ARTICLES

THE USUAL SUSPECT CLASSIFICATIONS: CRIMINALS, ALIENS AND THE FUTURE OF SAME-SEX MARRIAGE

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"It is worth taking the Court at its word, at least to see where that can lead us."[1]

ABSTRACT

In this Article, I argue for a new understanding of the immutability factor employed by courts in determining which classifications ought to receive suspect status under the Equal Protection Clause. Drawing on the process-based foundations of the Equal Protection Clause, this new understanding defines immutable traits not as traits that cannot be changed, but as traits that are in the words of the Supreme Court in Frontiero v. Richardson, *mere "accident[s] of birth."*[2] *In contrast, courts and scholars typically center the immutability inquiry on an individual's technical ability to exit a particular class, which has led to inconsistencies in applying equal protection doctrine to criminality, alienage, and sexual preference classifications.*

Understanding immutability in this way is vital given the ongoing litigation surrounding same-sex marriage. Courts, in addressing whether sexual preference can constitute a suspect classification, all too often get bogged down in biological studies or psychological profiling in an attempt to determine whether sexual preference is something that can be changed. In doing so, courts often import definitions of immutability from other doctrinal contexts, such as asylum or Title VII law. Doing so simply confuses the type of inquiry underlying the principles driving the Supreme Court's process-based approach to the Equal Protection Clause.

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1 Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1573 (2002).

2 Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

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INTRODUCTION

If trends in legal scholarship serve as any indication, scholars are hoping that the immutability factor simply disappears. The list of complaints with the immutability factor's role in constructing suspect classifications for Equal Protection purposes continues to grow,[3] and the list of defenders of immutability as a useful doctrinal tool has nearly shrunk to zero.[4] Some claim that immutability is the doctrinal equivalent of the appendix—a hanging appendage that no longer serves any useful doctrinal purpose.[5] Indeed, they claim, it has no real relationship with the true organizing principle of the Equal Protection Clause—to protect precariously positioned minorities from failures of the democratic process.[6] Other scholars have noted that immutability seems to be a proxy for the relevance of a particular trait to a given governmental enactment, and a poor proxy at that.[7] Such arguments typically end by calling upon courts to directly consider any number of substantive principles that are viewed as advancing the underlying logic of the Equal Protection Clause without considering whether or not the traits in question are immutable.[8]

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3 *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 150 (1980); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEXUALITY 1 (2003); E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 18 U. HAW. L. REV. 571, 598 (1996) ("A careful analysis of the Supreme Court's equal protection jurisprudence reveals . . . that immutability of a characteristic is neither a prerequisite to nor a sufficient condition for heightened scrutiny of a classification relating to that characteristic."); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485 (1998); Marc R. Shapiro, Comment, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409 (2003); *see also infra* notes 77–96 and accompanying text.

4 *See, e.g.*, Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 647–48 (2001) (noting that "[i]t is difficult to find the last academic defense of immutability or the last call for stressing it in constitutional litigation"); Yoshino, *supra* note 3, at 491 (describing attacks on immutability as "flog[ging] a dying horse"); Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 942 (1998) ("Arguments for suspect classification status for sexual orientation based on immutability have been almost completely rejected.").

5 *See infra* notes 97–114 and accompanying text.

6 *See infra* notes 47–54 and accompanying text.

7 *See* ELY, *supra* note 3; *see also infra* Section VII.

8 *See, e.g.*, J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2323–24 (1997) (arguing that the real question for classification ought to be whether the particular characteristic can sustain a stable social meaning); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996); Owen M. Fiss, *Groups and the Equal Protection*

And yet, even in the face of all this criticism, the immutability factor continues to animate judicial decisions, serving as a focal point in the ongoing litigations over state statutory schemes prohibiting same-sex marriage.[9] Indeed, immutability received its most recent attention in the California,[10] Connecticut,[11] and Iowa[12] Supreme Court de-

Clause, 5 PHIL. & PUB. AFF. 107, 155 (1976); Halley, *supra* note 3, at 50–63 (adopting First Amendment distinctions between speech and conduct in order to determine when interference with legislation on substantive grounds is legitimate); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994); Tribe, *supra* note 3, at 1066–67 (arguing that substantive justifications for the suspect classification status lurk behind the standard process-based account); Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1532–34 (1989) (arguing in favor of granting homosexuality suspect status on multiple grounds including the equal worth of human beings); *cf.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 533 (2004) (arguing in favor of a new context-sensitive test for evaluating potential Equal Protection violations, including consideration of "whether the classification reflects disapproval, dislike, or stereotyping of the class").

9 *See, e.g.*, Thomasson v. Perry, 80 F.3d 915, 939 (4th Cir. 1996) (Luttig, J., concurring) (arguing that "Don't Ask, Don't Tell" discriminates on the basis of a combination of both status and conduct, which prevents the underlying classification from being termed immutable); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."); Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (noting that immutability "may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them," thereby making sexual orientation immutable); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."); Equal. Found. of Greater Cincinnati, Inc., v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994) (holding that sexual orientation classifications are subject to heightened scrutiny because, inter alia, sexual orientation is a characteristic "beyond the control of the individual"), *rev'd* 54 F.3d 261 (6th Cir. 1995), *vacated* 518 U.S. 1001 (1996), *reinstated on reh'g* 128 F.3d 289 (6th Cir. 1997); Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (defining immutable traits as those that can be changed "only . . . at a prohibitive cost" and finding sexual orientation to be immutable), *rev'd* 976 F.2d 623 (10th Cir. 1992); Dean v. District of Columbia, 653 A.2d 307, 330 (D.C. 1995) (concluding that "the question whether appellants' constitutional rights to due process and equal protection of the laws, while not presenting any genuine issue of material 'adjudicative' fact in this case, requires . . . some findings about the origins of homosexuality and the extent to which sexual orientation is immutable"); Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006) (holding that plaintiffs had failed to demonstrate that sexual orientation was an immutable trait and therefore had failed to satisfy all necessary elements for achieving suspect status).

10 *In re* Marriage Cases, 183 P.3d 384, 442–43, 452 (Cal. 2008). The issue of same-sex marriage has remained hotly contested because of the continued controversy over California's Proposition 8, which effectively overturned the California Supreme Court's ruling that the statute prohibiting same-sex marriage was unconstitutional under California's state constitution. *See* CAL. CONST., art. I, § 7.5 ("Only marriage between a man and a woman is valid or recognized in California."); Text of Proposed Laws, *available at*

cisions considering same-sex marriage, and has been an important piece of any number of decisions considering the issue.[13] Moreover, given the sharp increase in litigation surrounding same-sex marriage, the number of cases focusing on immutability is clearly slated for an upswing.[14]

But understanding the persistence of immutability first requires defining the term. While some authors and judges often adduce the dictionary definition in order to facilitate analysis,[15] the very definition of the term remains deeply ambiguous. In this Article, I argue that it is confusion over the basic definition of immutability that has led, in part, to the criticism of its inclusion in equal protection analy-

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http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf; *see also* State Election Results, Election Center 2008, CNN.com, http://www.cnn.com/ELECTION/2008/results/state/#CA (last visited Oct. 3, 2009). The California Supreme Court subsequently upheld Proposition 8 in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *see also* News Release, Judicial Council of California, California Supreme Court Takes Action on Proposition 8 (Nov. 19, 2008), *available at* http://www.courtinfo.ca.gov/presscenter/newsreleases/NR66-08.PDF; Jesse McKinley, *Top Court in California Will Review Proposition 8*, N.Y. TIMES, Nov. 20, 2008, at A20.

11 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008).

12 Varnum v. Brien, 763 N.W.2d 862, 886–87 (Iowa 2009).

13 The issue of immutability was emphasized in the following decisions: *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006); and *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

14 Indeed, in the last ten years, an increasing number of states have considered the question, in various forms, of whether statutory provisions prohibiting same-sex marriage are constitutional. Examples of these state decisions include: *Standhardt v. Superior Court ex rel. County of Maricopa*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (holding that the state constitution did not guarantee a right to same-sex marriage); *Marriage Cases*, 183 P.3d 384; *Kerrigan*, 957 A.2d at 427–28 ("It is evident, moreover, that immutability and minority status or political powerlessness are subsidiary to the first two primary factors because . . . the Supreme Court has granted suspect class status to a group whose distinguishing characteristic is not immutable."); *Frandsen v. County of Brevard*, 800 So. 2d 757, 760 (Fla. Ct. App. 2001) (holding that the state's statutory scheme, understood as prohibiting same-sex marriage, did not violate the state constitution), *aff'd* 828 So. 2d 386 (Fla. 2002); *In re Estate of Hall*, 707 N.E.2d 201, 206 (Ill. App. Ct. 1998) (prohibiting same-sex marriage); *Morrison v. Sadler*, 821 N.E.2d 15, 38 (Ind. Ct. App. 2005) (holding that Indiana's Defense of Marriage Act did not violate the state constitution); *Varnum*, 763 N.W.2d 862; *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006) (holding that prohibiting same-sex marriage does not violate the state constitution); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (holding that New York's marriage statutes, which do not permit same-sex marriage, were not unconstitutional); *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 972–74 (Mass. 2003) (holding that denying a marriage license to a same-sex couple was unconstitutional under the Massachusetts constitution); *Conaway*, 932 A.2d at 635 (upholding the state's statutory scheme that defined marriage as between a "man" and a "woman"); *Andersen*, 138 P.3d at 990 (holding that Washington's Defense of Marriage Act did not violate the state constitution).

15 *See infra* note 77.

sis. Indeed, this confusion goes far beyond debates over functional versus constructive immutability.[16] Scholars and courts alike regularly demonstrate a basic uncertainty as to whether an immutable trait is a trait that has not been chosen,[17] a trait that cannot be changed,[18] or a trait that an individual should not be forced to change.[19]

The continued division over the very definition of immutability can be seen in the California, Connecticut, and Iowa state supreme court decisions addressing statutory provisions prohibiting same-sex marriage.[20] While all three courts, on the surface, advanced similar definitions of the term,[21] their analyses of the immutability factor clearly indicate three very different understandings of what immutability means.[22]

On the one hand, the Iowa Supreme Court held that "the immutability 'prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing

16 *See* Knauer, *supra* note 3, at 74 (noting that "[t]he handful of judicial opinions that have advocated heightened scrutiny for gay men and lesbians have not required strict immutability, but have instead focused on whether sexual orientation is difficult to change"); *see generally* Marcosson, *supra* note 4, at 650 (arguing for "a new vision of immutability, . . . 'constructive immutability,' which overcomes the objections of social construction theory by showing that a characteristic can be, for all relevant legal and political purposes, immutable even if it is the product of social construction").

17 *See, e.g.*, United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999); United States v. Harris, 537 F.2d 563, 565 n.2 (1st Cir. 1976); Carbonaro v. Reeher, 392 F. Supp. 753, 757 (E.D. Pa. 1975); *cf.* Plyler v. Doe, 457 U.S. 202, 219 n.19 (1982) (focusing on the voluntariness of entering a classification). For a discussion of *Plyler* and its use of an entrance-based definition of immutability, see *infra* notes 203–09 and accompanying text.

18 This is of course the dominant definition. *See infra* note 77 (collecting examples).

19 *See, e.g.*, Hernandez-Montiel v. I.N.S., 225 F.3d 1084, 1093 (9th Cir. 2000); Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998); Jantz v. Muci, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (noting that sexual orientation is not "*easily* mutable") (emphasis added) *rev'd* 976 F.2d 623 (10th Cir. 1992); *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73–74 (B.I.A. 2007); *In re* Acosta, 19 I. & N. Dec. 211 (B.I.A. 1985); *In re* Marriage Cases, 183 P.3d at 442.

