

***Iqbal* and Race**

Interrogating *Iqbal*: Intent, Inertia, and (a lack of) Imagination

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Abstract

In Ashcroft v. Iqbal, the Court reaffirmed the long-standing equal protection doctrine that government actors can only be held liable for discriminatory conduct when they purposefully rely on a forbidden characteristic, such as race or gender, in promulgating policy; to simply know that minorities and women will be adversely affected by the law does not deny these groups equal protection under the law. This Essay interrogates this doctrine by taking a closer look at Iqbal and Feeney,

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the thirty-year-old precedent the majority cited as the source of its antidiscrimination standard. Because Feeney was cited in neither of the lower court opinions, its reappearance in Iqbal signals the Court's reluctance to intervene in matters (even tangentially) related to national security even if the government's allocation of burdens and benefits perpetuates societal racial and gender privileges.

In Feeney, the Court upheld a Massachusetts law granting benefits to war veterans, even though the state legislature was aware that less than two percent of the veterans at the time were women, owing in part to women's exclusion from military service; thirty years later, the Iqbal Court dismissed constitutional claims against two high ranking federal officials responsible for orchestrating modern-day round-ups of noncitizens from so-called terrorist-breeding states, even though these officials knew their policies would disproportionately burden individuals of a certain racial, religious, and citizenship background.

Both cases illustrate the inertia that has befallen the Court as it appears unwilling to engage in the traditional balancing of government interests against individual rights on the theory that the disaffected minorities must essentially prove that lawmakers bore them the equivalent of ill will or animus—in Feeney's words, reiterated verbatim in Iqbal: that the decisionmakers chose a course of action "because of, not merely in spite of, [the action's] adverse effects upon an identifiable group."

By taking a closer look at the challenged laws in Feeney and Iqbal, by examining the Court's choice to defer to the political branches' decisions to press ahead despite the laws' effects upon minority groups, and by reminding ourselves of times when the Court's imagination and innovative thinking stretched beyond the confines of formal rational basis review, this Essay explores the limits inherent in deferring to political actors, especially when we know they are consciously perpetuating privilege, furthering discrimination by default. Even in matters that arguably relate to national security and foreign policy, the Court should never shirk its responsibility to closely scrutinize discriminatory governmental policies that were deliberately adopted.

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I. INTERROGATING *IQBAL*

The Supreme Court's decision to dismiss Pakistani national Javaid Iqbal's racial and religious discrimination claims against former Attorney General John Ashcroft and current FBI Director Robert Mueller¹ should not surprise students of constitutional immigration law,² post-9/11 profiling,³ or perhaps even doctrinal civil procedure.⁴ The Court's unwillingness to hear the constitutionally-based charges of invidious discrimination leveled by a foreign citizen commoner against prominent

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1372, 1374 (2009) ("We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.").

2. See, e.g., KEVIN R. JOHNSON, *THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004) (noting how domestic equal protection norms have long been ignored in immigration policy, contrary to the popular myth of the U.S. as primarily welcoming of immigrants); Shoba Wadhia, *Business as Usual: Immigration and the National Security Exception*, 114 PENN ST. L. REV. 1485 (2010) (characterizing *Iqbal* as part of a long pattern of race and ideological profiling within constitutional immigration law). But see Gabriel J. Chin, *Is There a Plenary Power Doctrine?: A Tentative Apology and Prediction for our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000) (describing constitutional immigration history as consistent with domestic race discrimination cases decided during the same period).

3. See, e.g., DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2005); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2004); Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185 (2002); Natsu Taylor Saito, *Will Force Trump Legality After September 11? American Jurisprudence Confronts the Rule of Law*, 17 GEO. IMMIGR. L.J. 1 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002);

4. See, e.g., Ray Campbell, *Getting a Clue: Two-Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN ST. L. REV. 1191 (2010); Jeffrey Rachlinski, *Why Heightened Pleading—Why Now?* 114 PENN ST. L. REV. 1247 (2010).

members of the U.S. government fits nicely into well-known outsider narratives in the critical legal studies vein as well.⁵

But what interests me about the opinion is the manner in which the Court chose to effect the dismissal of Iqbal's discrimination claims by resurrecting a 30-year-old case that was cited by neither the District Court nor the Second Circuit: *Personnel Administrator of Massachusetts v. Feeney*.⁶ The Court cited *Feeney* for the proposition that it was not enough for either Ashcroft or Mueller to know that the post-9/11 interrogation and detention of certain Arab and Muslim noncitizens would lead to a discriminatory impact upon the group.⁷ Iqbal would also have to prove that Ashcroft and Mueller purposefully chose to target Arab and Muslim noncitizens because of their race and religion, not in spite of it.

That this matter was resolved at the pleading stage is remarkable. Without examining a shred of evidence, the Court credited the government's national security arguments by ignoring Javid Iqbal's ordinariness, for nothing in Iqbal's petty criminal background suggests that he was a terrorist who deserved incarceration in a maximum security facility. While articulating a similarly heavy burden for plaintiffs seeking to prove invidious discrimination, the *Feeney* Court developed its theory on a more robust record, having taken two appeals from careful decisions by a three-judge district court, which examined Helen Feeney's gender discrimination claim carefully, weighing her interests against the legislative record underlying the Massachusetts veteran's preference law under fire in that case.⁸ That the *Iqbal* Court was willing to defer to the government so quickly when, thirty years earlier, it took several years

5. See generally LISA KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW* (2001) (noting how the Court uses procedural devices to avoid difficult substantive issues rather than to take the opportunity to fully vet them); Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (arguing that *Brown* is best explained not as a victory for blacks but as an example of how blacks' interests in civil rights merged with whites' interests in a better international profile more consistent with ideals of fair treatment and democratic values; once the white majority's interests diverge from the black minority's, however, the minority loses); Jean Sternlight & Sylvia Lazos-Vargas, *Ashcroft v. Iqbal and Other Recent Supreme Court Decisions Demonstrate the Need for Greater Judicial Diversity and Judicial Prudence* (2010).

6. 442 U.S. 256 (1979).

7. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948-49 (2009).

