

Conceptions of Equality:
Equal Protection and Statutory
Standards

XIV (1868)

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

Equal Treatment

“...essentially a direction that all persons similarly situated should be treated alike”

FS Royster Guano v. Va. (1920)

Cleburne v. Cleburne Living Center (1982)

Engquist v. Or. Dep't of Agric., (2008)

Why?

1. Rule of Law : rejection of arbitrary power
2. Justification to subjects of power/ equality of status

Not “because I say so”.

3. Cruzan v. Mo. DoH (1990)(Scalia ,concurring)

“What.... protects us, for example, from being assessed a tax of 100% of our income above the subsistence level, from being forbidden to drive cars, or from being required to send our children to school for 10 hours a day...? Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”

What makes two parties “similarly situated”?

Same last name? Same first initial?

SCOTUS: “Rational relation” to “legitimate government interest”

Logan v. Zimmerman Brush Co. (1982) (120 day limit) (Blackmun)
 (“Terminating potentially meritorious claims in a random manner obviously cannot serve to redress instances of discrimination...cannot protect employers from unfounded charges, for the frivolousness of a claim is entirely unrelated to the length of time the Commission takes to process that claim.”)

(Powell) (“ claimants with identical claims, despite equal diligence in presenting them, would be treated differently, depending on whether the Commission itself neglected to convene a hearing within the prescribed time. “)

Machine Learning/ Opaque Heuristics :concatenation of variables that may have no intuitive relation any public reason may be predictive

1. Rule of Law: rejection of arbitrary power **OK:** different probabilities
2. Justification to subjects of power/ equality of status [?]

“Because the program says so”

3. “requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.” [?]

Minority has less observations/ Less leverage to tweak

Race: Equal Opportunity/ Individual merit

Strauder v. West Virginia (1880) Blacks excluded from jury

Not “similarly situated”: Newly freed slaves lack experience, literacy

Response:

“The law in the States shall be the same for the black as for the white”

Hirabayashi v. United States (1943)/ Bolling v. Sharpe (1954)

"Distinctions between citizens solely based because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

MLK (1963) “not be judged by the color of their skin, but by the content of their character.”

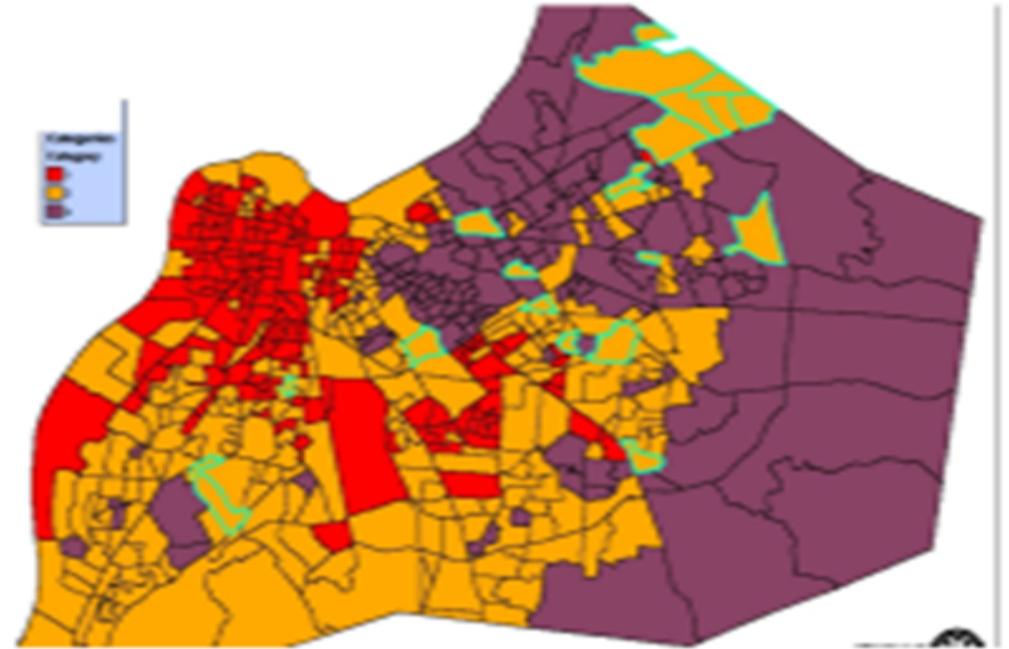
ML can exclude race

But substitute other unchosen characteristics... that map race

Louisville by race



Louisville by income, adult education, % nonwhite



Why are racial classifications “suspect”?

Strauder v. W Va. (1880):

1. **Equal regard:** “the right to exemption from unfriendly legislation against them distinctively as colored”
2. **Equal Status**”exemption from legal discriminations, implying inferiority in civil society”
3. **Equal Protection** “ lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.”