20 *See supra* notes 10–12.

21 *Marriage Cases*, 183 P.3d at 442–43 (defining an immutable trait as a trait over which an individual does not have "control"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 436 (Conn. 2008) (defining immutability as "[t]he degree to which an individual controls, or cannot avoid, the acquisition of a defining trait, and the relative ease or difficulty with which a trait can be changed") (quoting Dean v. District of Columbia, 653 A.2d 307, 346 (D.C. 1995)); Varnum v. Brien, 763 N.W.2d 862, 892 (Iowa 2009) ("A human trait that defines a group is 'immutable' when the trait exists 'solely by the accident of birth,' or when the person with the trait has no ability to change it.") (citations omitted).

22 *Marriage Cases*, 183 P.3d at 442–43; *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d at 892–93.

to change [it].'"[23] In other words, the Iowa Supreme Court held that because sexual orientation is so central to an individual's identity, sexual orientation is, in fact, immutable for the purposes of suspect classification analysis. In this way, the argument from identity helped *satisfy* the immutability inquiry.

In contrast, the Connecticut Supreme Court appears to have concluded that the identity argument explains not why the immutability factor was satisfied, but why sexual orientation could be deemed a suspect classification even if the immutability factor were not satisfied. In doing so, the Connecticut Supreme Court explained that immutability is a factor that is meant to aid courts in determining whether particular discrimination is "unfair,"[24] and whether the members of the class are truly being "victimized."[25] In turn, the Connecticut Supreme Court concluded that "[i]n view of the central role that sexual orientation plays in a person's fundamental right to self-determination," sexual orientation classifications should receive heightened scrutiny.[26] And, the Connecticut Supreme Court believed that because the "identifying trait is so central to a person's identity . . . it would be abhorrent for government to penalize a person for refusing to change it."[27] Accordingly, the court believed that "*it* [*was*] *not necessary* . . . to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable."[28] In this way, the identity argument appears to have explained why the Connecticut Supreme Court did not believe sexual orientation's immutability was relevant for its suspect-classification analysis.

The California Supreme Court's decision is ambiguous on this point, failing to clarify exactly how it understands the impact of the identity argument on the application of the immutability factor. Thus, the California Supreme Court stated that "[b]ecause a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her

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23 *Varnum*, 763 N.W.2d at 893 (quoting *Kerrigan*, 957 A.2d at 438) (internal quotation marks and citations omitted).

24 *Kerrigan*, 957 A.2d at 436 (quoting High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting)).

25 *Id.* (quoting Dean v. District of Columbia, 653 A.2d at 346 (Ferren, J., concurring in part and dissenting in part)).

26 *Id.* at 438.

27 *Id.* (quoting Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (alterations, citation, and internal quotation marks omitted)).

28 *Id.* at 437 (emphasis added).

sexual orientation in order to avoid discriminatory treatment."[29] In supporting this proposition, the California Supreme Court relied on a Ninth Circuit decision addressing the definition of immutability, which provided an alternative definition of immutability in the context of asylum law: "[s]exual orientation and sexual identity . . . are so fundamental to one's identity that a person should not be required to abandon them."[30] In reaching this conclusion, the California Supreme Court did not explain why the fact that sexual orientation is so important to an individual's identity entails not requiring sexual orientation to be immutable. This may be because—as per the Iowa Supreme Court—when a trait is fundamental to an individual's identity, it is considered, for the purposes of suspect-classification analysis, immutable, or because—as per the Connecticut Supreme Court—when a trait is fundamental to an individual's identity, it is not required to be immutable.

As these examples demonstrate, the definition of immutability remains contested, especially in its relationship to arguments about the centrality of sexual orientation to individual identity. In merging arguments from identity with the definition of immutability, courts appear to struggle with defining immutability, unsure as to whether a trait is immutable only when it is a trait that the individual can control, whether a trait is central to an individual's identity, both or neither. And, as the aforementioned state supreme court decisions demonstrate, this is even true among courts that reach near identical outcomes;[31] other courts, especially those reaching contrary outcomes, remain at odds over whether traits are immutable when the traits have not been freely adopted, or alternatively when the traits cannot be changed.[32] Indeed, the divergence of various definitions of the term immutability has left courts in a quandary when confronting the term.[33]

This Article argues that this confusion stems from, in part, a failure to recognize that the definition of immutability is clearly contextual. Already, immutability is understood differently when used in the Title VII context,[34] than when used in the asylum context.[35] But

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29 *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008).

30 *Id.* (citing, inter alia, Hernandez-Montiel v. I.N.S. 225 F.3d 1084, 1093 (9th Cir. 2000)).

31 *Marriage Cases*,183 P.3d at 442–43; *Kerrigan*, 957 A.2d at 438; Varnum v. Brien, 763 N.W.2d 862, 892 (Iowa 2009).

32 *See infra* notes 77, 191–92.

33 *See supra* notes 17–19 and accompanying text (outlining the various definitions of the term immutability).

34 *See infra* Part V.B.

35 *See infra* Part V.A.

many courts have not appreciated the significance of this context-sensitivity, importing definitions from contexts whose internal logic is not easily reconciled with the logic driving equal protection analysis.[36] By importing conflicting definitions, courts have obscured the definition of immutability in the equal protection context, making it difficult to understand the link between the immutability factor and the underlying logic of suspect-classification analysis.

Accordingly, the twin goals of this Article are to highlight the contextual character of the immutability factor and to explore the potential link between immutability and the underlying logic of the Equal Protection Clause.[37] By mining the inner-logic of the equal protection doctrine—and not by importing incompatible definitions from other doctrinal contexts—I argue that the immutability factor in the equal protection context is not concerned with whether or not a trait can be changed, but whether an individual chose the trait in question. Thus, the immutability inquiry in the equal protection context is not concerned with whether people can exit a classification, but whether they chose to enter the classification.

Using immutability to focus on entrance into a classification, as opposed to exit from it, ensures that immutability advances one of the primary principles underlying the suspect classification inquiry: determining whether imposing "legal burdens" on the classification "bear[s] some relationship to individual responsibility."[38] Indeed, it is because of the unique purpose of deploying the immutability factor in the equal protection context that the Supreme Court linked immutable traits to "accident[s] of birth";[39] it is also why the D.C. Circuit has noted on one occasion that "the 'immutable characteristic' notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a trait 'determined *solely* by accident of birth.'"[40] Defining immutability in this way helps focus courts' attention on whether the classification in question could have been employed legitimately and, in turn, highlights the way in which the immutability factor advances the underlying process-based framework of the Equal Protection Clause.

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36 *See infra* notes 153–58 and accompanying text.

37 *See infra* notes 165–92 and accompanying text.

38 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

39 *Id.*

40 Quiban v. Veterans Admin., 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (quoting Schweiker v. Wilson, 450 U.S. 221, 229 n.11 (1981)).

This definitional shift is of utmost importance to the continued litigation surrounding same-sex marriage. Much of the debate concerning immutability and same-sex marriage has gotten bogged down in biological and psychological studies regarding whether sexual preference is the type of trait that can be changed.[41] While some courts have embraced such questions,[42] understanding immutability in the equal protection context as completely uninterested in whether individuals can change a trait ensures that courts avoid the value-laden waters of psycho-biology in favor of legal standards more familiar to judicial determinations. As a result, reorienting immutability as concerned with entrance into a classification is vital if courts addressing the continued litigation surrounding same-sex marriage are to apply a set of doctrines that coheres with the Equal Protection Clause's process-based paradigm.

To do so, I begin, in Parts II through IV, by presenting the process-based account of equal protection. While this account is far from free of critics,[43] it persists, and continues to drive the "traditional indicia of suspectedness" which are consistently considered by the Court in determining whether or not a particular classification ought to be considered suspect.[44] Doing so also serves to expose many of

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41 For a general example, see Edward Stein, *Born That Way? Not a Choice? Problems with Biological and Psychological Arguments for Gay Rights* 5 (Benjamin N. Cardozo Sch. of Law, Cardozo Legal Studies Research Paper No. 223, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538; *see also* David Orgon Coolidge, *Should the Government Recognize Same-Sex Marriage? Session Two: Legal, Equitable, and Political Issues*, 7 U. CHI. L. SCH. ROUNDTABLE 33, 40–42 (2000); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 502–03 (1994); Edward Stein, *The Relevance of Scientific Research About Sexual Orientation to Lesbian and Gay Rights*, 27 J. HOMOSEXUALITY 269 (1994) (discussing the relevance of scientific research to questions of lesbian and gay rights); Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 997 (2007) (focusing on "the biological *effects* of homosexual behavior on human health"); Rachel Duffy Lorenz, Comment, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. REV. 523, 528–29 (2005).

42 *See, e.g.*, Dean v. District of Columbia, 653 A.2d 307, 330–31 (D.C. 1995) (considering "the nature and causes of homosexuality"); *see also* Conaway v. Deane, 932 A.2d 571, 615–16 n.57 (Md. 2007) (discussing scientific studies regarding sexual preferences and biological "immutability").

43 *See infra* note 55.

44 The Supreme Court has consistently relied upon what it has termed the "traditional indicia of suspectedness," considering whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974) (internal quotation marks omitted) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)); *see also* Mathews v. Lucas, 427 U.S. 495, 506 n.13 (1976) (same); Mass. Bd. of

the internal fissures in equal protection doctrine, highlighting the need to reconsider the way in which the immutability factor fits within the overall structure of the Equal Protection Clause.

Next, in Part V, I examine the definitions of immutability in other areas of law, specifically in the Title VII and asylum contexts. In turn, I explain how different definitions of immutability fit within their respective areas of law, given the principles driving each of these legal doctrines. Demonstrating how these various definitions of the term immutability derive their definitions from their contexts exposes the inherent fallacy of importing definitions of the term immutability from other contexts. By noting that immutability's definition is contextual, I point to the final task of this Article: to provide a definition of immutability that coheres with the core principles of the Equal Protection Clause.

Taking up this project in Part VI, I begin by harkening back to the Supreme Court's initial articulation of the immutability factor in *Frontiero v. Richardson*.[45] With our newfound emphasis on context, it is not surprising that the Supreme Court crafted its unique understanding of immutability for the equal protection context in its initial articulation of the factor, describing the term as referring to accidents of birth. It is this definition of immutability, focused on entrance into the classification, that coheres with the process-based understanding of the Equal Protection Clause underpinning the tiers of scrutiny approach currently employed in suspect classification analysis. In asking if a trait is an accident of birth, courts are able to successfully use immutability as a proxy to determine whether a particular trait is relevant to the statute or governmental policy in question. In contrast, I argue that the other definitions of immutability—whether or not an individual can or should be required to change a trait and whether an individual has control over a trait—accord with the overall purposes of other areas of law, such as asylum and Title VII law respectively.

In Part VII, I explore how this definition of the immutability factor obviates much of the criticism leveled against its use in suspect-classification analysis. In turn, I reconnect immutability to its con-

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Ret. v. Murgia, 427 U.S. 307, 313 (1976) (same). These indicia continue to be employed by the Federal Courts of Appeals. For cases illustrative of this principle, see Sonnier v. Quarterman, 476 F.3d 349, 368 n.17 (5th Cir. 2007); Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 354 (1st Cir. 2004); Gary v. City of Warner Robins, 311 F.3d 1334, 1337 n.6 (11th Cir. 2002); Save Palisade FruitLands v. Todd, 279 F.3d 1204, 1210 (10th Cir. 2002); Miller v. United States, 73 F.3d 878, 881 (9th Cir. 1995).