8. The *Feeney* case was originally titled *Anthony v. Commonwealth*, 415 F.Supp. 485 (D. Mass. 1976), after the lead plaintiff in the original action, but over time, Feeney's was the only action that remained, Anthony's having been mooted by the state having created an exemption from the veteran preference for lawyer jobs. 442 U.S. at 259 & n.3.

(and an intervening court case in *Washington v. Davis*)⁹ to reach its conclusion, suggests the Court's retreat from providing robust review of equal protection claims raised in the shadow of national security.

This Essay will carefully compare *Iqbal* and *Feeney*, examining how the Court has institutionalized inertia by failing to adequately assess the costs of the "purposeful discrimination" standard and what this reluctance to serve as a check on the political branches does to perpetuate privilege and the status quo worldview. The judiciary is the only federal branch that can consistently ensure individuals are fairly treated *qua* individuals and are not subjected to a majority perspective that, by default, defers to and preserves power, often in the form of affirming invidious stereotypes.

Moving beyond *Iqbal* and *Feeney*, this Essay will conclude by turning to critical decisions within the Court's jurisprudence that capture the promise of the Equal Protection Clause by looking behind the facts to understand how unmerited privilege is perpetuated. Cases from *Brown*¹⁰ and *Loving*¹¹ to *Plyler*,¹² *Romer*,¹³ and *Lawrence*¹⁴ cast a discerning eye upon the government's reasons to weigh the impact that the laws have on marginalized groups. While the shadow of *Korematsu*¹⁵ reminds us daily of its own fallibility, the Court also has a long history of championing individual rights and correcting injustice, leveling the playing field for the least well-off who are otherwise left unprotected by majoritarian politics.

9. 426 U.S. 229 (1976) (holding that plaintiffs had to prove intentional discrimination in order to subject written qualifying examination to strict scrutiny for its racially disparate impact on black candidates who took it).

10. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (ruling "separate but equal" public school facilities unconstitutional).

11. *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state antimiscegenation statute under equal protection and due process clauses).

12. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that state law denying undocumented children free public education is unconstitutional).

13. *Romer v. Evans*, 517 U.S. 620 (1996) (finding unconstitutional a state constitutional amendment that discriminated on the basis of sexual orientation).

14. *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking state law criminalizing same-sex relations for violating due process clause).

15. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding constitutionality of federal Executive Order authorizing internment of Japanese Americans solely on the basis of race).

II. INERTIA AROUND INTENT: THE COURT AT ITS WORST

A *Javaid Iqbal: Undocumented Worker, Petty Criminal, or Suspected Terrorist?*

Javaid Iqbal may have run afoul of the law, but none of his minor violations suggest that he had any connection with terrorism. Indeed, Iqbal apparently had married an American citizen and was hoping to adjust his status to lawful resident when the 9/11 attacks occurred and his religion and national origin brought him under federal government scrutiny.¹⁶

A Muslim man from Pakistan, Iqbal first came to the federal government's attention for allegedly obtaining gainful employment by way of a false Social Security card and driver's license, a strategy not uncommon among undocumented workers; accordingly, the government filed a two-count indictment in November 2001.¹⁷ Upon further investigation, the government filed a superseding indictment alleging Iqbal's involvement in a check-kiting scheme.¹⁸ In April 2002, Iqbal pled guilty to cashing two forged checks and to carrying a false driver's license, for which he was sentenced to serve a mere sixteen months on Sept. 17, 2002, a few days after the one-year anniversary of the 9/11 attacks.¹⁹

These facts are all that we have about Iqbal's criminal activity. Even if we were to assume his participation in the alleged check-kiting scheme went beyond merely cashing forged checks, nothing in the public record suggests Iqbal's tie to terrorism. Now, it may be that the government chose not to compromise important national security intelligence by formally charging Iqbal with terrorism, but its decision not to incarcerate Iqbal beyond his brief sixteen-month sentence (unlike, for instance, the Guantanamo detainees),²⁰ and instead to deport him home to Pakistan, suggests that he was not a terrorist.²¹

16. E-mail from Alex Reinert, counsel for Iqbal, to Victor Romero (Jan. 15, 2010, 3:53 PM) (on file with author).

17. Indictment, *United States v. Iqbal*, No. 01-CR-1318 (E.D.N.Y. Nov. 30, 2001) (on file with author).

18. Superseding indictment, *Iqbal*, No. 01-CR-1318 (E.D.N.Y. Feb. 28, 2002) (on file with author).

19. Email from Alex Reinert to Victor Romero, *supra* note 16; *see also* Indictment, *supra* note 17, and superseding indictment, *supra* note 18.

20. *See, e.g.,* *Boumediene v. Bush*, 553 U.S. 723 (2009) (ruling that Congressional substitute for habeas violates Suspension Clause); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding that noncitizen Guantanamo detainees had statutory right to habeas proceeding).

21. For more on Iqbal's background, *see* Complaint, *Elmaghraby v. Ashcroft*, No. 04-1809 (E.D.N.Y. May 3, 2004), *available at* 2004 WL 3756439.

In contrast, the Supreme Court, based simply on a review of the pleadings before it, had no difficulty including Iqbal among the lot of “suspected terrorists” worthy of maximum security detention. The Court proffers two reasons for denying the plausibility of Iqbal’s claims. First, because all nineteen of the 9/11 hijackers were Arab Muslim men who were members of Al-Qaeda, which was led by another Arab Muslim man, Osama bin Laden, whose followers included many other Arab Muslim men, Ashcroft and Mueller knew that Arab Muslim men like Iqbal would be disproportionately affected by the policy, but that their “intent [was] to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts,” not to discriminate based on race, religion, or national origin.²² Put differently, Ashcroft and Mueller fully expected that Arab Muslim men would be selectively targeted by law enforcement, but not because they were Arab Muslim men, but because they were unlawfully present and might have been connected with the 9/11 hijackings. Second, and similarly, the Court notes that Iqbal was not likely placed in restrictive confinement conditions because of his race, religion, or national origin, but because he was a “suspected terrorist,” and as such, the government’s intent was “to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity.”²³

While this analysis seems plausible, the facts surrounding Iqbal’s arrest belie this. Iqbal admitted to engaging in criminal activity, for which he received a relatively light sixteen-month sentence; he was also therefore deportable—and his presence was unlawful—under our immigration laws. It appears Iqbal worked in the U.S. without proper documentation and was involved in a minor criminal offense, for which he was duly punished. But what in his background made him a suspected terrorist worthy of restrictive confinement? The government presented no evidence that his involvement in the alleged check-kiting scheme was somehow a fundraising front for Al-Qaeda; it is just as likely that Iqbal needed more cash for himself or, more benignly, got caught up with the wrong people and had thought he was cashing legitimate checks. In the meantime, the decision to label him a suspected terrorist subjected him not only to harsh confinement conditions, he alleges, but also to beatings at the hands of prejudiced prison officials and other government officers.²⁴ Furthermore, after he had served his sixteen-month sentence,

22. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

23. *Id.* at 1952.

