pac. R.R., 120 U.S. 227, 234 (1887); Leisy v. Hardin, 135 U.S. 100, 129, 145, 158 (1890); St. Louis & S.F. Ry. Co. v. Mathews, 165 U.S. 1, 24 (1897); Workman v. New York City, 179 U.S. 552, 585 (1900); Texas & New Orleans Ry. Co. v. Miller, 221 U.S. 408, 415 (1911); Omnia Com. Co. v. United States, 261 U.S. 502, 513 (1923); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 476 (1934).

of seeking the general welfare.”<sup>73</sup> Representative John Hubbard relied on Cicero as well: “[T]here is an old maxim of law in which I have very considerable faith, that regard must be had to the public welfare; and this maxim is said to be the highest law.”<sup>74</sup>

Emer de Vattel’s mid-eighteenth-century version of social contract theory built on Locke’s work from a few generations before. Vattel explained the social contract in terms of citizenship: “The citizens are the members of the civil society: bound to this society by certain duties, and subject to its authority, they equally participate in its advantages.”<sup>75</sup> Chief Justice Marshall quoted this passage for the Supreme Court in 1814 in explaining the federal government’s duties to U.S. citizens abroad during the War of 1812.<sup>76</sup> John Adams’s preamble to the Massachusetts Constitution of 1780 echoed the same idea: “The body politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”<sup>77</sup> The first Justice Harlan relied heavily on this promise in explaining the government’s duties during a pandemic.<sup>78</sup> The responsibility of each nation-state for its citizens was a staple of mid-nineteenth-century international law. One treatise put it quite simply: “[E]ach state is the trustee of its citizens for public objects.”<sup>79</sup>

The Supreme Court explained the state’s duty to promote all citizens’ interests in an early dormant-commerce-clause case from 1837, *Mayor of New York v. Miln*:

[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every

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73. CONG. GLOBE, 39th Cong., 1st Sess. 677 (1866).

74. *Id.* at 630.

75. VATTEL, *supra* note 30, bk. I, ch. XIV, § 212.

76. *The Venus*, 12 U.S. (8 Cranch) 253, 289 (1814).

77. MASS. CONST. pmbl.

78. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905).

79. DANIEL GARDNER, *INSTITUTES OF INTERNATIONAL LAW* 484–85 (1860).

act of legislation which it may deem to be conducive to these ends . . . .<sup>80</sup>

The Court's explanation of the police power was important background for Reconstruction. Senator Willard Saulsbury quoted this passage in Congress as a warning against the implications of the Civil Rights Act of 1866.<sup>81</sup>

One phrase used repeatedly in Congress during the discussions of the Civil Rights Act of 1866 and the Fourteenth Amendment was "general good of the whole." It appeared in Justice Bushrod Washington's oft-quoted description of the fundamental rights of citizens in *Corfield v. Coryell*.<sup>82</sup> The phrase "general good of the whole" had a long history, however, as a description of the basic obligation of government. As Henry Clay put the point in 1842 with respect to bankruptcy laws (as put into the past tense by the reporter),

It was just, and it was the imperative duty of Congress to pass uniform laws upon the subject. The Constitution was an aggregate of power, of which the States stripped themselves, and vested it in the General Government for the general good of the whole, and in its parts . . . . [I]t was the duty of Congress to examine into the interests of all the states . . . . The Union was a family of States, and their fraternal affections, and their harmony, could only be preserved by mutual concessions . . . . Congress was bound to legislate without regard to sectional divisions, but for the entire country. If the exercise of the power over bankruptcy, then, was of vital interest to one State, and did not inflict serious injury on others, it was the duty of Congress to legislate upon it—weighing the interests of all . . . . It was their duty to act.<sup>83</sup>

Note particularly the congressional duty to *examine* the interests of states; merely staying ignorant was of course not enough for Clay.

The same year, Representative John Pope discussed the "general good" with respect to the tariff:

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80. 36 U.S. 102, 139 (1837).

81. CONG. GLOBE, 39th Cong., 1st Sess. 478–79 (1866).

82. 6 F. Cas. 546, 552 (E.D. Pa. 1825).