45 411 U.S. 677, 686–87 (1973).

text, providing an account of how the Court's definition of the term fits with the overall process-based scheme of the Equal Protection Clause. Finally, in Part VIII, I consider how this new understanding of the immutability factor frames the debate over same-sex marriage by changing the way we evaluate whether sexual preference should be considered a suspect classification.

I. REVISITING THE CANNON: SUSPECT CLASSIFICATIONS AS DEMOCRACY ENHANCING[46]

In many ways, the story of suspect classifications begins with age-old concerns regarding the "countermajoritarian difficulty."[47] At its core, the countermajoritarian difficulty is meant to engage "the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy."[48] In the context of the Fourteenth Amendment, the answer has been to revisit the way in which the Equal Protection Clause can be construed as a democracy-enhancing principle, one that focuses on the way in which judicial review can explore and rectify the potential pitfalls of an unbridled democratic system.[49] Thus, one concern regarding democracy left unchecked is the potential that certain minority groups will simply not be represented in the democratic process; moreover, the majority might impose severe

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46 For a similar discussion as that found below and in Part II, see Michael A. Helfand, *How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine*, 17 WM. & MARY BILL RTS. J. 607, 614–18 (2009).

47 This term was famously coined by Alexander Bickel in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962). For a comprehensive review and analysis of the history of the countermajoritarian difficulty, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *Countermajoritarian, Part Five*]. For additional authority, see BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS (1998); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373 (1998); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

48 See Friedman, *Countermajoritarian, Part Five*, *supra* note 47, at 155.

49 This was most famously the aim of ELY, *supra* note 3, at 135–79.

harms and restrictions on a particular minority group given the potential for festering animus towards that group. Indeed, this concern is as old as the Constitution itself.[50]

Construing the Equal Protection Clause as an answer to the countermajoritarian difficulty begins with footnote four in *United States v. Carolene Products Co.*[51] On the Court's analysis, "discrete and insular minorities may be a special condition," where legislation directed at such minorities should be scrutinized under the Fourteenth Amendment in order to insure that legislation does not "curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[52] In *Carolene Products*, the Court also gave some examples of what it might mean to be a "discrete and insular minority": religious, national and racial minorities.[53]

By sorting out particular minorities as worthy of particular protections, the Court both emphasized the potential problems of unbridled democracy and its potential solution. Using the Equal Protection Clause to subject certain legislation to "more searching judicial inquiry"[54] could fend off any legislative initiatives on the part of the majority intended to politically debilitate minorities from getting a fair shake in the political arena.

But this is all quite vague. The Court's first foray into some scrutiny-based approach to the countermajoritarian difficulty left two questions unanswered. First, what were the criteria for inclusion into the category of "discrete and insular minorities;" second, what would the contours of a scrutiny doctrine look like? It is into this vacuum that the now well-rehearsed suspect classification and strict scrutiny doctrines have been introduced.

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50 *See* THE FEDERALIST NO. 10, at 40 (James Madison) (Terence Ball ed., Cambridge Univ. Press 2003) (noting that "measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority").

51 304 U.S. 144, 153 n.4 (1938). This is not to say that such reasoning is correct, only that it is the route most typically traveled. Indeed, the Court has repeatedly referenced footnote four in many of its Equal Protection cases. *See* Adarand Constructors v. Pena, 515 U.S. 200, 218 (1995) (citing footnote four of *Carolene Products*); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 495 (1989) (same); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 288 (1978) (same); Graham v. Richardson, 403 U.S. 365, 372 (1971) (same). However, Bruce Ackerman has famously argued that the "discrete and insular minority" analysis in footnote four ignores the more precarious position of "anonymous and diffuse" groups. *See* Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985).

52 *Carolene Prods.*, 304 U.S. at 153 n.4.

53 *Id.*

54 *Id.*

II. SUSPECT CLASSIFICATIONS AND STRICT SCRUTINY: THE PROCESS-BASED UNDERSTANDING

On the canonical story we have been recounting thus far, the doctrinal innovation of strict scrutiny links up directly with footnote four in *Carolene Products*.[55] It is on this account that the Court has described strict scrutiny as a tool "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[56] In other words,

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55 I refer here to the process-based understanding of the Equal Protection Clause as "canonical" not because it is a universally accepted framework to understand the Equal Protection Clause. To the contrary, scholars and judges continue to debate the merit of other interpretive paradigms as applied to the Equal Protection Clause. Most notably, there has been ample debate over the coherence of originalism as applied to the Equal Protection Clause. For a discussion along these lines, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14 (1971); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). In this Article, I do not attempt to resolve this debate besides to note some of originalism's most formidable critics. For such critiques, see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991); Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

Instead, when I describe the canonical account of the Equal Protection Clause as process-based, I mean to express my own view that the dominant account that has animated the Supreme Court's majority decisions regarding the Equal Protection Clause are best described as grounded in a process-based theory. Of course, individual justices have expressed their own affinities for originalism. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 328–29 n.365 (1997) (recounting the affinities for originalism of various Supreme Court justices). But here, I try to present the dominant theory that explains the Court's decision. It is of this fact I hope to, among other arguments, convince the reader in this Article. In turn, many of the proceeding arguments are built off of this process-based theory. In this way, the conclusions of this Article are predicated on my view that a process-based theory, for the most part, has animated the Court's Equal Protection decisions.

56 *J. A. Croson Co.*, 488 U.S. at 493. Jed Rubenfeld, however, has noted that the Supreme Court has advanced two conflicted views regarding the purpose of strict scrutiny. *See* Rubenfeld, *supra* note 55, at 428 (describing the shift in strict scrutiny). While on the one hand the Court often emphasizes the way in which strict scrutiny can smoke out illegitimate purposes, it has also stated that strict scrutiny ensures that the goal being pursued is important enough to justify the *prima facie* equal protection violation. *Cf.* Korematsu v. United States, 323 U.S. 214, 219–20 (1944). Rubenfeld is critical of this second approach to strict scrutiny in part because he understands rights as being the type of legal mechanism whose violation cannot be justified. Moreover, the implications of the justificatory account do not, in Rubenfeld's view, cohere with the multiple tiers of scrutiny invoked by the court. *See generally* Rubenfeld, *supra* note 55, at 428. For a response, see Helfand, *supra* note 46.

strict scrutiny is used to investigate whether legislation containing a suspect classification on its face does in fact violate the Equal Protection Clause. In doing so, it unmasks invidious legislation as enactments of the majority intended to harm a discrete and insular minority. But who qualifies as a discrete and insular minority? On the canonical account, groups that evidence a likelihood to fall victim to majoritarian politics are included; and it is these groups that are deemed protected groups whose classifications are considered suspect.

It is thus unsurprising that at the core of the Supreme Court's case law determining which classifications are suspect, we find the following "traditional indicia of suspectness: the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[57] Thus, either past history or current political demographics give us good reason to believe that certain protected classes have not been appropriately represented in the political arena; in turn, animus, and not deliberation, may serve as the motivation driving a particular suspect classification on the face of a given piece of legislation.[58]

But the purely process-based story cannot account for all the suspect classification criteria. Indeed, the Court, in *Frontiero v. Richardson* announced another set of criteria for qualifying to be a suspect classification:

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .' And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of

57 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973).

58 *Korematsu*, 323 U.S. at 216 ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

> females to inferior legal status without regard to the actual capabilities of its individual members.[59]

This statement by the Court is deeply puzzling. If we construct suspect classifications because we are concerned about the ability of particular groups to participate in the democratic process, why include immutability on the list of criteria? It seemingly has no relationship to our process-based account. At first glance, it is hard to envision why a group having an immutable trait makes them more likely to be left out—or discriminated against—by the majority through the political system; put another way, why should a group with an immutable trait be considered more "discrete and insular"? This tension—what we might call the immutability problem—has occupied a wide range of scholars, intent on unpacking the rationale behind using immutability as a factor in equal protection analysis.[60] We will turn to some of these suggestions shortly.

To be sure, it is not only in the secondary literature that we find some uneasiness regarding immutability. The Supreme Court itself has backed off on applying the immutability factor in a number of cases; indeed, it seems most accurate to say that the Court's articulating of the immutability factor was done haltingly. Consider the following. The immutability factor was announced in *Frontiero v. Richardson*, a case decided on May 14, 1973.[61] Interestingly, the Court decided another equal protection case two months earlier—*San Antonio Independent School District v. Rodriguez*—a case that considered whether wealth discrimination constituted a classification of a protected class.[62] One of the holdings of the case was that wealth classifications are not subjected to strict scrutiny because they do not constitute discrimination against a suspect class.[63] In light of the reasoning soon to be announced in *Frontiero*, we might have expected the Court to trumpet the fact that wealth discrimination is not an immutable characteristic, thus bolstering the Court's contention that it is not a suspect class.[64] Indeed, such an argument would have fit perfectly with the primary holding of the case. And yet, the Court completely

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59 *Frontiero*, 411 U.S. at 686–87 (internal citations and footnotes omitted).

60 *See, e.g.*, ELY, *supra* note 3, at 150; Halley, *supra* note 3; Richards, *supra* note 41 at 501–08; Yoshino, *supra* note 3.

61 *See Frontiero*, 411 U.S. at 686–87.

62 411 U.S. 1 (1973).

63 *Id.* at 28.

64 Indeed, the Ninth Circuit, in addressing a statute criminalizing homelessness, has noted that homelessness is not immutable. *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006).

ignored immutability, focusing instead solely on the lack of the "traditional" process-based criteria for suspect classification.[65]

There have been other important instances where the Court has ignored the immutability factor in deciding whether a particular group ought to be considered a suspect class. In *Massachusetts Board of Retirement v. Murgia*, the Court considered whether the elderly should be deemed a suspect classification.[66] Like in *San Antonio Independent School District*, the Court refused to expand the list of suspect classes.[67] And, like in *San Antonio Independent School District*, the Court ignored the immutability factor in its analysis.[68] While deciding how to apply immutability to age is far from a simply matter, one would have expected some discussion of the factor by the Court.

Even more notable is that the Court, at times, has explicitly questioned whether immutability ought to remain a factor in compiling a list of suspect classes. In *City of Cleburne v. Cleburne Living Center*, the Court addressed whether a zoning ordinance prohibiting a home for the "mentally retarded" violated the Equal Protection Clause.[69] The first step of such an analysis required determining whether the mentally retarded should be deemed a suspect class.[70] The Court's analysis noted, in passing, that mental retardation was an immutable characteristic, but such a characteristic was still a legitimate consideration of the zoning ordinance: "[the mentally retarded] are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one."[71] In justifying this proposition, the Court cited John Hart Ely's attack on the immutability factor, noting its irrelevance to the process-based paradigm of suspect classes.[72] It is difficult to see the Court's analysis and citation as evincing anything but an extraordinary lack of comfort with the immutability factor.

Lower courts, in dealing with similar equal protection claims to suspect status, have taken note of the Court's ambivalence towards the immutability factor.[73] For example, Judge Norris's concurrence

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65 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

66 427 U.S. 307 (1976).

67 *Id.* at 312–14.

68 *Id.*

69 473 U.S. 432 (1985).

70 *Id.* at 439–47.

71 *Id.* at 442.

72 *Id.* at 442–43 n.10.