24. Iqbal v. Hasty, 490 F.3d 143, 149 (2d Cir. 2007).

Iqbal was simply released and returned to Pakistan.²⁵ If he had truly been a terrorist worthy of restrictive confinement, Iqbal would have presumably been held longer, perhaps moved to Guantanamo or elsewhere until the government could charge him with an appropriate terrorism offense.

At day's end, the things he had in common with the nineteen hijackers were things he could not or should not change: his race, religion, and national origin. These attributes served as proxies for dangerousness rather than evidence thereof, but the Court nonetheless chose to credit them as incidental affronts to Iqbal's dignity in light of what it adjudged to be the government's true and legitimate purpose: to interrogate and detain all Arab Muslim noncitizens who were unlawfully present in order to ascertain their ties to the 9/11 hijacking, then reserving the most restrictive detention for those actually suspected of terrorism. Javaid Iqbal may have been here illegally, and he may have been involved in crime, but there is no evidence that he was ever a terrorist threat. For the Court to disregard this reality at such an early stage of the litigation process effectively denied it the opportunity to more closely review the government's actions here.

B. Helen Feeney: Highly-Qualified Non-Veteran Women Need Not Apply

Like Javaid Iqbal, Helen Feeney did not fit the profile the government had in mind for her. Feeney was a long-time civil service employee in Massachusetts who, time and again, was passed over for certain competitive jobs because of the state's absolute, lifetime preference for veterans even though her exam scores were consistently higher than the veterans who won appointment. Here is but one example from the District Court's opinion:

On February 6, 1971, [Feeney] took an examination for the single position of Assistant Secretary, Board of Dental Examiners. Although she received the second highest grade of 86.68 on the examination, the application of the Veterans' Preference formula caused her to be ranked sixth on the list behind five veterans, all of whom were male and four of whom received lower grades. She was not certified and a male veteran with an examination grade of 78.08 was appointed.²⁶

Apparently, Feeney was not the lone female disadvantaged by the preference. At the time of the lawsuit, over 98% of all veterans were

25. *Id.*

26. *Anthony v. Commonwealth*, 415 F. Supp. 485, 492 (D. Mass. 1976).

male and only 1.8% were female; this stark difference prompted the Supreme Court to describe the adverse gender impact of the law to be “severe.”²⁷ The Court also noted that laws limiting military service to women and men-only draft policies had contributed to this discrepancy.²⁸

Yet, as in *Iqbal*, the Court was reluctant to conclude that the Massachusetts legislature intended to invidiously discriminate against women. Even though as a class, women disproportionately bore the burden of the veteran’s preference, the state discriminated against both men and women by preferring veterans to non-veterans. As the Court put it, “Too many men [were] affected by [the veteran’s preference] to permit the inference that the statute [was] but a pretext for preferring men over women.”²⁹

C. *Measuring Loyalty and Disloyalty: Intent, Inertia, and the Supreme Court*

Iqbal and *Feeney* present us with interesting case studies of how the Court deconstructs (dis)loyalty. In *Iqbal*, the Supreme Court held that race, religion, and national origin were not the reasons for targeting Arab Muslim noncitizens during the government’s post-9/11 sweep, but their suspected ties to terrorism were relevant.³⁰ Similarly, in *Feeney*, although gender would be an impermissible basis for excluding women from the workplace, their non-veteran status would be relevant.³¹ In both cases, the government knew that the policies it had chosen (i.e., interrogating and detaining suspected terrorists in one, preferring veterans in the other) would have a disproportionate impact upon certain groups (i.e., Arab Muslim noncitizens in one, women in the other).

Yet, the government was permitted to proceed because it had legitimate reasons for doing so—that is, to punish the disloyalty of the suspected terrorists (in *Iqbal*) and to reward the loyalty of the presumptive patriot veterans (in *Feeney*). As a policy matter and at a very general level of abstraction, it is hard to quibble with this approach. That the political branches would create policies which honor loyal subjects and ferret out disloyal ones makes much sense.

27. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979).

28. *Id.* at 269-70 (“Notwithstanding the apparent attempts by Massachusetts to include as many military women as possible within the scope of the preference, the statute today benefits an overwhelmingly male class. This is attributable in some measure to the variety of federal statutes, regulations, and policies that have restricted the number of women who could enlist in the United States Armed Forces, and largely to the simple fact that women have never been subjected to a military draft.”).

29. *Id.* at 275.

30. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009).

31. *Feeney*, 442 U.S. at 277-78.

It is, however, properly the Court's role to make sure that these policies fit the individual cases that are brought before it to test the integrity and parameters of these rules. Based on his actions, is Javid Iqbal someone whom the federal government should have adjudged sufficiently disloyal, such that he deserved restrictive confinement, or did his status as an Arab Muslim render him either immediately or presumptively disloyal until proven otherwise? Similarly, did Helen Feeney's non-veteran status render her sufficiently undeserving of a civil service job when compared with her veteran peers with lower test scores, or did her gender serve as a convenient means to relegate women to either less prominent work or no work at all?

A critic might contend that this (dis)loyalty theory ignores the underlying rules of law that the Court was obliged to follow. In *Iqbal*, the Court could not proceed with a *Bivens* action for money damages brought by a criminal noncitizen who could not plausibly assert that two high-ranking government officials specifically targeted him because of his race and religion when being an Arab Muslim was a relevant attribute of the 9/11 hijackers. Similarly, in *Feeney*, the Massachusetts legislature's legitimate desire to honor loyal veterans with an employment preference should not be deemed invidious gender discrimination when non-veteran men, like non-veteran women, were equally disadvantaged. Put another way, there are neutral, non-invidious explanations that show the government's good intentions to capture the terrorist in *Iqbal* and to honor the veteran in *Feeney*, regardless of the race, religion, or gender of the alleged terrorist or veteran. The Court was duty-bound to honor these legitimate reasons and reassure both *Iqbal* and *Feeney* that their losses were not due to unlawful discrimination.