83. CONG. GLOBE, 27th Cong., 2d Sess. 185 (1842) (emphasis added).



He was opposed (continued Mr. P.) to the protection of manufactures, or any other branch of industry, for the special benefit of those engaged in it. We ought not to enrich one class, or give them extensive privileges, or a monopoly, at the expense of the rest of the community. No encouragement should be given to any branch of business for the sake of those engaged in it; but the question should ever be, will such encouragement clearly conduce to the general good of the whole community?<sup>84</sup>

Representative Richard Donnell—a Whig from North Carolina disagreeing sharply with a Democratic colleague from the same state—invoked the “general good” while discussing slavery in the territories in 1848:

As it would seem, therefore, that the same portion of territory cannot be made equally available to both sections of the Union, we can only in a partition hope for or obtain equality of participation. The application, however, of these and other principles relating to government, is a matter which addresses itself to the sound discretion of Government itself. In the application it must look to the general good of the whole, taking care never to sacrifice the interests of any section of the country, or of any individual of the community, unless the public welfare imperiously demands it.<sup>85</sup>

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84. CONG. GLOBE, 27th Cong., 2d Sess. app. 914 (1842).

85. CONG. GLOBE, 30th Cong., 1st Sess. app. 1060 (1848). Donnell’s comments about the principles’ inapplicability to courts anticipate Samuel L. Bray and Paul B. Miller’s criticisms in *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479 (2020) of the use of fiduciary principles to interpret the Constitution. Earlier, Donnell had spoken generally of the one-of-a-kind nature of the government’s trust obligations:

I admit that the powers of government are a trust in the hands of those who constitute the legislative branch of the Government. But this is not a trust subject to the same rules which are established by courts of equity to govern the relations of the trustee to the *cestui que trust*. It is a trust *sui generis*, controlled by its own principles, and the trustee is the supreme power.

CONG. GLOBE, *supra*. After the portion quoted in the main text above, Donnell elaborated,

In the discharge of this trust the Government may err. It may even abuse its powers. But could its action be declared by our courts to be unconstitutional? On the contrary, it would be the abuse of a constitutional power; a violation of the principles of good government, and not the assumption of

Likewise, Moses Hampton considered the “general good when discussing navigation rights the same year:

[I]f the General Government has power to declare that these streams are public highways, and that all the citizens of the United States have the right to pass and repass upon them, I should like to know if it has not committed itself to keep these public highways in repair? It is that fact that enables the General Government to take toll on these waters, to erect custom-houses, and to receive money for licenses. It is because they have declared them to be highways, free and open for all the citizens of these United States. And as the States have surrendered their power to the General Government, it is bound in good faith to carry out the power for the general good of the whole.<sup>86</sup>

Discussing the Kansas-Nebraska Act, Representative Philip Phillips quoted Vattel and applied the trust analogy and the equal-beneficiaries principle to the territories:

Congress being the agent or trustee for the common good and benefit of the people of the several States, can pass no act, either in the disposition of the soil or in the government of the Territory, inconsistent with the rights of the beneficiaries in the trust, for it is a principle of the law of nations “that all the members of a community have an equal right to the use of the common property;” and this principle is no less strongly secured in the Constitution of our Union.<sup>87</sup>

This background of the nature of citizenship was well known to the Congress that passed the Fourteenth Amendment. Representative Samuel Moulton said in defense of the Civil Rights Act, “[I]t is also made the duty of Congress to guaranty to each state a

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unconstitutional power. The imagined rights of the North or the South are, at best, but rights of *imperfect* obligation.

*Id.*

86. CONG. GLOBE, 30th Cong., 1st Sess. 451 (1848).

87. CONG. GLOBE, 33d Cong., 1st Sess. app. 534 (1854). Representative Phillips’s translation of Vattel is slightly different from the 1797 translation used by the Liberty Fund edition, which translates as “corporation” the word Phillips quotes as “community.” “All the members of a corporation have an equal right to the use of its common property.” VATTEL, *supra* note 30, at 234.

republican form of government, and to provide for the common good and for the general welfare.”<sup>88</sup> Senator George Edmunds described the duty to respond to cholera:

It appears to me that this is a subject which concerns the general welfare of the people of the United States, irrespective of State or local organizations and irrespective of State boundaries. It concerns the general welfare, and therefore, in my judgment, it is the highest duty of the General Government to promote that general welfare if anything can be done by exercising its paramount authority over the subject.<sup>89</sup>