73 *See* Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997) (citing *Cleburne* and noting that "[i]mmutability is merely one of several possible indications that a classification is likely to reflect prejudice. Indeed, though alienage is not immutable, aliens are accorded

in the Ninth Circuit's *Watkins v. United States Army* expresses serious ambivalence in considering whether immutability is relevant to equal protection analysis, noting that the Court has both at times cast doubt on using the immutability factor[74] and at times simply refrained from doing so itself.[75] As Judge Norris makes clear, immutability's place in equal protection doctrine is unstable, primarily because its relationship to the process-based core of the suspect classification doctrine remains unresolved.[76]

III. ASSESSING THE PROCESS-PLUS-IMMUTABILITY PARADIGM: THE CRIMINAL PROBLEM

Much of the problem with immutability stems from the lack of a legal definition or defined role. Courts and scholars typically have understood an immutable trait to refer to a trait that cannot be changed.[77] Unfortunately, given prior application of the immutability

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heightened scrutiny"), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998); Equal. Found. of Greater Cincinnati, Inc., v. City of Cincinnati, 860 F. Supp. 417, 434 n.13 (S.D. Ohio 1994) (recognizing "that the Supreme Court has demonstrated some skepticism as to the relevance of the immutability factor"), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996), *reinstated on reh'g*, 128 F.3d 289 (6th Cir. 1997); Jantz v. Muci, 759 F. Supp. 1543, 1548 n.5 (D. Kan. 1991) (noting that the Supreme Court has refrained from applying the immutability factor on a number of occasions), *rev'd*, 976 F.2d 623 (10th Cir. 1992).

74 875 F.2d 699, 725–26 (9th Cir. 1989) (Norris, J., concurring).

75 *Id.*

76 *Id.*

77 *See* Startzell v. City of Philadelphia, No. 05-05287, 2006 U.S. Dist. LEXIS 34128, at *20 n.9 (E.D. Pa. May 26, 2006) (concluding that characteristics such as a person's religion are not immutable and defining immutability: "not subject to or susceptible of change; unchangeable, unalterable, changeless" (internal quotation marks omitted)) (quoting OXFORD ENGLISH DICTIONARY (2d ed. 1989)); A.G.G. Enters. v. Washington County, 145 F. Supp. 2d 1215, 1227 (D. Or. 2001) (arguing that the trait in question was not immutable because it was subject to change); D'Amario v. Russo, 718 F. Supp. 118, 123 (D.R.I. 1989) (defining immutable as "not capable of change"); Tanner v. Oregon Health Scis. Univ., 157 Or. App. 502, 522 (Or. Ct. App. 1998); Baker v. State, 744 A.2d 864, 892–93 (Vt. 1999) (Dooley, J., concurring); Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 59 (2005) ("Immutability should be distinguished from the related concept of accountability which addresses whether the individual acquired the characteristic as a result of his or her own choices."); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 723 (2001) (noting that "[o]ne difficulty with th[e] argument is that 'performance' is not an immutable characteristic. It is, by definition, changeable."); Pamela J. Smith, *Part I—Romantic Paternalism—The Ties That Bind Also Free: Revealing the Contours of Judicial Affinity for White Women*, 3 J. GENDER RACE & JUST. 107, 170-71 (1999) ("The general definitions support this type of use. For instance, *Webster's Dictionary* defines an immutable characteristic as that which is 'unchangeable; unalterable; changeless.'"); Patricia Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade*

factor, "cannot" may not be understood in the strictest sense. If immutability is taken to mean an inability to exit, then application of the immutability factor must center on what it might mean to be unable to change a characteristic. For example, sex is considered immutable,[78] and yet it can most definitely be changed.[79] This has led some courts and scholars to modify the definition of immutability, arguing that a trait is immutable when it is either too difficult to change the trait or when the trait is too valuable to expect change. But this just raises further questions: for instance, how difficult is difficult? Unsurprisingly, courts[80] and scholars[81] alike have struggled to answer this type of question.

Organization, 11 AM. U. J. INT'L L. & POL'Y 1, 10 (1996) (stating "the definition of an immutable characteristic is one that is unchangeable"); Gabriella A. Davi, Note, *A Progression Towards Freedom: Protecting the Disabled Under the Ku Klux Klan Act*, 20 CARDOZO L. REV. 1019, 1020 n.9 (1999) (noting that "*Webster's Dictionary* defines *immutable* as 'not capable or susceptible of change'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1131 (3d ed. 1986)); Ben Geiger, Note, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1211 (2006) (discussing *Frontiero* and noting that the "dictionary definition of immutable is 'not capable or susceptible of change: invariable, unalterable'"); Steven M. Ziolkowski, Note, *The Status of Weight-Based Employment Discrimination Under the Americans with Disabilities Act After* Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals, 74 B.U. L. REV. 667, 678 n.70 (1994) (stating that "[a] condition is 'immutable' if it cannot be relieved").

There have been some cases that argue immutability cannot apply to cases where the trait is behavioral in nature. *See, e.g.*, High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989). It is not clear if they are working with a different definition of immutability which precludes conduct-based traits from being deemed immutable, or if it is simply a separate doctrinal side constraint. At least one author has suggested that these cases represent a category of "passive immutability," which requires that the immutable trait be something that can be developed without action. On this account, "passive immutability" is meant to be differentiated from a trait that simply cannot be changed. *See* Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 242 (1996) (distinguishing "passive" immutability").

78 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) ("[S]ex . . . is an immutable characteristic determined solely by the accident of birth . . . .").

79 Stein, *supra* note 41, at 70 (arguing the immutability factor is selectively applied, as sex is considered a suspect classification, yet it can be changed). *But see* Littleton v. Prange, 9 S.W.3d 223, 230 (Tex. App. 1999) (concluding that sex is a characteristic that, for legal purposes, is fixed at birth).

80 Consider the following analysis presented by the Ninth Circuit in *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989):

> It is clear that by "immutability" the Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class. People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes "pass" for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections. At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it

Indeed if our analysis were to stop here, we should pause and wonder whether immutability, on this account, can be a useful doctrinal tool. For example, is being a baseball player truly immutable? Some people just could not hold any job except the one they have—or at least so they think. How about being Christian? Can religionists really see themselves as simply converting?[82] This type of analysis forces judges down into the murky waters of political philosophy and psychology.[83] Such a construction of immutability almost defies application.

> would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. Reading the case law in a more capacious manner, "immutability" may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically. Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment.

Id. at 726 (internal citation omitted).

81 *See* Marcosson, *supra* note 4, at 653 ("This in turn raises the immediate question: what constitutes a 'substantial' cost or difficulty, sufficient to render the characteristic substantially immutable?"); Shapiro, *supra* note 3, at 412 ("Given immutability's problematic nature, the Court should explicitly adopt the 'effective immutability' approach of Judge William Norris in *Watkins*."). This type of analysis, in turn, leads to peculiar questions about the potential immutability of all sorts of human characteristics. *See, e.g.*, Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 334–35 n.262 (1989) (arguing that the in fact obstacles to learning a new language justify the conclusion that foreign language speakers ought to constitute a protected class); Elizabeth Kristin, Comment, *Addressing the Problem of Weight Discrimination in Employment*, 90 CAL. L. REV. 57, 71 (2002) ("I assume that to be fat is not necessarily unhealthy and that weight is either immutable or so difficult or dangerous to permanently change as to be practically immutable.").

82 *See, e.g.*, Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1137 (9th Cir. 1997) (Reinhardt, J., dissenting) (arguing that "there is no more justification for discrimination against individuals because of their sexual orientation, which is most frequently a happenstance of birth, than there is for discrimination against blacks, Hispanics or Asians—or against Catholics, Jews, or Muslims, who at least have the option to convert"). As a rule, few courts have considered whether religion is a suspect classification because such claims are typically subsumed under First Amendment doctrine. *See* Yoshino, *supra* note 3, at 495 n.33 ("The existence of the First Amendment has generally prevented courts from entertaining the claim that religious classifications deserve heightened scrutiny."); Benjamin Hoorn Barton, Note, *Religion-Based Peremptory Challenges After* Batson v. Kentucky *and* J.E.B. v. Alabama*: An Equal Protection and First Amendment Analysis*, 94 MICH. L. REV. 191, 204 (1995).

83 *See, e.g.*, Conaway v. Deane, 932 A.2d 571, 614–16 (Md. 2007) (citing to a variety of conflicting psychological and biological studies regarding the immutability of homosexuality, but concluding that no studies could be considered by the court because they did not satisfy any of the evidentiary standards for admissibility of scientific evidence); Dean v. District of Columbia, 653 A.2d 307, 330–31 (D.C. 1995) (explaining that although some might argue the judicial context is not the appropriate context for fact-finding regarding "the nature and causes of homosexuality," the court would make such findings upon fur-

However, if scanning the secondary literature is any indication, the most formidable problems posed by immutability to equal protection doctrine do not stem from such slippery slope arguments; more often that not, scholars point to the fact that it is far from clear what role immutability is meant to play in determining whether a particular classification should be deemed suspect. Indeed, a number of scholars have noted that immutability is neither a necessary nor sufficient criterion for deciding whether to deem a particular classification suspect.[84] Thus, they argue that the disabled, for example, are a class with an immutable trait yet are not considered suspect,[85] while alienage is not an immutable trait yet alienage is a suspect classification.[86] The fact that immutability is neither a necessary nor sufficient criterion for suspect classification status inevitably gives rise to questions about whether immutability is doing any doctrinal work that actually serves the overall purpose of the Equal Protection Clause.[87]

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ther presentations by the party, in reliance "not only on case law but also on scientific and social science sources proffered by the parties—and found on [the court's] own").

This debate has also, to some extent, been one of the preoccupations of recent contemporary theory. Unsurprisingly, no decisive blows have been landed. For an overview, see SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 148–71 (1992); RAINER FORST, CONTEXTS OF JUSTICE: POLITICAL PHILOSOPHY BEYOND LIBERALISM AND COMMUNITARIANISM (John M. M. Farrell trans., 1994); JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 239–52 (2d ed. 1999); AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS 121–30, 171–79 (Joel Anderson trans., 1995); ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971); CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 187–210 (1985); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 185–98, 502–06 (1989); Michael Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81 (1984).

84 *See* Halley, *supra* note 3, at 966 (describing "the counterfactual assertion that homosexuality . . . is immutable"); Spitko, *supra* note 3, at 598 (arguing that "immutability of a characteristic is neither a prerequisite to nor a sufficient condition for heightened scrutiny of a classification relating to that characteristic"); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994) ("Mutability, however, is not the decisive factor."); Tribe, *supra* note 3, at 1073 ("[F]eatures like immutability are neither sufficient nor necessary." (citations omitted)); *see also* Olagues v. Russoniello, 797 F.2d 1511, 1520 (9th Cir. 1986) ("But immutability is not the sole determining factor. For example, the Supreme Court has held that aliens form a suspect class.").

85 *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (holding that mental retardation is not a quasi-suspect class).

86 *See, e.g.*, Tribe, *supra* note 3, at 1073 n.52 (so noting). For the proposition that alienage is a suspect classification, Tribe cites *Nyquist v. Mauclet*, 432 U.S. 1 (1977). The first Supreme Court case announcing alienage as suspect was *Graham v. Richardson*, 403 U.S. 365 (1971). There is nearly universal agreement among courts and scholars that alienage is mutable; however, we will return to the application of immutability to the alienage classification in Section VI(b).

87 *See supra* note 84.

But shuttling immutability from the current paradigm leaves the "traditional" process-based indicia as the sole factors to determine whether a classification should be considered suspect; such a result has its own complicated consequences. Consider the following: what are we to make of criminals as a suspect classification? Criminals clearly fit all the "traditional indicia of suspectness." Historically, they have probably been discriminated against more than any other group. And, given, for example, their lack of voting rights during incarceration,[88] it seems hard to conceive of a group that faces more formidable obstacles in trying to participate in the political process.