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Color blinded ML conveys overt message of equality

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ML isn't “unfriendly”.

But ML can encode a history of hostility

And it is transparent: always a choice to retain impact

Cf. “Pregnant persons”

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For juries: exclusion from jury systematically imperils safety, property reinforcing deprivation and subordination: “discrete and insular minority”

ML outputs may generate reinforcing cycles of exclusion. Exacerbating excluded groups’ lack of political status to challenge.

Other “suspect” classifications

National Origin Hernandez v. Texas (1974)

Noncitizens Graham v. Richardson(1971)

Sex Reed(1971)--- US v. VA (1996)

Nonmarital Children Mills (1982)

LGB Romer (1992)--- Windsor (2013)

Statutory:

ADEA (1967)

ADA (1990)

RFRA (1993)

The problem of selective indifference and disparate impact

Title VII (1964) “tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.”

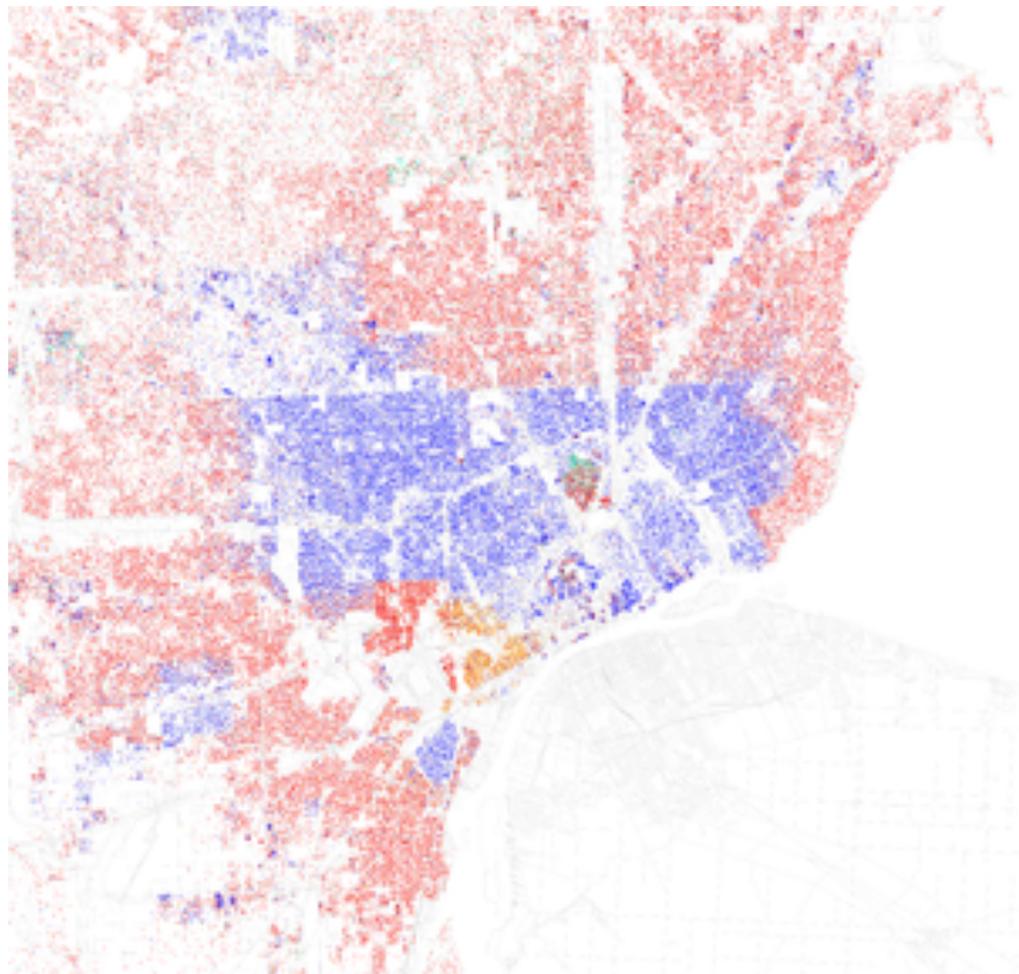
Griggs v. Duke Power (1971) HS grad: NC 1960 34%W 12% B

“may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job-seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”

Title VI (1964) "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

Lau v. Nichols (1974)

Chinese speaking children/ English Curriculum



Ricci v. DeStefano (2009) [1991 Title VII amendment]

1. An employer may defend against [disparate impact] liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity." **ML is predictive.**

2. Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs. “

ML is transparent: alternatives are available.

What level of increased cost or decreased predictivity

“serves.... legitimate needs”?

Title VI guidance DoJ 1998: “a substantial legitimate justification for the challenged practice and whether there exists an alternative practice that is comparably effective with less of a disparate impact”