As in the debate over territorial slavery, Democratic arguments in 1866 were put in terms of the obligation of the federal government to serve the interests of citizens from all sections equally. Daniel Voorhees complained in familiar terms about protectionism’s putting the interests of sellers over consumers:

The European manufacturer is forbidden our ports of trade for fear he might sell his goods at cheaper rates and thus relieve the burdens of the consumer. We have declared by law that there is but one market into which our citizens shall go to make their purchases, and we have left it to the owners of the market to fix their own prices. The bare statement of such a principle foreshadows at once the consequences which flow from it. One class of citizens, and by far the largest and most useful, is placed at the mercy, for the necessities as well as luxuries of life, of the fostered, favored, and protected class to whose aid the whole power of the Government is given . . . I would rather be directly robbed than forced to assume, in the name of justice and right, the burdens and obligations of others more able to meet them than I am. Must the western people, because they are consumers and not manufacturers, be compelled by indirection to meet a large proportion of the debts of their fellow-citizens in other sections?<sup>90</sup>

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88. CONG. GLOBE, 39th Cong., 1st Sess. 631 (1866).

89. *Id.* at 2484.

90. CONG. GLOBE, 39th Cong., 1st Sess. 154 (1866).

Note particularly Voorhees's statement that the costs of protectionist tariffs were indirect; even facially neutral policies could run afoul of the obligation to serve all citizens' interests impartially.

Against this background, the imposition of African-American citizenship on the South had a well-understood meaning. The word "citizen" was the vehicle for demanding that the South—and of course other states in the Union—live up to its side of the social contract.<sup>91</sup>

C. *Civil v. Political Rights, Ownership v. Control, Beneficiaries v. Trustees*

A third reason to see the Fourteenth Amendment as the imposition of a fiduciary duty on states is its distinction between political and civil rights. As noted earlier, Republicans insisted over and over that the Amendment conveyed only civil rights, not political ones like voting.<sup>92</sup> Section Two of the Amendment imposed a House-representation penalty on states that restricted the voting rights of men over 21. This would make no sense if such restrictions were flat-out banned under Section One. John Bingham made this very point in his speech on the Amendment in the House: "The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States. The second section excludes the conclusion that by the first section suffrage is subjected to congressional law . . ."<sup>93</sup>

The distinction between rights of governmental consideration and rights to control the government has a long history. Solon, for instance, established laws giving certain basic rights to all Athenian

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91. Samuel Bray and Paul Miller have questioned whether fiduciary concepts had "crystallized" enough to be "operative in the minds of lawyers and politicians" of this era. And even if so, they have expressed doubt over the extent to which the fiduciary analogy had moved from the realm of political principle to being an actual legal constraint on government. See Bray & Miller, *supra* note 85, at 1519. But as the title of William Nelson's book makes clear, the Fourteenth Amendment was intended to be the vehicle for translating "political principle" into "judicial doctrine" by means of the constitutional text. See generally WILLIAM NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

92. See *supra* note 56 and accompanying text.

93. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

citizens in the early sixth century B.C. but reserving political control for those with certain levels of wealth. He “ma[de] all citizens equal under his own despotic sway.”<sup>94</sup> Five centuries later, Cicero’s principles of equal governmental concern for all citizens’ interests sat side by side with his approval of aristocratic political rights.<sup>95</sup> The English idea of a commonwealth had long coexisted alongside the idea that the monarch’s right to rule need not be put up to a vote.<sup>96</sup> The Putney debates of 1647 featured a sophisticated debate between the likes of Thomas Rainborough, who wanted voting rights for all Englishmen, and Cromwell’s son-in-law Henry Ireton, who resisted such voting rights because of the threat they would pose to property rights, but who insisted at the same time that Cromwell was bound to promote the commonwealth.<sup>97</sup> Edmund Burke’s 1774 explanation of why his constituents had no power to issue binding instructions to him as a member of Parliament hits a similar theme:

Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion. . . . Parliament is not a congress of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a deliberative assembly of one nation, with one interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole.<sup>98</sup>

The French pioneered a useful terminological distinction between “passive citizenship” — the right to *be treated as an equal by* the government — and “active citizenship” — the right to *exert control over* the government. In rejecting Fourteenth Amendment political

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94. IVAN M. LINFORTH, *SOLON THE ATHENIAN* 57 (1919).