Others have noted the problem that criminals pose to process-based equal protection analysis.[89] But courts continue to struggle to find reasons why criminals, or people with a criminal record, do not constitute a suspect classification. Some courts, in addressing what we might term the "criminal problem," retreat to precedent: "The Supreme Court has not announced that the status of 'criminal defendant' is a suspect classification."[90] Other courts have simply dismissed the idea as absurd.[91] Still other courts have ignored both process-based and immutability factors: "We can easily see a rationale for a policy decision not to hire persons who have been convicted of felonies even though they have been pardoned; a person who has committed a felony may be thought to lack the qualities of self control or honesty that this sensitive job requires."[92] And they are willing

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88 For a discussion of criminal disenfranchisement, see Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

89 *See, e.g.*, Tribe, *supra* note 3, at 1075. *See generally* Aukerman, *supra* note 77, at 51–66 (considering the applicability of suspect status to criminals).

90 Virgin Islands v. Hodge, 359 F.3d 312, 326 (3d Cir. 2004); *see also* Baer v. City of Wauwatosa, 716 F.2d 1117, 1125 (7th Cir. 1983) ("[F]elons are not yet a protected class under the Fourteenth Amendment."); Miller v. Carter, 547 F.2d 1314, 1320 (7th Cir. 1977) (Campbell, J., concurring) (same); Watson v. Cronin, 384 F. Supp. 652, 659 (D. Colo. 1974) ("[S]uch a classification has not as yet been held suspect."); Butts v. Nichols, 381 F. Supp. 573, 579 (S.D. Iowa 1974) (same).

91 Moss v. Clark, 886 F.2d 686, 690 (4th Cir. 1989) ("Moreover, it would be ironic for the law to confer special solicitude upon a class whose members had violated it."); Ransom v. Wainwright, 553 F.2d 900, 901 (5th Cir. 1977) ("If it is an attempt to assert that the statute infringes equal protection by creating an invidious class—felons—who are forbidden to carry firearms, the argument is without merit."); *see also* Zipkin v. Heckler, 790 F.2d 16, 18 (2d Cir. 1986) (dismissing the possibility without analysis); Furst v. N.Y. City Transit Auth., 631 F. Supp. 1331, 1336 (E.D.N.Y. 1986) (same); Greenwell v. Walters, 596 F. Supp. 693, 695 (M.D. Tenn. 1984) (same); Kindem v. Alameda, 502 F. Supp. 1108, 1111 (N.D. Cal. 1980) (same).

92 Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970) (concerning police appointment). To be sure, *Upshaw* was decided before *Frontiero v. Richardson*, 411 U.S. 677 (1973).

to do so even as they readily admit that the right to vote has been denied to felons, leaving felons as the ultimate political process outsiders.[93]

Indeed, Laurence Tribe believes the criminal problem demonstrates that the process-based view cannot guide equal protection doctrine:

> Burglars are subject to widespread hostility: indeed, the activity that defines the group is everywhere legislatively prohibited. Are burglars therefore a "suspect class"? Of course not. Suspect status is unthinkable—but only because of the substantive value we attach to personal security, and the importance for us of the system of private property and its rules of transfer, which the burglary prohibition preserves.[94]

The Court, most explicitly in *Frontiero*, believed that introducing the immutability factor into suspect classification analysis would help ensure that statutes and regulations would impose "legal burdens" only on classifications that bore some relationship to "individual responsibility."[95] And yet, despite that fact, the immutability factor does not appear to provide any leverage in addressing the criminal problem.

Indeed, it is far from clear how to apply the immutability factor to claims on behalf of criminals who seek suspect classification status despite the fact that it would seem that criminals are the class most worthy of having legal burdens imposed upon them. If we define "being a criminal" as "having committed a crime," then the character trait of being a criminal is immutable. We might, however, argue that people no longer incarcerated are ex-convicts; that is, they are no longer criminals. But what about having a criminal record? On the immutability-as-exit view, having a criminal record is immutable. And, given our earlier comments about how criminals fare when evaluated on process grounds, it seems as if the class of people with a criminal record would be a protected class and all enactments using such a classification would be subject to strict scrutiny. Maybe, on this account, we should subject all treatment of ex-convicts on parole, for example, to strict scrutiny. Indeed, some scholars have advocated such or similar approaches.[96]

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93 *Id.*; *see also Greenwell*, 596 F. Supp. at 695 (reiterating the plaintiff's argument that "prisoners are entitled to the intermediate level of review because they are politically powerless").

94 Tribe, *supra* note 3, at 1075.

95 *Frontiero*, 411 U.S. at 686–87.

96 *See, e.g.*, Aukerman, *supra* note 77, at 85 (arguing that "courts should recognize that people with criminal records, like traditional suspect classes, lack political power and have suffered a history of discrimination"); Geiger, *supra* note 77, at 1192 (stating that bases for denying ex-offenders suspect classification standing does not survive analytical scrutiny).

But this seems deeply troubling. Could it be that classifications of ex-convicts (strict scrutiny) should be subjected to higher scrutiny than sex-based classifications (intermediate scrutiny)? And yet, on the process-plus-immutability paradigm we have no doctrinal tools in our legal quiver to strike down such a conclusion.

Indeed, the fact that immutability both does little to eliminate troubling classes from consideration for suspect status and does not cohere in any obvious way with the process paradigm, brings its inclusion as a factor in equal protection analysis into question. And it is this puzzling dynamic that has attracted the attention of scholars hoping to make sense of the factors used by the court to determine which classes ought to be considered suspect.

IV. RECONSIDERING THE PROCESS-PLUS-IMMUTABILITY PARADIGM: RESPONSES IN THE SECONDARY LITERATURE

The tensions between the process-based approach to suspect classifications and the immutability factor have not gone unnoticed. In fact, the perceived irreconcilability of these two concepts has led to the near universal derision of immutability as a useful mechanism for approaching the construction of protected classes.[97] One recent scholar has described critiquing immutability as "flog[ging] a dying horse."[98] Unsurprisingly, this deep skepticism that immutability has anything to offer informs the various approaches taken by scholars hoping to address how we should understand immutability.

The ambassador of the pure process-based interpretation of the Equal Protection Clause—John Hart Ely—has simply bit the proverbial bullet in analyzing the process-plus-immutability paradigm. On the one hand, Ely argues that immutability is irrelevant to determining which classes ought to be deemed suspect:

> [N]o one has bothered to build the logical bridge, to tell us exactly *why* we should be suspicious of legislatures that classify on the basis of immutable characteristics. Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that *those* characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate

97 *See* Marcosson, *supra* note 4, at 647–48 (noting that "[i]t is difficult to find the last academic defense of immutability or the last call for stressing it in constitutional litigation").

98 Yoshino, *supra* note 3, at 491.

> purposes. At that point there's not much left of the immutability theory, is there?[99]

But if, as Ely claims, immutability does not do any actual doctrinal work, he must come to grips with the "criminal problem." On this front, Ely does not disappoint, even if somewhat ambiguously:

> [I]t may help to recall that all that labeling a classification "suspect" means functionally is that a prima facie case has been made out and that the inquiry into its suspiciousness should continue. If it turns out directly to pursue a substantial goal . . . it will survive. Thus, for example, burglars are certainly a group toward which there is widespread societal hostility, and laws making burglary a crime certainly do comparatively disadvantage burglars. Such laws plainly should survive, however.[100]

This is quite the conclusion. Ely believes that his process-based account turns criminals into a suspect classification. He does, however, take the easy case of "laws making burglary a crime," and concludes triumphantly that such laws would survive strict scrutiny. But what about the myriad of other laws that employ criminal classification—would those obviously survive? Indeed, the frequency with which courts have encountered the question of whether criminals constitute a protected class indicates that many laws applied to criminals as a group would not survive strict scrutiny.[101] Ely might be willing to embrace such a conclusion, but I presume that most of us would not. Unfortunately, living with criminals as a suspect classification appears to be the fate of a pure process-based paradigm.

Recognizing this problem with a pure process-based paradigm, other scholars have sought to introduce, either explicitly or implicitly, substantive criteria to a predominantly process-based inquiry. For example, Janet Halley has described her own project as advocating "judicial review of substantive legislative choices that impinge on the process of majoritarian decisionmaking."[102] Others have sought to construct new principles for determining whether a particular governmental initiative runs afoul of the Equal Protection Clause by eliminating process-based concerns and looking instead to the effects of such initiatives on the existent social hierarchy. Thus the secondary literature is replete with theories that advance principles such as

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99 ELY, *supra* note 3, at 150. Much of this critique is cited in City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443 n.10 (1985).

100 ELY, *supra* note 3, at 154.

101 *See supra* notes 89–96 and accompanying text.

102 Halley, *supra* note 3, at 965 (adopting First Amendment distinctions between speech and conduct in order to determine when interference with legislation on substantive grounds is legitimate).

"the pariah principle,"[103] the "anticaste principle,"[104] and the "antidiscrimination principle."[105] In doing so, such theories give up on the process-plus-immutability paradigm, as it is simply not up to the challenge of addressing the most difficult of equal protection cases.[106]

These two extreme theories do share one feature in common: they simply eliminate immutability from the equal protection equation. Others scholars have attempted to navigate a middle path which at least considers the possibility that immutability can be integrated into the process-based paradigm—or at least they have done so in order to then critique it. Such arguments claim that immutable groups, unable to extricate themselves from their own suspect class, are more likely to face animus in the political process.[107] In other words, in cases where individuals cannot exit the group classification because the classification criterion is immutable—that is, individuals cannot change the relevant characteristic—group members are more likely to be left out of the political process. Indeed, as Kenji Yoshino has explained in his critique of the immutability factor, "process theory does not ask whether the legislation burdening the indistinct group is just or unjust."[108] Instead, it "seeks to discover and protect groups that are systematically disempowered in the political process."[109] Thus, on the process-based accounts,

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103 Farber & Sherry, *supra* note 8.

104 Sunstein, *supra* note 8.

105 Fiss, *supra* note 8. There are still other theories on how we ought to determine which classifications should be deemed suspect that look to non process-based criteria in the hopes of locating a more stable principle that better coheres with the true impulse driving the Equal Protection Clause. *See, e.g.*, Balkin, *supra* note 8 (arguing that the real question for classification ought to be whether the particular characteristic can sustain a stable social meaning); Tribe, *supra* note 3 (arguing that substantive justifications for the suspect classification status lurk behind the standard process-based account); *Developments in the Law: Sexual Orientation and the Law*, *supra* note 8 (arguing in favor of granting homosexuality suspect status on multiple grounds including the equal worth of human beings).

106 This also seems to be the implicit tactic of other theories that eliminate the entire multiple tier framework adopted by the court in order to avoid both procedural and substantive constructions of suspect classifications. *Cf.* Goldberg, *supra* note 8 at 533 (arguing in favor of a new context-sensitive test for evaluating potential Equal Protection violations, including consideration of "whether the classification reflects disapproval, dislike, or stereotyping of the class").

107 For a discussion of this position, see Halley, *supra* note 3, at 929–33.

108 Yoshino, *supra* note 3, at 507; *see also* Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 614 (1994) ("Although this factor is sometimes noted, in process terms it serves more as evidence that those with animus can readily single out the objects of their hatred and direct their contempt at the chosen party than as an independent reason for suspending the presumption of constitutionality.").