While loyalty and disloyalty are certainly legitimate subjects of legislative debate and are presumptively beyond an unelected judiciary's expertise, relevant precedent and psychological research caution a more vigilant alternative to the apparent inertia and deference that has befallen the Court in so-called national security contexts.

1. Precedent: The Court's Deference in National Security Contexts

A brief review of Supreme Court precedent suggests that this judicial inertia or deference to the political branches is but part of a long-standing acquiescence to the Executive in foreign affairs,³² generally, and to the military, in particular. For instance, in *Goldman v. Weinberger*,

32. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as the representative of the nation.").

the Court upheld the Air Force's dress code against a religious discrimination claim even though, as enforced, the code effectively prevented an Orthodox Jewish doctor and ordained rabbi from wearing his yarmulke.³³ The Court noted that its "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."³⁴ Esprit de corps and the subordination of personal interests to the military's mission justified the code, in the Court's eyes.³⁵ Under Air Force regulations, Rabbi Goldman was to be loyal to his country's military first, rather than to his God; for him to try to be loyal to both by wearing the yarmulke and the uniform was insufficient.

Indeed, even in the *Korematsu* case, the Court claimed to be applying strict scrutiny in reviewing the Executive's internment of over 100,000 Japanese-Americans, which presumptively would have invalidated this racially-discriminatory law.³⁶ Likening the law to the curfew upheld in *Hirabayashi*,³⁷ the Court had little trouble upholding the West Coast evacuation:

[E]xclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground.³⁸

As in *Iqbal*, *Korematsu* involved the use of a profile for disloyalty in justifying the targeting of a specific group.³⁹ And while one might have expected the *Korematsu* Court to call the military to account when it decided to profile U.S. citizens based solely on their race, as in *Iqbal*, the Court was reluctant to second-guess the Executive when it cries "national security."

Although less closely related to the national security theme than either *Iqbal* or *Korematsu*, *Feeney* finds a distant cousin in the recent case, *Ricci v. DeStefano*.⁴⁰ In *Ricci*, white and Hispanic firefighters who

33. *Goldman v. Weinberger*, 475 U.S. 503 (1986).

34. *Id.* at 507.

35. *Id.* at 508.

36. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

37. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

38. *Korematsu*, 323 U.S. at 218-19.

39. *Id.*

40. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

applied for a job promotion sued the City of New Haven for rejecting the results of a civil service exam on which they scored higher than all the black firefighters who took it.⁴¹ The City defended by claiming that if it had certified the results it would have faced a suit from the black firefighters, alleging that the written test had a disparate impact based on their minority race, which it did. The Court held that the City violated Title VII's anti-race discrimination mandate by rejecting the otherwise validated test results simply because "too many whites and not enough minorities would be promoted were the lists to be certified."⁴²

Notice how *Ricci* parallels *Feeney*: Like *Feeney*, the plaintiff firefighters claimed that their superior test results entitled them to certain civil service positions. However, unlike *Feeney*, these white, male firefighters fit the profile of loyal public servants whom the Court deemed deserved to be rewarded. Much like war veterans, firefighters enjoy a solemn respect borne out of their willingness to stand in harm's way to protect their communities from danger. If test performance had been the only factor relevant to employment, *Feeney*, like the firefighters, would have qualified. In *Feeney*'s case, there was an additional factor—whether one was a veteran. Veteran status was not a relevant concern in *Ricci* because they were all firefighters; they had all proven their loyalty to their communities through their service. Put differently, loyalty and service trump test scores (*Feeney*), but where loyalty is not an issue, higher test scores prevail (*Ricci*).

While attractive at first blush, the above account is incomplete. Why should higher test scores prevail in *Ricci*? What about the City's race-neutral justification for rejecting the scores—i.e., that it feared a lawsuit and wanted to make sure that whatever criteria it employed to evaluate candidates' performances did not discriminate against minority applicants? Why did the *Ricci* Court conclude that this was an insufficient justification, but rather a purposeful decision to discriminate against the white plaintiffs on the basis of race? Why not adopt the *Feeney* or *Iqbal* analyses instead—to wit: the City's discrimination was not purposeful, even though it had a disparate impact upon the white plaintiffs for two reasons. First, as in *Feeney*, there were non-majority applicants—the two Hispanics with high test scores⁴³—who also qualified for promotion, so majority race status was not the basis for discrimination even though a disproportionate number of whites were affected. The true reason was to ensure a fair and accurate promotion process, one that did not tend to promote the status quo to the detriment

41. *Id.* at 2661.

42. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 152 (D. Conn. 2006).

43. 129 S. Ct. at 2666.

of minority applicants. The test was rejected not because the City hated or wished ill will upon whites and Hispanics, but because it wanted to make sure it was fair to all the applicants, including the African-American applicants, who appeared to be disproportionately excluded and burdened by the exam.

Or second, one might adopt the rationale from *Iqbal*: The City's objective was to find the most qualified individuals and promote them; if the data suggest that the exam may not be successfully doing that because it appears to disadvantage one group, then the City should be allowed to pursue that inquiry. In other words, when the district court described the City's concern as one focusing on race (i.e., "too many whites"),⁴⁴ it misunderstood the context and true import of the exam rejection: possible unfairness in the promotion process.

Of course, the District Court's proclamation that there were "too many whites" could have been read in much the same way as "too many Arab Muslims" was read in *Iqbal*. Just as the *Iqbal* Court regarded the impact on Arab Muslims as "incidental," the same could have been said for the plaintiff firefighters in *Ricci* because the City had not purposefully intended to deny them an opportunity simply because they were white. Rather, the City sought to ensure that any process—including any test—it made applicants complete was fair and just for all.