95. See CICERO, *supra* note 71.

96. See, e.g., EDMUND DUDLEY, *THE TREE OF COMMONWEALTH* (D.M. Brodie ed., Cambridge Univ. Press 1948) (1509); THOMAS SMITH, *DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND* (L. Alston ed., Cambridge Univ. Press 1906) (1565).

97. See GEOFFREY ROBERTSON, *THE PUTNEY DEBATES: THE LEVELLERS* 69–93 (Verso 2018) (1647).

98. 1 *WORKS OF EDMUND BURKE* 446–48 (Henry G. Bohn ed., 1854) (1774).

rights as outside the concept of “civil rights,” its framers clearly constitutionalized merely passive citizenship: a citizenship of equal beneficiaries.

Chief Justice Morrison Waite’s opinion in *Minor v. Happersett*<sup>99</sup> explains this distinction at length. Writing for a unanimous Court, Chief Justice Waite argued that the Fourteenth Amendment did not give women the vote. Waite had joined the Court only after the catastrophe in the *Slaughter-House Cases*<sup>100</sup> had largely banished the idea of the rights of citizenship from the Court’s doctrine, but *Minor* represents one last sustained treatment of the idea of the rights of citizenship from the Court.<sup>101</sup> The Court echoed Vattel’s reasoning in *The Law of Nations* and Adams’s preamble for the Massachusetts Constitution:

The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association . . . . For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words ‘subject,’ ‘inhabitant,’ and ‘citizen’ have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was

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99. 88 U.S. 162 (1875).

100. 83 U.S. 36 (1873).

101. Citizenship did appear very prominently, of course, in Justice Harlan’s dissents in *The Civil Rights Cases* and *Plessy v. Ferguson*, as well as Justice Bradley’s recapitulation of his *Slaughter-House* dissent in his concurrence in *Butchers’ Union Co. v. Crescent City Co.*, 111 U.S. 746 (1884), which later served as the chief precedent for *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), leading in turn to *Lochner v. New York*, 198 U.S. 45 (1905); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); and *Obergefell v. Hodges*, 576 U.S. 644 (2015). But despite building on the *Slaughter-House* dissents, the Court has never again devoted significant attention to the scope of the privileges of Fourteenth Amendment citizenship, other than by dismissing the issue in *McDonald v. Chicago*, 561 U.S. 742, 758 (2010).

afterwards adopted in the Articles of Confederation and in the Constitution of the United States.<sup>102</sup>

The word “citizen,” then, plainly connotes the people whose general welfare the government is bound to promote. In requiring states to take such citizenship seriously, the Fourteenth Amendment required them to behave as a trustee with multiple beneficiaries. Indeed, the entire notion of a trust is based on a separation between one group with the power to control some resource—the trustees—and a second group in whose interests that power is to be exercised—the beneficiaries. Trust law is thus a natural model for a constitutional rule like the Fourteenth Amendment that gives equal civil rights to one set of people but allows political rights to be reserved for a smaller subset.

### III. TRUSTEESHIP, MULTIPLE BENEFICIARIES, AND “FAIR AND IMPARTIAL ATTENTION”

If citizens must be treated as beneficiaries by their states, what does that mean for our constitutional law? Much of this terrain has already been canvassed by Professors Gary Lawson and Guy Seidman, relying heavily on earlier work by Robert Natelson.<sup>103</sup> This article puts fiduciary law to a slightly different purpose, however, by arguing it is a requirement embodied in the idea of Fourteenth Amendment citizenship and imposed on states, rather than part of the nature of the Constitution itself. The idea here is not that the Fourteenth Amendment itself is a “great power of attorney” entrusting the states with power, but rather that the Amendment imposes a trust-like obligation on states. Special emphasis is also needed on multiple-beneficiary law at the time of Reconstruction, rather than at the initial Founding—though we will see that they are not very different.

#### A. *English Multiple-Beneficiary Law*

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102. *Minor*, 88 U.S. at 165–66.

103. Lawson & Seidman, *supra* note 14, at 151–71, 205–09; *see generally* Robert G. Natelson, *The Constitution and Public Trust*, 52 *BUFF. L. REV.* 1077 (2004).