109 Yoshino, *supra* note 3, at 507.

> "[Immutability] can be justified by arguing that distinct groups are politically powerless because, inter alia, they cannot evade discrimination. When confronted with discrimination, an indistinct group may temporarily or permanently escape it by changing or hiding its defining trait. Distinct groups do not have this chameleon-like ability and are thus subject to the full force of discrimination."[110]

But such theories often fail because of the overwhelming number of counter-examples. For example, age and disability are both immutable characteristics—once acquired, they are traits that cannot be changed—and yet the Supreme Court has explicitly rejected the notion of granting them suspect classification.[111] Thus, if the goal of such inquiries is to truly uncover new cases of process failure, it is hard to see how the immutability factor is a useful doctrinal tool.

Finally, some scholars argue that immutability is important because it enables us to determine whether the classification in question is in fact relevant for legislative consideration.[112] This additional prong for granting suspect class status gives us a more complete picture—or so the argument goes—of whether the characteristic in question is legitimate for lawmakers and other government officials to consider in their deliberation about and application of the law. But pursuing such an explanation requires explaining why courts use immutability instead of considering relevance directly.[113] While some argue that immutability is simply another useful indicator for relevance,[114] it seems difficult to believe that no other doctrinal indicators would function more predictably.

In sum, the secondary literature provides little explanation for why courts persist in employing the immutability factor within the process-based framework of the Equal Protection Clause. Some scholars suggest that immutability helps us uncover process failures or irrelevant legislative consideration, but further examination does not bear out their conclusions; immutability, upon initial consideration, does not seem to be a doctrinal tool built for such purposes.

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110 *Id.* at 507–08. To be sure, Yoshino is not only discussing immutability in these passages; he is discussing what he terms the "assimilationist bias," which includes both immutability and visibility. For examples of the Court's invocation of the visibility factor, see Bowen v. Gilliard, 483 U.S. 587, 602 (1987); Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

111 Indeed the existence of counter-examples seems to have guided the Court in not granting suspect classification status to age and disability. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441 (1985).

112 *See, e.g.*, Marcosson, *supra* note 4.

113 ELY, *supra* note 3, at 150.

114 Marcosson, *supra* note 4.

V. IMMUTABILITY IN CONTEXT: CONSIDERING IMMUTABLE TRAITS IN ASYLUM AND TITLE VII CASES

It is one of the central claims of this Article that much of the problem in understanding immutability's role in equal protection doctrine stems from confusion regarding the very definition of the term. Courts vary as to whether they understand immutable traits simply as traits that the individual cannot change,[115] traits over which the individual has no control,[116] or traits that the individual did not choose.[117] In choosing one definition over the other, courts sometimes simply look to a variety of dictionaries.[118] On other occasions, and maybe even more problematically, courts look to the way in which previous courts, addressing the meaning of immutability in other contexts, have understood the term. Indeed, while the immutability factor is most well-known for its role in equal protection analysis, immutable traits also play a significant role in both asylum and Title VII cases. And, as we will see shortly, not only are the roles played by immutability in each of these contexts unique, but so are the understood definitions of the term immutability in those contexts. However, courts, addressing equal protection claims frequently borrow definitions from these areas of law in their search for an understanding of immutability. While an understandable tactic—looking to precedent when faced with a definitional issue—this inter-doctrinal borrowing poses significant problems for understanding the unique role of the immutability in equal protection analysis. But to understand this problem requires first looking at the use of immutability in some of these other contexts. This is because the definitions of immutability are context-specific.

A. Asylum and Immutability: Protecting the Persecuted

The Attorney General has discretion to grant asylum to any individual who is a "refugee."[119] The term refugee is statutorily defined as an alien "who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, [the country of removal] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[120] The definition of the

115 *See supra* note 17.

116 *See supra* note 77.

117 *See supra* notes 19 and 75.

118 *See supra* note 77.

119 8 U.S.C. § 1158(b)(1)(A) (2006).

120 8 U.S.C. § 1101(a)(42)(A) (2006).

term "social group" has proven somewhat elusive and continues to be a topic of significant debate among circuits,[121] scholars,[122] and international tribunals.[123] It is here that immutability has become an important factor.

In its decision in *In re Acosta*, the Board of Immigration Affairs ("BIA") interpreted "the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic."[124] In further defining what immutability meant in the asylum context, the BIA stated that the "common characteristic that defines the group . . . must be one that the members of the group either cannot change, or *should not be required to change* because it is fundamental to their individual identities or consciences."[125] The reason the BIA advanced a more expansive view of immutability in the asylum context—including also traits that individuals "should not be required to change"—stemmed from two factors. First, the BIA interpreted the term "social group" in light of the other classifications in the list.[126] Thus, political opinion was undoubtedly capable of being changed; in turn, the BIA incorporated the term immutability into the definition of social group, but in a more expansive sense so as to parallel the other groups listed in the asylum statute.[127]

But even more importantly, the BIA adopted a more expansive conception of immutability to remain in keeping with the principles underlying refugee status: "[b]y construing 'persecution on account

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121 *See, e.g.*, Koudriachova v. Gonzales, 490 F.3d 255, 261 (2d Cir. 2007); Hassan v. Gonzales, 484 F.3d 513, 517 (8th Cir. 2007); Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005); Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005).

122 *See, e.g.*, Andrea Binder, *Gender and the "Membership in a Particular Social Group" Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167 (2001); Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505 (1993); Karen Musalo, *Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777 (2003); John Hans Thomas, *Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in* Lwin v. INS, 1999 BYU L. REV. 799 (1999); Ellen Vagelos, *The Social Group That Dare Not Speak Its Name: Should Homosexuals Constitute a Particular Social Group for Purposes of Obtaining Refugee Status? Comment on* Re: Inaudi, 17 FORDHAM INT'L L.J. 229 (1993).

123 *See, e.g.*, UNHCR, *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html.

124 *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

125 *Id.* (emphasis added).

126 *Id.*

127 *Id.*

of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[128] Thus, refugees were those who were, on some account, deserving of refuge in the United States based on the nexus between their fear of persecution and their membership in a particular social group.[129] As a result, strict immutability—the ability to in fact change a particular trait—did not capture the underlying impulse of asylum. Only a more expansive understanding of immutability—one that also incorporated traits that individuals "should not be required to change"—captured the purpose of asylum law: "to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate . . . . admission to this country of refugees of special humanitarian concern to the United States."[130]

B. Title VII and Immutable Traits: Equal Employment Opportunity

As with asylum, immutability has been employed as a factor in Title VII jurisprudence. However, in contrast to the asylum context, immutability is deployed for purposes of Title VII to capture a very different type of organizing principle. Indeed, while asylum law is primarily constructed to advance the needs of persons subject to persecution, Title VII doctrine has been built to navigate the "balance between employee rights and employer prerogatives."[131] Thus, immutability's use as a factor in Title VII law stems directly from courts trying to navigate this complex balancing of values.[132]

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128 *Id.* at 234. In a recent decision, the BIA affirmed its analysis in *In re Acosta*. *See In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73 (B.I.A. 2007). However, in its decision, the BIA also stated "that 'wealth' is not an immutable characteristic. This determination alone, however, is not dispositive if, for example, the shared characteristic is so fundamental to identity or conscience that it should not be expected to be changed." *Id.* In this most recent decision, the BIA appears to use immutability in the strict sense. Thus, even if a trait was not immutable, according to the BIA, it could still serve as the basis for membership in a "social group" if the trait in question "should not be expected to be changed." In this truncated statement, the BIA seems to understand traits that are not expected to be changed to be mutable, but still potentially sufficient to satisfy the definition of a "social group."

129 *See, e.g.*, Davila-Mejia v. Mukasey, 531 F.3d 624 (8th Cir. 2008); Vumi v. Gonzales, 502 F.3d 150 (2d Cir. 2007); *see also* Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT'L L. 265 (2002); Musalo, *supra* note 122.

130 Refugee Act of 1980, Pub. L. No. 96-212, § 101, 94 Stat. 102 (1980).

131 Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989).

132 *See, e.g.*, William R. Corbett, *The Ugly Truth About Appearance Discrimination and the Beauty of Our Employment Discrimination Law*, 14 DUKE J. GENDER L. & POL'Y 153 (2007) (describing

The Supreme Court, in its landmark decision *Griggs v. Duke Power Co.*, explained that "[t]he objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities."[133] Subsequent to *Griggs*, the question became how to implement the equal-employment-opportunity principle. The success of implementing the principle hinged on a court's ability to differentiate between legitimate and illegitimate employment criteria.

The equal-employment-opportunity principle received significant attention and explanation in the Court's *McDonnell Douglas Corp. v. Green* decision.[134] In *McDonnell Douglas Corp.*, the Supreme Court faced a Title VII claim where the plaintiff alleged his former employer refused to rehire him on account of race.[135] The employer, McDonnell Douglas, responded that its refusal to rehire was based not upon race, but upon the plaintiff's participation, arrest, and conviction for intentionally obstructing traffic.[136] But these were no simple attempts to obstruct traffic; the plaintiff participated in these so called "lock-ins" as part of coordinated civil rights protests.[137] And, the plaintiff claimed that discriminating against him for his participation in civil rights protests amounted to employment discrimination on the basis of race.[138]

In deciding the case in favor of McDonnell Douglas, the Court explained why the facts before it differed in an important way from the facts of *Griggs*. In *Griggs*, the Court determined that the testing device used by the employer had a disparate impact on African Americans and therefore the use of such testing devices violated the terms of Title VII.[139] Thus, according to the Court in *McDonnell Douglas Corp.*, the *Griggs* decision "dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions."[140] As a result, "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, *resulting from forces beyond their control*, not be allowed to work a

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the overall purpose of Title VII as maintaining this balance); Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319 (2007) (same).

133 401 U.S. 424, 429–30 (1971).

134 411 U.S. 792, 806 (1973).

135 *Id.* at 796–98.

136 *Id.* at 795.

137 *Id.* at 794–96.

138 *Id.*

139 *See* Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971).

140 *McDonnell Douglas Corp.*, 411 U.S. at 806.

cumulative and invidious burden on such citizens for the remainder of their lives."[141] In the case before it, the *McDonnell Douglas Corp.* Court concluded that the "disruptive" acts in question were in fact material to job performance and were not beyond the control of the employee.[142] In this way, the equal-employment-opportunity principle linked up with the Court's emphasis on the employee's or potential employee's ability to control certain traits or acts. If an employee either chose to act in a certain way or could change a particular trait, then the Court would conclude that the individual had an equal opportunity to be employed; it was just up to that individual to bring his actions and traits into alignment with what the employer wanted.

Courts have subsequently used the term immutability to capture the "beyond control" requirement advanced in *McDonnell Douglas Corp.* For example, in *Willingham v. Macon Telegraph Publishing Co.*, the Fifth Circuit addressed allegations of discriminatory hiring on the basis of sex.[143] The alleged discrimination was based upon a grooming code which required short hair for men, but not women.[144] Alan Willingham, the plaintiff, claimed that such a differential policy violated Title VII.[145]

Holding that such requirements did not constitute a violation of Title VII, the Fifth Circuit explained that Title VII's guiding principle did not prohibit employers from discriminating on the basis of "chosen" traits: "[e]qual employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin."[146] This formulation of the immutability factor has subsequently appeared in numerous cases and has become the default doctrinal view in cases regarding employee dress and grooming codes.[147]

Indeed, as a notable example of the link between Title VII's purpose and the definition of immutability in the Title VII context, consider *Fagan v. National Cash Register Co.*[148] In *Fagan*, the court held

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141 *Id.* (emphasis added).