The question remains: Why the different characterizations of the process? On the one hand, *Feeney* and *Iqbal* teach us that race-neutral explanations can be more plausible than allegedly race-based explanations. As such, the government prevails if it can reasonably justify a policy in non-invidious terms, even if it involves the rounding-up of Arab Muslim noncitizens (*Iqbal*) or the effective exclusion of women from desirable civil service positions (*Feeney*). Not so in *Ricci*. While the City's decision not to certify the results adversely affected many whites, the race-neutral explanation for the rejection of the exam results was its intent to make the process a fair one for all. Yet, a bare majority of the Court could not accept the City's contention, instead finding that invidious racial discrimination was at work.

But the frustration of reading *Ricci* alongside *Feeney* lies not just in the difference in result, but rather what the narrative suggests about the nature of the Court's inertia. I suppose, taking a look at *Ricci*, one might conclude that the Court was not deferential at all. Rather, it decided to credit the plaintiffs' race discrimination claims, but not its sister, *Feeney*'s, gender claims because it carefully scrutinized the record on summary judgment, concluding there were no legitimate reasons for the City to suspect that its exam or promotion process were racially-biased.

44. *Id.* at 2673.

Yet the Court's decision to overturn the nullification of the exam results suggests a *selective* inertia: The Court is loath to second-guess the political branches' characterizations and interpretations of (dis)loyalty and (de)merit unless their decisions seem to upset the status quo worldview. Thus, in *Ricci*, the Court would not accept the City's argument that it was suspicious of its process and wanted to ensure a fair one in part because doing so would have led to the non-promotion of a privileged class: predominantly white, male firefighters who had performed well on a standardized exam. For Feeney, a woman trying to break through the glass ceiling, for Iqbal, a Muslim Pakistani trying to avoid the terrorist label, and for Korematsu, a Japanese-American trying to avoid the internment, a majority of the Court had a difficult time seeing how the political branches aimed to purposefully discriminate against these individuals. After all, each fit a profile: a woman is likely not a veteran (or "loyalist"), a Muslim Pakistani is likely a terrorist (or "traitor"), and a Japanese-American, well, as then Commanding General DeWitt put it most ineloquently, "A Jap's a Jap."⁴⁵ In contrast, white firefighters who scored well on their promotion exams fit the profile of a captain or lieutenant, and therefore deserved to be promoted. For the City of New Haven to forestall promotion because it wanted to ensure fairness to all candidates was but a ruse; its true aim was to effectively deny the white plaintiffs that which was rightfully theirs.

2. Inertia and the Psychology of Judging: *Discrimination by Default*⁴⁶

The Court's (selective) inertia—its precedential pattern of affirming political decisions that affirm well-worn stereotypes of (dis)loyalty and (de)merit—finds support in social psychology. When the Court perpetuates privilege by affirming political acts that favor the status quo, it does so not because it desires to harm the underprivileged, but because such garden-variety discrimination has become the default rule. As legal scholar Lu-in Wang notes:

[L]ike a default in a traditional sense, we often discriminate through failure or neglect, reaching a bad result not through ill will or evil

45. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 42 (1990). On the Japanese internment, see also ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II* (2007). For a comparison between Japanese internment and post-9/11 race profiling, see Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 *ASIAN L.J.* 195 (2002).

46. This is the title of Lu-in Wang's seminal work on how commonplace discrimination is. LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* (2006).

purpose, but because we are unaware of our failing or are incapable of doing differently. Social psychologists have shown, for example, that most people are afflicted with unconscious cognitive and motivational biases that lead us reflexively to categorize, perceive, interpret the behavior of, remember, and interact with people of different groups differently. These unconscious biases, in turn, can lead us to treat people differently based on race and other irrelevant characteristics without intending to or even being aware that we are doing so.⁴⁷

If Wang is right, then does it make sense to have a *Feeney* rule requiring “because of” purposeful intent before a disparate impact claim can be subjected to more scrutiny than the Court currently affords it? If, at the end of the day, the crux of the constitutional inquiry is to ensure that a person or entity acts with no animus or ill will, how does the Court know whether a person acts out of prejudice if she herself might simply have adopted and assimilated the current default norm (i.e., acting prejudicially) without knowing it?

Applying such an analysis, *Iqbal* and *Feeney* become more understandable—at least in terms of understanding the Justices—if not more persuasive. If the majority of Justices in both *Iqbal* and *Feeney* truly believed that their role was not to intervene in the political process except on rare occasions, then their (selective) deference makes complete sense: The Court assumes that, because legislatures and executives negotiate, pass, and implement laws, it may generally not intervene. Such an approach comports with a narrow view of the unelected judges’ role in a tripartite federal regime, but it also leads to deference to the political branches on almost all policy questions. If such policy questions may be justified on status-neutral grounds, the Court, not wishing to infer ill will in others nor capable of fully monitoring its own biases, will necessarily defer to the considered judgment of the political branches. A court adopting such a stance will likewise necessarily uphold the status quo more times than not. So, in *Iqbal* and *Feeney*, the Court trusts that the government played by the rules in both of these cases: that, absent specific proof of a discriminatory purpose, any law that was duly passed, but had a disparate impact on an identifiable group, would be entitled to a presumption of constitutionality.

Steve Legomsky has tackled a similar set of issues in the thorny context of the current debate surrounding undocumented migrants, often an emotionally-charged affair.⁴⁸ He notes that immigration restrictionists

47. *Id.* at 8-9.

48. Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 159-60 (2009) (“While the social science literature reveals the overall impact of illegal immigration on the interests of the larger society to be mixed and

tend to view the undocumented in the *aggregate* as an undifferentiated group whose large numbers pose a challenge to our capacity to effectively uphold the rule of law through attrition by deportation.⁴⁹ Immigrant rights advocates, on the other hand, tell stories of specific *individuals* who have been unjustly treated, stigmatized, or simply rendered invisible by their lack of ability to gain proper documentation and assume a settled life in the U.S.⁵⁰

These different perspectives help explain each sides' policy preferences in the immigration debate, and perhaps help us further explain the Court's (selective) inertia. In cases where the Court views the individual as part of an aggregate, as part of a group that the political branches have decided to legislate for or against, the Court is correspondingly reluctant to substitute its judgment on this political matter for the equally considered judgment of its colleagues in the federal or state legislatures. So, in *Iqbal*, if the administration decides that sufficient evidence and intelligence linked Iqbal to the 9/11 terrorists to warrant categorizing him as a "suspected terrorist," the Court would be inclined to defer to that call. However, if the Court had been willing to more strictly study Iqbal *qua* Iqbal—that is, Iqbal the individual—perhaps it would have been willing to let the case against Ashcroft and Mueller proceed, forcing the government to clearly articulate what it was in Iqbal's petty criminal history that warranted labeling him a potential threat. As a normative matter, while it may be understandable that political branches concerned with the difficult challenge of enacting broad policy may tend, more than the individual decisionmaker, to categorize and compromise, courts have the luxury of choice and the responsibility to check the political branches for abuse. For the judge, choosing to look at the *individual as individual* rather than as *part of an undifferentiated aggregate mass* appears to comport better with the bench's responsibility as the apolitical branch assigned to impartially interpret and infuse constitutional equal protection with meaning, insulating individuals from any ill effects and unintended consequences the blunt instrument of legislation might create.

So far, we have learned from Lu-in Wang that we all discriminate, sometimes subconsciously,⁵¹ and that, from Steve Legomsky, we should

uncertain, the effects of proposed solutions on the interests of the *individual* undocumented immigrants and their families are typically clear-cut. That contrast reinforces the case for placing greater weight on the latter and, therefore, giving undocumented immigrants the benefit of the doubt when the policy questions are close.") (emphasis added).

49. *Id.* at 70.

50. *Id.*

51. See *supra* note 47 and accompanying text.

make conscious choices about how we should assess the impact of law on people as individuals.⁵² Both perspectives help explain the (selective) inertia that seems to have afflicted the Supreme Court. This is a court that generally upholds the status quo, (un)consciously supporting discrimination by default, and usually refusing to closely examine the individuals before it as individuals.

Might the racial and gender makeup of the judiciary make a difference in terms of its ability to be aware of societal bias and its willingness to hold the political branches accountable for perpetuating privilege and discrimination by default? Two recent studies suggest that the answer to this question may be “yes.” In her 2005 study, Jennifer Peresie found that female judges were “significantly more likely than male judges”⁵³ to find for plaintiffs in federal sex discrimination and sexual harassment claims. More recently, Pat Chew and Robert E. Kelley released the results of their twenty-year study of the differences between African-American and other judges in federal workplace harassment cases.⁵⁴ They found that African-American judges were significantly more inclined to rule for plaintiffs than were white and Hispanic judges.⁵⁵ Interestingly, Chew and Kelley also found that a judge’s gender was not a significant factor.⁵⁶ Perhaps these findings are not all that surprising. In general, a woman might be in a better position to understand the contours of a sexual harassment claim than a man might, even though she may not necessarily understand a racial harassment claim as well as a judge of color might. While Chew and Kelley are quick to point out that their findings do not help predict how an individual judge may rule in a particular case,⁵⁷ the study does give the lie to the idea of the truly colorblind judge, thereby reinforcing Wang’s thesis that we all tend to discriminate by default.

While embracing greater racial and gender diversity among judges may appear to help the Court overcome its inertia affliction, I believe even more important will be ensuring that the Court re-embrace its role as the federal body best suited to call discriminatory policies to account by utilizing its power of judicial review to focus on the individual *qua* individual, and not simply to defer to the political branches, in effect perpetuating discrimination by default. As the next section will

52. See *supra* note 48 and accompanying text.

53. Jennifer Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005).

54. Pat K. Chew & Robert E. Kelley, *Myth of the Color Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009).

55. *Id.* at 1141.

56. *Id.* at 1144.

57. *Id.* at 1156.

demonstrate, the Court, at its best, has been, even as an overwhelmingly white, male body, an institution that has taken seriously its role as protector of individual liberties by closely examining where tyranny persists and unfailingly striking it down in the name of equal protection.

III. IMAGINATION AND INNOVATION: THE COURT AT ITS BEST

Many regard *Brown v. Board of Education*⁵⁸ as marking the birth of the modern Supreme Court, and with good reason. That landmark, unanimous opinion struck down the long-standing practice of segregating schoolchildren based solely on the color of their skin.⁵⁹ I would like to begin this discussion of the Court's "greatest hits," however, some twelve years after *Brown*, with a quote from the Supreme Court's decision in *Loving v. Virginia*, in which the Court dismissed antimiscegenation laws as unconstitutional:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.⁶⁰

In this relatively short opinion, the Court was quick to note that the only conceivable purpose for the Virginia statute was to maintain "White Supremacy."⁶¹ It is interesting to observe that, although all of them were white, none of the judges took offense at the use of the term. Why? Because "white" was not simply a word to describe the color of a person's skin; it was used here to symbolize an ideology: that white people are superior over others. In the context of that time, the phrase was meant to convey the idea that white people were in power and that they deserved to be in power. The Supreme Court's decision to use the term "White Supremacy" and to question its validity made clear that perpetuating race-based privilege violated the core constitutional value of equal treatment under the law.

I would respectfully suggest that it would be impossible to imagine the Supreme Court using the phrase "White Supremacy" today to

58. 347 U.S. 483 (1954).

59. *Id.*

60. 388 U.S. 1, 11-12 (1967) (internal footnotes omitted).

61. *Id.*

describe an otherwise legitimately enacted law by a state legislature. Even though white people still hold the reins of power in the United States, our country no longer has an official policy of maintaining segregated facilities based on an idea of white superiority. There remains, however, an unequal distribution of power in American society, and just as it did in *Loving*, the Court should be willing to call Congress and state legislatures to task when politicians pass laws that seem to maintain power only for the sake of maintaining power, especially when done at the expense of the most vulnerable in society.

The good news is that the Court has, from time to time, done exactly that. What the Court failed to do in *Iqbal* and *Feeney*, under the guise of presuming unintentional behavior, it did in *Brown* and *Loving*, as well as in *Plyler v. Doe*,⁶² *Romer v. Evans*,⁶³ and most recently, in *Lawrence v. Texas*.⁶⁴ In each of the last three cases, arguably utilizing little more than its traditional rational basis review—the same standard it effectively applied in *Iqbal* and *Feeney*—the Court treated the plaintiffs *qua individuals*, thwarting the stereotypical profile and truly analyzing the effects of the laws on the human beings before it.