*Rooke's Case*, reported by Edward Coke in 1598, prevented the commissioners of sewers from imposing taxation unequally, on a single landowner among the many benefitted by the sewer.<sup>104</sup> Justifying his decision, Coke referred to “cases of equality grounded on reason and equity.”<sup>105</sup> *Keighley's Case*, another case from Coke in 1609, also involved sewer commissioners with a duty to repair a wall. In the case of accidents, commissioners had a duty to spread the cost to all landowners, but more specialized taxation could be imposed given a particular reason:

If one is bound by prescription to repair a wall, &c. against the flowing of the sea, and there is no default in him, but by reason of the sudden and unusual increase of water the wall is broken, the commissioners of sewers ought to tax all who hold lands or tenements, or common of pasture, &c. or have or may have any loss, damage, &c. according to the quantity of their lands. If any fault is in him, and the danger is not inevitable, but he may well repair it, the commissioners may charge him only to repair it.<sup>106</sup>

Coke quoted Cicero's maxim: “The reason . . . is *pro bono publico*, for, [] *salus populi est supreme lex*.”<sup>107</sup> *Salus populi*—the welfare of the people—was understood to require impartial promotion of the interests of *all* the relevant people. Special reasons could justify a departure from such a rule, but an equal-distribution-of-costs rule was the default.

*Astry v. Astry*, from 1706, considered a widow with power to distribute her husband's estate “amongst his three children.”<sup>108</sup> The Court followed the rule from an earlier case in which the devise stated that the widow should distribute the estate “in such proportions as she should think fit.”<sup>109</sup> Despite this broad language of

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104. (1598) 77 Eng. Rep. 209, 209; 5 Co. Rep. 99 b, 99 b.

105. *Id.* at 210.

106. (1609) 77 Eng. Rep. 1136, 1136; 10 Co. Rep. 139 a, 139 a.

107. *Id.* at 1137.

108. (1706) 24 Eng. Rep. 124, 124; Prec. Ch. 256, 256.

109. *Id.*



discretion, “she must divide it amongst them equally, unless a good reason can be given for doing otherwise.”<sup>110</sup>

*Ord v. Noel*, from 1820, considered the duty of a trustee conducting a sale. Vice-Chancellor Sir John Leach set out a rule paraphrased repeatedly<sup>111</sup> in American statements of the law:

Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of their trust they will pay equal and fair attention to the interests of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party, a Court of Equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been.<sup>112</sup>

Notice particularly here the emphasis on “attention” and “diligence,” creating an affirmative duty to heed all beneficiaries’ interests.

#### B. *Multiple-Beneficiary Law During Reconstruction*

American trust law at the time of Reconstruction repeatedly used the phrase “fair and impartial attention” to describe the duty of trustees with multiple beneficiaries. Frequently a single beneficiary was called a “cestui que trust,” and multiple beneficiaries “cestuis que trust.” These sources all use very similar language. The Supreme Court of North Carolina, relying on *Ord* but changing “equal and fair” to “fair and impartial,” said in 1844:

Every trustee for sale, is bound by his office to bring the estate to a sale, under every possible advantage to the *cestui que trust*; and, when there are several persons interested, with a fair and impartial attention to the interest of all concerned. He is bound to

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110. *Id.*

111. See *infra* notes 112–117 and accompanying text.

112. (1820) 56 Eng. Rep. 962, 963; 5 Madd. 438, 440.

use, not only good faith, but also every requisite degree of diligence and prudence, in conducting the sale.<sup>113</sup>

Likewise, Thomas Lewin's treatise noted in 1837, "A trustee . . . will remember that he is bound by his office . . . with a fair and impartial attention to the interests of all the parties concerned."<sup>114</sup> Alexander Burrill's 1858 treatise parroted the North Carolina Supreme Court:

Every trustee to sell is bound by his office to bring the estate to a sale under every possible advantage to the *cestui que trust*, and, where there are several persons interested, with a fair and impartial attention to the interest of all concerned. He is bound to use not only good faith, but also every requisite degree of diligence and prudence in conducting the sale.<sup>115</sup>