142 *Id.*

143 507 F.2d 1084 (5th Cir. 1975).

144 *Id.* at 1086.

145 *Id.* at 1087–88.

146 *Id.* at 1091 (emphasis omitted).

147 *See, e.g.*, Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976); Arnett v. Aspin, 846 F. Supp. 1234, 1239 (E.D. Pa. 1994); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); *see also* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 33 (2000).

148 481 F.2d 1115 (D.C. Cir. 1973).

that a particular employee grooming code did not constitute a violation of Title VII, drawing heavily on the Court's rationale in *McDonnell Douglas Corp.* In doing so, the D.C. Circuit began by emphasizing that "[p]erhaps no facet of business life is more important than a company's place in public estimation. . . . Good grooming regulations reflect a company's policy in our highly competitive business environment."[149] In contrast, the court explained that "Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of *immutable* race, national origin, color, or sex classification."[150] In applying both what it considered to be a legitimate employment requirement and the need to protect employees from illegitimate discrimination, the D.C. Circuit noted that "there are 'societal as well as personal interests' so involved in providing equal opportunities for citizens, that an employer is not to be permitted under [Title VII] to discriminate because of grounds 'resulting from forces beyond [the employees'] control.'"[151] After emphasizing the importance of control in determining what types of discrimination are prohibited by Title VII, the D.C. Circuit concluded as follows: "[b]ut equally it seems obvious to us, that one seeking an employment opportunity as in *our* situation *where hair length readily can be changed*, may be required to conform to reasonable grooming standards designed to further the employing company's interest by which that very opportunity is provided."[152] Thus, the court held that the grooming code did not violate the terms of Title VII because the trait in question could easily be changed. In turn, the grooming code did not impact the effected employee's employment opportunity—the employee could simply modify his hair length.

In sum, in *Fagan*, just as in *McDonnell Douglas Corp.*, the court defined the immutability requirement in light of the principles animating Title VII. If Title VII, in balancing the interests of the employers and employees, was intended to provide equal employment opportunity, then the immutability requirement would be interpreted to advance that principle. In turn, immutability in the Title VII context has been understood to mean something completely different than it does in the asylum context. In the Title VII context, an immutable trait is a trait that is not under the individual's control. Thus, an in-

149 *Id.* at 1124–25.

150 *Id.* at 1125.

151 *Id.* (second alteration in original). Indeed, footnote 23, attached to the foregoing text, reads "[s]uch matter as we have quoted in this paragraph reflects the principles comprising the philosophy of the Court in McDonnell Douglas v. Green." *Id.* at 1125, n.23.

152 *Id.* (second emphasis added).

dividual is considered to have a mutable trait *either* if he chose to adopt the trait or if he could easily change the trait. In this way, immutability in the Title VII context captures the control requirement: a trait is beyond the control of the individual if he both did not choose to adopt the trait and he cannot currently change the trait. For this reason, race is the paradigmatic immutable trait in the Title VII context as individuals neither choose to adopt their race, nor can they change their race.

C. Thinking About Immutability in Context

As should be clear, importing the definition of immutability from the asylum context into the Title VII context would likely lead to very different outcomes in cases addressing grooming codes. Instead of considering whether the trait in question was beyond the control of the employee, courts would consider whether or not the trait was one that the employee should be required to change. As a result, courts would examine the connection between "grooming" choices and personal identity. In certain circumstances, courts might very well determine that certain grooming choices were simply too bound up with individual identity to require employees to change their appearance. Indeed, such an approach has already been advanced by a number of scholars.[153]

But importing the definition of immutability from asylum cases into the Title VII context would be to misunderstand the principles animating each doctrinal sphere. Rightfully or not, Title VII is understood as legislation aimed at balancing the autonomy of the employee against the business interests of the employer.[154] In navigating these competing values, the courts have interpreted Title VII as ad-

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153 *See, e.g.*, Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994) (discussing the grooming cases without focusing heavily on their history or chronology); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Roberto J. Gonzalez, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195 (2003) (arguing for the elimination of the immutability requirement under Title VII); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 860 (1994) (arguing that Title VII should be amended to include a prohibition against workplace discrimination on the basis of ethnic traits); Ponte & Gillan, *supra* note 132; Post, *supra* note 147; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Mary Whisner, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73 (1982); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

154 *See supra* notes 131–52.

vancing the principle of equal employment opportunity and used an immutability criterion that is meant to capture that principle.[155] As a result, the term immutability has a very specific meaning when deployed in Title VII cases.

In contrast, asylum law is built to address a very different set of problems. While there are any number of individuals who have reason to seek protection in the United States, asylum law must find a way to differentiate between those who are in the most desperate need of protection.[156] In doing so, asylum differentiates by examining the nexus between the persecution and the rationale for that persecution.[157] In such a context, the immutability criterion does not seek to help determine which individuals could have avoided persecution, but which individuals were persecuted for traits that we view as having value. It is for this reason that immutability in the asylum context is not concerned with whether the traits in question were beyond the control of the persecuted, but whether the traits in question are the type that the individual should never have had to change.

Immutability means different things in different contexts. In the Title VII context, immutable traits are traits you neither chose to adopt nor could you change. In the asylum context, a trait is considered immutable so long as you should not have been required to change it. And in each context, these varying definitions are linked to the principles the immutability factor is meant to capture. This analysis leads to two conclusions. First, despite the propensity of courts for doing so,[158] importing the definition of immutability from one context to the other does not make much sense. Second, if we are to understand the meaning of the immutability factor in the equal protection context, we must first figure out what principle it is meant to advance. It is to this second task that we now turn our attention.

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155 *See supra* Part V.B.

156 *See supra* note 130.

157 *See supra* notes 119–30.

158 *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 442-43 (Cal. 2008) (relying on cases considering the immutability factor in the asylum context in defining immutability for the purposes of equal protection); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008) (same); Conaway v. Deane, 932 A.2d 571, 614–15 (Md. 2007) (refusing to rely on a case defining immutability in the asylum context because the appellees neglected to present scientific or sociological studies supporting the contention that sexual orientation is an immutable trait); Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006) (considering the applicability of a case defining immutability in the asylum context to equal protection cases, only to reject doing so on the grounds that the case in question had been overruled).

VI. IMMUTABILITY IN THE EQUAL PROTECTION CONTEXT: BACK TO THE PROCESS-BASED PARADIGM

Examining the link between the definition of immutability and its doctrinal context provides a framework for analyzing the meaning of immutability in the equal protection context. In the asylum context, immutability helped advance the underlying principle of protecting others from persecution, enabling courts to differentiate between those who were most in need of such protections and those who were not. In the Title VII context, immutability helped advance the principle of equal employment opportunity, enabling courts to differentiate between those who were discriminated against for traits beyond their control and those who were not. The question then becomes what is the principle driving equal protection doctrine and how does immutability help isolate cases where there have been equal protection violations.

We explored the answer to the first part of this inquiry above.[159] Current equal protection doctrine has crystallized the Equal Protection Clause into a constitutional provision aimed at protecting minorities who might otherwise lose out to majoritarian politics.[160] Thus, equal protection doctrine employs a process-based paradigm, which protects the discrete and insular minorities referenced in footnote four of *Carolene Products*.[161] In this way, the Equal Protection Clause is meant to prevent process failures where political animosities grab hold of political deliberations.

Moreover, by focusing on process as opposed to substance, equal protection doctrine becomes a democracy enhancing tool, without passing judgment on the substance of any individual claim of discrimination.[162] Thus, courts look to determine whether, based on past history, it is likely that a new piece of legislation represents another instance of discriminatory policies. In doing so, courts do not consider whether a group is worthy of additional protection because of who the group is. Instead, courts are meant to eschew substantive moral judgments in favor of a process-based paradigm, which focuses on the likeliness of discrimination and not the worthiness of protection.

However, as we have already noted, in emphasizing a purely process-based approach, equal protection doctrine remains vulnerable to

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159 *See supra* Parts II–III.

160 *See supra* notes 47–54 and accompanying text.

161 *Id.*

162 *See generally* ELY, *supra* note 3, at 30–32, 135–79.

what we have termed the "criminal problem."[163] While focusing on process ensures that groups receive protection when it appears likely that they have been discriminated against, it also precludes the use of substantive moral judgments even when doing so seems intuitive. Accordingly, a pure process-based account does not provide any analytic tools for explaining why criminals ought not to be considered a suspect classification. Focusing on the history of discrimination against criminals, it would seem possible, if not likely, that current legislation restricting criminals is the result of political animosities. In turn, the current paradigm would, on one level, recommend subjecting legislation affecting criminals to heightened scrutiny.

And yet, the obvious response to such a suggestion is that criminals are deserving of "discrimination." Indeed, criminals are being punished for their own actions. The problem, however, for the pure process-based paradigm is that such judgments—who is and is not "deserving of discrimination"—are the very types of judgments a focus on process is meant to avoid. In other words, a pure process-based paradigm cannot differentiate between race-based classifications and criminal-based classifications.

It is this Article's contention that immutability was deployed in the equal protection context, in part, to solve the criminal problem. However, as with the other contexts in which immutability plays a doctrinal role, to see how immutability helps solve the criminal problem requires defining immutability in a way that fits with the overall principles animating equal protection doctrine.

A. Redefining Immutability as Concerned Solely with Entrance Cases

The central claim of this Article is that immutability—when considered in the equal protection context—means something different than it does in other contexts. This is because, like other uses of the immutability factor, the meaning of the term varies depending on the principle it is meant to advance.

The Equal Protection Clause, in constructing suspect classifications, seeks to ensure that discrete and insular minorities are protected from the animus of the majority.[164] To see how the immutability factor could further that purpose requires looking back at the Supreme Court's first articulation of the factor in *Frontiero v. Richardson*:

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163 *See supra* Part III.

164 *See supra* notes 47–50 and accompanying text.

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "*the basic concept of our system that legal burdens should bear some relationship to individual responsibility* . . . ."[165]

In linking immutability to the notion of individual responsibility, the *Frontiero* Court invoked a line of cases in which the Supreme Court announced that it considered illegitimacy a suspect classification.[166]

In the illegitimacy cases, the Court emphasized that "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."[167] In turn, the Court concluded that penalizing illegitimate children violated the Equal Protection Clause: "the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth."[168] The Court reached this determination because "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[169]

In grounding the immutability factor in its illegitimacy cases, the Court focused on the way in which immutability might ensure that laws impose liabilities only where doing so bears some relationship to individual responsibility or wrongdoing. Illegitimate children clearly have not engaged in conduct that deserves to have legal burdens imposed. They have simply acquired a trait through an "accident of birth."[170]

This was the core feature of the illegitimacy cases that the Court hoped to capture in the immutability factor. Immutability was meant to help weed out cases where classifications were being used to impose legal burdens on groups without a legitimate reason, and where the burdens imposed bore no relationship to individual responsibility. But the link to the illegitimacy cases tells us about more than just the principle at work. As with immutability in the asylum and Title VII contexts, the principle animating immutability in the equal protection context also points to the definition of the term.

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165 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (emphasis added) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

166 *See generally* Benjamin G. Ledsham, Note, *Means to Legitimate Ends: Same-Sex Marriage Through the Lens of Illegitimacy-Based Discrimination*, 28 CARDOZO L. REV. 2373, 2376 (2007) (discussing the "Supreme Court's case law confronting discrimination against illegitimate children").

167 *Weber*, 406 U.S. at 175; *see also* Jimenez v. Weinberger, 417 U.S. 628, 632 (1974).