In *Plyler v. Doe*, Texas decided to employ a cost-cutting measure to shore up the resources it devoted to public education: it chose to deny all undocumented children the free education it provides for lawful residents.⁶⁵ The Court assumed no ill will on the part of the state toward the undocumented children or their families. It did not view the law as a proxy for race discrimination. Rather, it weighed the purported benefits of the law against its costs.

In a close, 5-4 decision, the majority found it irrational and unfair that children were being penalized for the transgressions of their parents.⁶⁶ First, the children were not to blame for their undocumented status, as they were neither the cause of their condition nor had they an effective way to cure the situation.⁶⁷ And second, Texas's exclusionary policy would, in the long run, lead to the creation of a permanent underclass of uneducated youth.⁶⁸ Accordingly, the state's goal of conserving resources by denying public benefits to undocumented children was not a substantial interest, and therefore, irrational.⁶⁹

62. 457 U.S. 202 (1982).

63. 517 U.S. 620 (1996).

64. 539 U.S. 558 (2003).

65. 457 U.S. 202.

66. *Id.* at 219-20.

67. *Id.*

68. *Id.*

69. "[T]he discrimination contained in [Tex. Educ. Code] § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State." *Id.* at 222. Despite its reference to a rationality standard, the *Plyler* majority is typically read as

Though perhaps less than obvious, the parallels between *Plyler* and *Iqbal* are striking. Both involve undocumented persons the state has chosen to target. Although Javid Iqbal is an adult, not a child, and deemed a suspected terrorist, not one seeking public education, I find the *Plyler* Court's discussion of the "sins of the parent being visited on the child" to have resonance when considering Iqbal's situation: At bottom, Iqbal's discrimination claim is that his national origin, race, and religion were used as proxies by Ashcroft and Mueller in the decision whether or not to include him in the post-9/11 round-up. Like the children's undocumented status in *Plyler*, Iqbal's race, religion, and national origin were all statuses he inherited from his forebears. Just as the undocumented children cannot be blamed for their undocumented status, neither should Iqbal have been blamed for his race, religion, or national origin by labeling him a suspected terrorist when, as previously discussed, there was nothing in his conduct to suggest he was one.

While a critic might point out the lack of a security concern in *Plyler*, I am not so sure the state of Texas would have characterized the issue so cavalierly: The state's decision to pass the law was based on a concern that its public education system would be seriously undermined should it need to continually support undocumented children in its midst.⁷⁰ That the *Plyler* majority was able to strike the Texas law without having to find *Feeney*-like purposeful intent or accusing the state legislature of animus suggests that it sought to dismantle all official barriers to educational privilege; this was clear in its citation to *Brown v. Board of Education* in support of its approach.⁷¹ Noting the importance of education as the state's investment in every child's future, the Court was loath to deny some that opportunity based solely on their federal immigration status. Had the *Iqbal* Court taken a similarly long view, it may have decided to let the case proceed in order to hold the federal government accountable for choosing to use race, religion, and national origin as relevant proxies in the war on terror.

having employed a heightened scrutiny standard, otherwise, Texas's cost-cutting reasons for denying a non-suspect class public benefits would arguably have been rational. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 776 (3d ed. 2006) ("[I]t appears that the Court was using intermediate scrutiny in evaluating the discrimination against undocumented alien children with regard to education."). Like Gayle Pettinga, I am not sure how this differs from "rational basis with bite," either in theory or in operation, but it strikes me as important that the Court would deem irrational a state cost-savings measure. See, e.g., Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987).

70. *Plyler*, 457 U.S. at 207.

71. *Id.* at 222-23.

Like *Plyler*, *Romer v. Evans*⁷² also presents a situation wherein the state's populace appeared sufficiently threatened by a group of people so that it felt compelled to pass legislation limiting their access to certain privileges. But unlike in *Plyler*, the people of Colorado chose not to simply pass legislation to mark the divide between sexual majorities and minorities; through the initiative process, a majority of Coloradans passed Amendment 2⁷³ to the state constitution. Their stated goals were twofold: (1) to respect citizens' freedom of association, especially those of landlords and employers who had religious objections to homosexuality, and (2) to conserve state resources so government might protect other groups from discrimination.⁷⁴ On a 6-3 vote, the Court viewed the amendment as being so overbroad that it could not have possibly been limited to these two objectives.⁷⁵ The sheer breadth of the provision could only be explained by animus toward those of a homosexual orientation.⁷⁶

Evan Gerstmann's study of *Romer* and its aftermath suggests that the Court got it partially right.⁷⁷ Gerstmann notes that Amendment 2 passed by a narrow margin: 53.4% voted for it, while 46.6% voted against it; interestingly, polls conducted by the *Denver Post* before and after the vote suggest that most Coloradans did not believe in discriminating against homosexuals in the areas of employment and housing, for example, which Amendment 2 would have allowed.⁷⁸ The Court was right that the Amendment had a much broader sweep than what the voters appeared to have contemplated, thus undercutting one of the state's primary justifications for the law.

Still, for the few voters who would have allowed landlords and employers the privilege of not serving or hiring sexual minorities, was such a perspective tantamount to animus against gays and lesbians? As Justice Scalia noted in dissent:

The Court has mistaken a Kulturkampf for a fit of spite Of course it is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even “animus” toward such conduct. Surely that is the only sort of “animus” at issue

72. *Romer v. Evans*, 517 U.S. 620 (1996).

73. COLO. CONST. art. II, § 30b.

74. *Romer*, 517 U.S. at 635.

75. *Id.*

76. *Id.* at 632.

77. EVAN GERSTMANN, *THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION* (1999).

78. *Id.* at 12, 99-102.

here: moral disapproval of homosexual conduct The Colorado amendment does not, to speak entirely precisely, prohibit giving favored status to people who are *homosexuals*; they can be favored for many reasons—for example, because they are senior citizens or members of racial minorities. But it prohibits giving them favored status *because of their homosexual conduct*—that is, it prohibits favored status *for homosexuality*.⁷⁹

Paraphrasing Justice Scalia, is one's disapproval of certain conduct on moral grounds the same as hating that person? Shouldn't a landlord or an employer be able to assert her constitutionally-protected religious convictions by refusing to condone conduct she finds immoral?