An American Law Register note explained in 1863, "[A trustee's discretion] must be exercised with fair and impartial attention to the interests of all parties concerned."<sup>116</sup> The Supreme Court of Iowa said in 1864, "[The sheriff conducting a sale] should never forget that he is, for many purposes, the agent of *both* parties, in the execution of the power with which the law invests him. . . . [T]his discretion must be exercised with a fair and impartial attention to the interests of *all parties concerned*."<sup>117</sup> Jairus Ware Perry's treatise noted in 1872, "The trustees are bound by their office to sell the estate under every possible advantage for the beneficiaries, and if there are different *cestuis que trust*, they must act with a fair and impartial attention to the interest of all."<sup>118</sup>

Note particularly the stark difference between these rules and the purposeful-discrimination rule in *Smith* and *Washington*. A

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113. *Johnston v. Eason*, 38 N.C. (3 Ired. Eq.) 330, 334 (1844) (citations omitted).

114. THOMAS LEWIN, A PRACTICAL TREATISE ON THE LAW OF TRUSTS 500 (Sweet & Maxwell 12th ed. 1911) (1837).

115. ALEXANDER M. BURRILL, A TREATISE ON THE LAW AND PRACTICE OF VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS 506 (James L. Bishop & James Avery Webb eds., Beard Books 1999) (1858).

116. J.F.D., *Sales and Titles Under Deeds of Trust*, 2 AM. L. REG. 705, 713 (1863).

117. *Swortzell v. Martin*, 16 Iowa 519, 523 (1864).

118. JAIRUS WARE PERRY, A TREATISE ON THE LAW OF TRUSTS AND TRUSTEES 1320–21 (Raymond C. Baldes ed., 7th ed. 2008) (1872).

requirement of impartial *attention* means that more is required of a trustee than simple avoiding intentionally targeting beneficiaries for harmful treatment. They are required affirmatively to learn about beneficiaries' interests and promote them.

C. *Multiple-Beneficiary Law Today*

We turn finally to multiple-beneficiary law today. It has changed remarkably little from the sorts of rule articulated over three centuries ago in cases like *Astry*. Distinctions between beneficiaries are allowed as long as a good reason is given, but in the absence of such a reason, equal treatment is demanded. As modern portfolio theory has developed a more sophisticated understanding of the different investment needs of different beneficiaries, multiple-beneficiaries law has kept pace.<sup>119</sup> The basic obligation has not changed, however: a trustee must attend to, and promote, all beneficiaries' interests fairly and impartially. The Uniform Prudent Investor Act, approved by the National Conference of Commissioners on Uniform State Laws in 1995 and adopted in 1995, wholly or in part, by several states, requires, "If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."<sup>120</sup> Note particularly here the importance of paying attention as well as requiring flexibility with respect to beneficiaries' different interests. The Uniform Trust Code, approved in 2000, is similar: "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests."<sup>121</sup> A comment amplifies the fact that equality is not always required: "The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the

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119. See generally Frederic J. Bendremer, *Modern Portfolio Theory and International Investments Under the Uniform Prudent Investor Act*, 35 REAL PROP. PROB. & TR. J. 791 (2001) (analyzing "how the Uniform Prudent Investor Act has modernized the law of fiduciary investing while preserving the traditional fiduciary duties of the trustees.")

120. UNIFORM PRUDENT INVESTOR ACT § 6 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1995).

121. UNIFORM TRUST CODE § 803 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2018).

beneficiaries equitably in light of the purposes and terms of the trust.”<sup>122</sup> The Restatement (Third) of Trusts, adopted in 2001, similarly requires “due regard” for multiple beneficiaries’ interests: “A trustee has a duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust . . . . [T]he trustee must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust.”<sup>123</sup> A comment explains the importance of attending properly to the complexities of different beneficiaries’ interests:

It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of “equality” of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee’s balancing of those interests. Impartiality does mean that a trustee’s treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee’s personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration. Nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect, or because a particular beneficiary has more access to the trustee or is more aggressive, or simply because the trustee is unaware of the duty stated in this Section.<sup>124</sup>

Again, we see the importance of the trustee devoting attention to the interests of all beneficiaries, not merely avoiding purposeful harm. Departures from identical treatment are allowed, but they must be justified.

*D. Administrative Law: A Better Cost-Sensitive Model for Assessing Arbitrariness*

As Professors Lawson and Seidman have noted, the demand in historic English multiple-beneficiaries law for an explanation of

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122. UNIFORM TRUST CODE § 803 cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2023).

123. RESTATEMENT (THIRD) OF TRUSTS ch. 15 § 79 (AM. L. INST. 2007).

124. *Id.* ch. 15 § 79 cmt. b.

costs imposed on particular beneficiaries is strikingly similar to modern American administrative law.<sup>125</sup> This fits with the fact that before the tiers of scrutiny were constructed, arbitrariness was the central consideration in the Supreme Court's law of equality,<sup>126</sup> while a major portion of modern administrative law consists of assessing when agency action is "arbitrary" and "capricious."<sup>127</sup> *Astry's* demand for a "good reason" for a departure from a rule of equality is quite similar to the demand that *State Farm* puts on agencies.<sup>128</sup> The requirement that trustees devote attention to the particular circumstances of beneficiaries—and the costs that policies impose on them—is quite similar to the sort of inquiry the Court required in *Overton Park* with respect to the Memphis Zoo, which was obviously not targeted for purposeful harm, but whose connection to the rest of the park was merely seen as insufficiently important to change the path of I-40.<sup>129</sup> The administrative-law analogy is thus a natural cure for possible governmental callousness toward religious citizens—the "arbitrary quality of thoughtlessness"<sup>130</sup>—that sometimes lies behind laws of "general applicability." The Court elaborated in *State Farm*,

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."<sup>131</sup>

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125. LAWSON & SEIDMAN, *supra* note 13, at 163–64.

126. *See supra* note 44.

127. 5 U.S.C. § 706(2)(A).

128. Compare *Astry v. Astry* (1706) 24 Eng. Rep. 124, 124; Prec. Ch. 256, 256, with *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

129. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 406–08 (1971).

130. *See supra* note 42–44 and accompanying text.

131. *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

The Court's final line here offers another advantage of an administrative-law model for Fourteenth Amendment equal citizenship: it provides an alternative to the excessive deference in cases like *Williamson v. Lee Optical, Inc.*, under which judges may rely on post-hoc rationalizations rather than the actual interest that motivated a legislature.<sup>132</sup> The Court recently reminded the Sixth Circuit in a summary reversal of this "simple but fundamental rule of administrative law."<sup>133</sup> As the Court explained in 1947,

[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.<sup>134</sup>

Just eight years later, however, the Court relied on what "might be thought . . . rational" in order to prevent judicial invalidation of an eyeglass cartel.<sup>135</sup> Six years later still the Court said, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."<sup>136</sup> This is not what "fair and impartial attention" for all citizens' interests would require.<sup>137</sup> Lower production and higher prices are obviously in the interests of current sellers of a good or service, but states should be required to explain why the interests of other citizens are not as important. Why did the interests of consumers in lower prices, or the interests of possible competitor sellers seeking to offer a lower-cost alternative, not receive the same sort of attention as current sellers' interests? For addictive products like tobacco or painkillers, such a justification for regulation might succeed; a free market might produce a level

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132. 348 U.S. 483, 487–88 (1955).

133. *Calcutt v. FDIC*, 143 S. Ct. 1317, 1318 (2023) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).

134. *Chenery*, 332 U.S. at 196.

135. *Williamson*, 348 U.S. at 488.

136. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

137. See *supra* Part III.B.

of consumption that does not serve the general welfare. For eyeglasses<sup>138</sup> or filled milk,<sup>139</sup> though, a credible explication is much harder to give. Requiring states to supply the justification at the time of regulation will sharpen their responsibility to serve at all times as trustees for the benefit of all of their citizens.

Besides offering a new way to promote entrepreneurial liberty and requiring courts to address the distributional consequences of protectionism, what would this approach mean for cases like *Washington v. Davis* and *Employment Division v. Smith*? Serious engagement with the costs of the lack of an exemption for sacramental peyote would demand more than Oregon presented to the Court in *Smith*. Particularly in light of the detailed findings of other courts and of the federal government that religious use of peyote had not been shown to be harmful,<sup>140</sup> the dissent in *Smith* was right that the state was required to do more than rely on its mere assumption otherwise.<sup>141</sup> Failing to explain why numerous other policymakers had gotten the issue wrong is analogous to the Department of Transportation's failure in *State Farm* to confront data that supported its earlier passive-restraint rule.<sup>142</sup> The state must "examine the relevant data and articulate a satisfactory explanation for its action."<sup>143</sup> In lieu of such an articulation, the litigants in *Smith* were entitled to an exemption and hence to unemployment benefits. *Washington v. Davis* poses a more difficult issue, because the merit of the particular test for police officers that produced a disparate racial impact was never litigated in detail. Also, because *Washington* involved the qualifications of public employees, rather than burdens imposed on

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138. See *Lee Optical of Okla. v. Williamson*, 120 F. Supp. 128, 135–39 (W.D. Okla. 1954).