But this is where the dissent misunderstands the majority, providing yet another lesson for our *Iqbal* inquiry, as well. Justice Scalia confuses act with status, for Amendment 2, by its terms, would have permitted discrimination based on one's homosexual orientation—or status—as well as action.⁸⁰ For instance, even assuming Coloradans meant to preserve a landlord's right to deny those who engage in same-sex activities a rental apartment, Amendment 2 would have also extended that right to deny those with a "homosexual orientation"—a phrase that connotes status, not conduct. As a practical matter, how would a landlord discern whether an applicant had a "homosexual orientation?" Presumably, this judgment would be based on stereotyped notions of whether the person fit the profile of a homosexual. If so, this analysis draws us back again to *Iqbal*. Just as a landlord would presumably – and unconstitutionally—have relied on stereotypes to assess a person's "homosexual orientation," the Court was hard-pressed to articulate reasonable grounds for this mistreatment based solely on *Iqbal*'s conduct beyond the fact that he shared the same race and religion as the 9/11 hijackers.

Moreover, one does not have to hate a specific group to perpetuate or promote privilege. This is the core lesson of Lu-in Wang's work:⁸¹ discrimination happens by default. It is therefore the Court's job to help guard against discrimination's most invidious forms. Just as it was willing to do in *Loving*, the Court should stand against "White [read: "Majority"] Supremacy" in its broadest sense—that is, the preservation of the status quo worldview based on existing unearned and unexamined privilege. *Plyler* and *Romer* are reminders of how the Court did exactly that, and how it could have found a similarly thoughtful solution in *Iqbal*

79. *Romer*, 517 U.S. 620, 636, 644 (1996) (Scalia, J., dissenting) (emphasis in original).

80. *Id.* at 620 (noting Amendment 2's language).

81. *See supra* part II.

by requiring the government to prove Javid Iqbal's specific tie to terrorism, justifying his mistreatment.

To round out the trilogy begun with *Plyler* and *Romer*, let us take a brief look at *Lawrence v. Texas*.⁸² Under the category of "deviate sexual intercourse," Texas criminalized certain acts engaged in by persons of the same sex.⁸³ For doing what many adult couples do in the privacy of their own homes, John Geddes Lawrence and Tyron Garner were convicted under that law when police discovered them (having responded to what turned out to be a phony report of a weapons violation).⁸⁴ The Court, by a 6-3 margin, ruled the statute unconstitutional for violating plaintiffs' liberty interests under the Due Process Clause.⁸⁵ Examining the history of anti-sodomy laws, the development of its own precedent, the emerging acceptance of private sexual conduct as an important aspect of individual liberty, and the stigma even a minor criminal conviction begets, the Court concluded that the Texas statute furthered "no legitimate state interest which [could] justify its intrusion into the personal and private life of the individual."⁸⁶ As to the justification on moral grounds, the majority borrowed a line from Justice Stevens: "[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."⁸⁷

Just as the antimiscegenation laws struck down in *Loving* promoted "White Supremacy" as a moral notion, laws criminalizing same-sex acts arguably promote "heterosexual supremacy," both terms code words for unearned and unexamined privilege. Similarly, labeling Iqbal a terrorist suspect worthy of special detention based solely on his race, religion, and national origin promote the status quo worldview and leave the government unaccountable for its stereotypical reliance on proxies for disloyalty and dangerousness. Like *Romer* and ostensibly, *Plyler*, *Lawrence* was decided without resort to some higher level of scrutiny. The law's irrational criminalization of private sexual conduct between consenting adults required no special review.

A critic may argue that *Lawrence* and *Iqbal* are similar only at the most general level of abstraction, that the country's concerns over national security in *Iqbal* far outweigh the state's in *Lawrence*. On the

82. *Lawrence v. Texas*, 539 U.S. 558 (2003).

83. *Id.* at 563 (citing TEX. PENAL CODE § 21.06).

84. *Id.*

85. *Id.* at 579.

86. *Id.* at 578.

87. *Id.* at 577-78.

contrary, of the three cases I discussed in this section, *Lawrence* most closely approximates *Iqbal* from the perspective of the state's interest in security. In *Plyler* and *Romer*, the states were concerned with the proper allocation of benefits among persons it deemed not entitled to full (i.e., because undocumented) or "special" (i.e., because of their sexual orientation) protection from the state; these classifications were achieved through the use of civil laws—a civil statute in Texas, a constitutional amendment in Colorado. In *Lawrence*, by contrast, Texas chose to use its criminal law regime, not the civil laws, to target the group at issue. A state's use of its penal system is a strong analogue to the nation's use of its antiterrorism procedures—both regimes seek to maintain the integrity of the polity by subjecting suspects and violators to detention and incarceration, respectively. That Texas saw it fit to criminalize private, consensual adult sex rather than, for example, passing a "no special rights law" of the kind tried in Colorado, suggests the threat homosexual conduct posed in the imagination of the state legislature. And in the end, the *Lawrence* Court did not hesitate to find those fears unfounded by striking the morals-based law, for it did not rationally advance a legitimate concern but rather demonized a class of people for no better reason than that it had the votes to do so. The *Iqbal* Court would have done well to have approached the issues of security and stereotype with the same equanimity and resolve.

IV. *IQBAL* AND THE INDIVIDUAL

Dismantling ensconced privilege, whether in the form of legislation or executive order, requires vigilance by the judiciary. The Court's retreat in *Iqbal* through its citation to *Feeney*'s purposeful intent standard betrays the legacy of its more notable commitments to individual liberty, particularly in its pathbreaking decisions in *Plyler*, *Romer*, and *Lawrence*. Declaring itself bound by formulaic notions of rational basis review, the Supreme Court in *Iqbal* revealed itself a prisoner to a lack of imagination and a purveyor of the status quo worldview. This Essay is a call for the Court to heed, in Lincoln's words, "the better angels of our nature,"⁸⁸ for to not do so mires us in a world of discrimination by default, when the hope and wisdom of an independent judiciary reveals the promise of a democracy more just and fair.

88. Abraham Lincoln, First Inaugural Address (March 4, 1861).