139. See *Milnot Co. v. Richardson*, 350 F. Supp. 221, 225 (S.D. Ill. 1972) (glossing the Equal Protection Clause as banning "arbitrary or capricious distinctions" and finding obsolete the justifications for the act upheld in *United States v. Carolene Products*).

140. See *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 911–13 (1990) (Blackmun, J., dissenting).

141. See *id.* at 674–78 (Brennan, J., dissenting). Justices Marshall and Blackmun joined in Justice Brennan's opinion. *Id.*

142. 463 U.S. at 43–57.

143. *Id.* at 43.

citizens at large, the equal-citizenship issue is more complicated.<sup>144</sup> Citizens are entitled as such only to civil rights related to proper *treatment by the state*, not political rights to *serve on behalf of the state*.<sup>145</sup> The Fourteenth Amendment issue would thus be whether there was an adequate justifying explanation for the burdens that a racially less-balanced police force would place on the citizenry as a whole. The qualifying test might produce such benefits, but it would have to be litigated. Finally, *Village of Arlington Heights v. Metro Housing Corp.*,<sup>146</sup> the case that extended *Washington v. Davis* to the Fourteenth Amendment itself, poses very similar issues to those in *Williamson*. It is possible that a smaller quantity of lower-cost housing might somehow prevent externalities for surrounding home values, but before towns deny zoning permits on that basis, they must confront the data on the harms of exclusionary zoning.<sup>147</sup> Without a better response to this data than was supplied by Arlington Heights, developers should be able to build the sorts of homes that poor people particularly need.

#### CONCLUSION

Fourteenth Amendment citizenship is not a concept with sharply defined implications, and the tiers of scrutiny respond to an understandable urge to make results seem predictable and orderly. But we should resist the urge to make the Fourteenth Amendment's requirements more straightforward than they really are.<sup>148</sup> Enforcing

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144. 426 U.S. at 248.

145. See *supra* Part II.C.

146. 429 U.S. 252 (1977).

147. See, e.g., Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5B HANDBOOK OF REG'L. & URB. ECON. 1289 (Gilles Duranton et. al. eds., 2015); Richard D. Kahlenberg, *Tearing Down the Walls: How the Biden Administration and Congress Can Reduce Exclusionary Zoning*, CENTURY FOUND. (April 18, 2021), <https://tcf.org/content/report/tearing-walls-biden-administration-congress-can-reduce-exclusionary-zoning/> [<https://perma.cc/GV5P-UNW9>]; BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (2021).

148. See ARISTOTLE, 1 THE NICOMACHEAN ETHICS ch. 3 (F.H. Peter trans., eCampusOntario Public Domain Core Collection 2022) (c. 322 BCE) ("We must be content if we can attain to so much precision in our statement as the subject before us admits of . . . [W]e must be content if we can indicate the truth roughly and in outline . . . [I]t



a requirement of impartial attention to all citizens' interests will require states, Congress, and the courts all to be much more concerned about the details of citizens' particular circumstances, and more careful about explaining their choices that impose costs on some citizens and not others. There will be many unclear cases in which courts should defer to the elected branches and in which Congress therefore has the power under Section Five to clarify what equal citizenship requires for states. But a retreat by the Court from the false promise of formalistic certainty in its tiers of scrutiny, and especially the extreme deference of hypothetical-rational-basis review, is the first step.

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is the mark of an educated man to require, in each kind of inquiry, just so much exactness as the subject admits of: it is equally absurd to accept probable reasoning from a mathematician, and to demand scientific proof from an orator.”), accessible at <https://pressbooks.library.torontomu.ca/nicomacheanethics/chapter/3-exactness-not-permitted-by-subject-nor-to-be-expected-by-student-who-needs-experience-and-training/> [<https://perma.cc/94KW-6AX6>].