168 *Weber*, 406 U.S. at 176.

169 *Id.* at 175.

170 *Frontiero*, 411 U.S. at 686–87.

As already emphasized, the Court, in first introducing immutability, focused on the fact that immutable traits are "accidents of birth."[171] This, of course, makes sense in light of the fact that the Court was drawing on the illegitimacy cases.[172] But the reason that the Court found imposing liabilities on illegitimate children so abhorrent is because the children never chose to enter into the classification; they were born illegitimate. Put differently, the Court was not focused on whether such children would ever be able to exit the classification, but the fact that the children never chose to enter the classification.

Similarly, instead of using immutability to determine whether a particular trait can or cannot be changed, immutability in the equal protection context appears concerned with whether or not a trait was chosen.[173] In other words, the immutability inquiry in the equal protection context is not concerned with whether an individual can exit the classification in question, but whether or not the individual chose to enter the classification.

Examining the Court's analysis in *Frontiero* also explains why, in light of the principles animating the Equal Protection Clause, focusing on entrance makes sense. As discussed above, equal protection focuses on classifications in an attempt to determine when certain pieces of legislation are the result of inter-group animus.[174] Classifications are useful because they can alert a court to a possible equal protection violation. Most of the time, classifications are harmless. A rule that prohibits smoking in public places has a negative impact on the class of smokers. However, this gives us little pause; through the democratic process, a legislature has determined that a particular course of conduct must be circumscribed. In other words, based on a legitimate rationale, a legislature has determined that the class of smokers "deserves" to be singled out for this type of treatment.[175]

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171 *Id.*

172 *Id.* (quoting *Weber*, 406 U.S. at 175).

173 *See* United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999); Quiban v. Veterans Admin., 928 F.2d 1154, 1161 n.13 (D.C. Cir. 1991); United States v. Harris, 537 F.2d 563, 565 n.2 (1st Cir. 1976); Carbonaro v. Reeher, 392 F. Supp. 753, 757 (E.D. Pa. 1975).

174 *See supra* notes 47–76 and accompanying text.

175 *See, e.g.*, BRIAN BARRY, CULTURE & EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM 34 (2002) ("If we consider virtually any law, we shall find that it is much more burdensome to some people than to others. Speed limits inhibit only those who like to drive fast. Law prohibiting drunk driving have no impact on teetotallers. Only smokers are stopped by prohibitions on smoking in public places. Only those who want to own a handgun are affected by a ban on them, and so *ad infinitum*.").

Under current equal protection doctrine, courts are charged with the task of identifying classifications that are not legitimate. However, it is hard to know when the use of a classification violates the Equal Protection Clause. Under the current doctrine, courts are given a variety of tools to find likely cases where a classification has been employed illegitimately. Some of those tools instruct courts to look at the background facts regarding the likelihood that the members of the class were able to participate in the process by which the relevant piece of legislation was passed.[176] In circumstances where a particular group has limited political power and has been subjected to discrimination historically, courts have good reason to think that the use of a classification singling out such a group is the result of inter-group animus.[177] Such classifications serve as good candidates to receive heightened scrutiny.

However, the Supreme Court also requires that courts consider immutability in determining whether a classification should be deemed suspect. The goal of the immutability inquiry is to determine whether there are reasons to believe that there is any link between individual responsibility and the legal burdens imposed by the statute in question; if the classification's trait is immutable, then it would indicate that the individual members of the classification should not have legal burdens imposed on them for membership in the classification. But courts are interested in this inquiry not because they want to blame the members of a particular classification; instead, the absence of a link between individual responsibility and the classification makes it more likely that inter-group animus motivated the statute or regulation in question. This is because without a link between individual responsibility and legal burdens, it becomes increasingly likely that invidious discrimination may have driven the drafting of the statute or regulation. Thus, the immutability inquiry is simply another doctrinal tool for determining whether there is good reason to believe that the use of a particular classification constituted an equal protection violation;[178] in such circumstances, courts use strict scrutiny to further investigate the justification behind the legislation or regulation in question.

It is here that we begin to see why understanding the immutability inquiry as asking whether the members of the class chose to enter the classification makes sense in the context of the Equal Protection

176 *See supra* note 44.

177 *See supra* note 58.

178 For further explanation of the process-based paradigm, see Helfand, *supra* note 46; Rubenfeld, *supra* note 55.

Clause. If immutability is a proxy for individual responsibility, then the immutability inquiry ought to focus on whether the members of the classification are facing legal burdens based upon a course of conduct in which they engaged. A smoker, who faces the imposition of burdens as a result of his smoking, faces those burdens because of his conduct. If a statute imposed burdens on African Americans, they would be facing burdens despite the fact that their membership in the relevant classification is not based upon a chosen course of conduct. It is because the goal of the suspect-classification inquiry is to determine whether inter-group animus motivated a statute that considering whether the individual is responsible for membership in the classification makes sense. In turn, the immutability factor is meant to further that inquiry by requiring courts to consider whether the legal burdens imposed bear any relationship to individual responsibility. In circumstances where an individual was simply thrust into the classification—by an accident of birth—imposing burdens on the members of such classification would seem to derive from inter-group animus.

Focusing on the ability to exit a classification, however, would serve a different purpose. Consider again, for contrast, the use of the immutability factor in the Title VII context. Under Title VII, the governing principle is equal employment opportunity.[179] In instances where an individual claims that he has been rejected for employment because of a particular trait, courts investigate whether the trait is immutable.[180] In doing so, courts balance the competing interests of the employer and the employee, trying to determine why, in the particular case, the individual has lost out on a particular employment opportunity.[181] To do so, courts use the immutability inquiry to focus on whether the individual had the "opportunity" to actually secure the employment in question; if the individual is responsible for *having* the trait, then the individual can be deemed to have had the opportunity to secure the employment in question.[182] Thus, if the employer requires prospective employees to adhere to a grooming code, the fact that a potential employee could have modified his appearance to comply with the grooming code—but failed to do so—would mean that the employee had the opportunity to secure the employ-

179 *See supra* notes 131–52 and accompanying text.

180 *See supra* Part V.B.

181 *Id.*

182 *See generally* Sandi Farrell, *Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence*, 92 KY. L.J. 483 (2004) (noting the importance of voluntarism in the context of Title VII).

ment. In turn, it is the prospective employee who is, under the current Title VII paradigm, to blame for the fact that he lost out on the employment opportunity.[183] Indeed, it is for this reason that some have criticized the current Title VII paradigm as being, at bottom, a "blame game."[184] And this is why immutability, in the Title VII context, is defined in such a way to allow courts to consider both whether or not an individual chose to enter the classification *and* whether or not he could still exit the classification.

Similarly, in employing immutability in asylum cases, courts focus on whether an individual can or should be required to exit a particular classification. This type of inquiry—focusing on exit—makes sense when the principle in play is determining who is most deserving of asylum protections.[185] Such an inquiry focuses on the substance of the asylum seeker's claim; is the asylum seeker, in light of the type of persecution he has experienced, sufficiently worthy of being granted asylum? Thus, immutability in the asylum context is aimed at evaluating the asylum seeker's ability to exit the classification in question and the costs of doing so. In turn, the immutability inquiry, in the asylum context, asks courts to determine whether the trait in question is one the individual "cannot change, or *should not be required to change*."[186]

In contrast, under the Equal Protection Clause, courts do not care who is to blame for the imposition of particular legal burdens or how important a particular trait is to the members of a particular classification. Instead, under the process-based paradigm that animates current equal protection doctrine, courts are simply interested to know whether some link exists between imposing burdens on a particular classification and individual responsibility. In other words, the question is not whether the classification's members could have avoided the burdens imposed by changing their traits, but whether there is a good reason for imposing the burdens in the first place.

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183 Of course, if Title VII were reconceptualized as advancing a different principle, then the definition of immutability in the Title VII context also would need to change. For this reason, critiques of the current Title VII paradigm invariably focus on the problems caused by the current immutability inquiry under Title VII. *See* Farrell, *supra* note 182, at 483 (arguing that the use of voluntarist ideology in Title VII jurisprudence is deeply problematic and needs to be rethought); Post, *supra* note 147, at 16, 33–40 (arguing that the "*dominant conception* of American antidiscrimination law, distorts and masks the actual operation of that law, and by so doing, potentially undermines the law's coherence and usefulness as a tool of transformative social policy").

184 *See* Farrell, *supra* note 182.

185 *See supra* note 128–30 and accompanying text.

186 *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (emphasis added).

When there does not appear to have been a good reason for imposing legal burdens on the classification in the first place—that is, when there does not appear to be a link between individual responsibility and the imposition of legal burdens—courts think it increasingly likely that inter-group animus may have motivated the statute or regulation in question. And it is in such circumstances where heightened scrutiny is appropriate.

The immutability factor, in the equal protection context, was built to investigate this very question. In order to determine the link between individual responsibility and the legal burdens imposed, immutability looks to see whether or not burdens are a result of a chosen trait or a chosen conduct. When it is not—when the trait or conduct in question is a mere accident of birth—then courts have good reason to apply heightened scrutiny in reviewing the constitutionality of the statute or regulation. By focusing on entrance into the classification, courts can use the immutability factor as another useful tool in its process-based inquiry.

One can see how the immutability-as-entrance paradigm links immutability to the principle of personal responsibility by considering its impact on the "criminal problem."[187] As discussed above, a pure process-based account of equal protection doctrine does not provide any obvious answer as to why criminals should not be considered a suspect classification; criminals undoubtedly face discrimination and their inability to participate in the political process leaves them quite powerless.[188] While the Court clearly indicated in *Frontiero* that the immutability factor was meant to ensure that legal burdens would be tied to individual responsibility,[189] on the prevailing view that defines immutability as unable to change, it is far from clear how deploying the immutability factor could help exclude the class of criminals from the ranks of suspect classifications.

The link, however, between individual responsibility and immutability comes into focus once we consider immutability's definition in context. Linked to the "accident of birth" language in *Frontiero*, the Court extracted immutability from its illegitimacy cases.[190] Thus, the immutability inquiry, in the context of the Equal Protection Clause, asks courts to determine whether a particular trait was adopted volitionally. Such an inquiry—focusing on whether an individual chose to enter a particular classification—enables a court to consider

187 *See supra* Part III.

188 *See supra* note 88.

189 Frontiero v. Richardson, 411 U.S. 677, 686–87 (1973).

190 *See supra* notes 167–70 and accompanying text.

whether imposing legal burdens on a particular class stems from a chosen course of action. Applying this brand of equal protection immutability to the class of criminals would clearly preclude them from becoming a suspect classification; criminals have chosen to engage in a set of acts and in turn they have suffered consequences stemming from those acts.

Indeed, this basic link between thinking about immutability as concerned with coerced entrance into a classification and the principles of the Equal Protection Clause has led a number of courts to rely on *Frontiero*'s "accident of birth" language in disposing of difficult claims for deeming criminals a suspect classification.[191] In addition, the D.C. Circuit concluded, in a case addressing whether World War II veterans could constitute a suspect class, that "the 'immutable characteristic' notion, as it appears in Supreme Court decisions, is tightly-cabined. It does not mean, broadly, something done that cannot be undone. Instead, it is a trait 'determined solely by accident of birth' . . . ."[192] Thinking about immutability in this way captures the general intuition that there is nothing inherently suspect in imposing legal burdens on individuals for their conduct; indeed, such an approach is an understood premise of criminal and civil liability more generally.

In this way, the Court deployed immutability as another indication of whether the use of a particular classification was likely a function of inter-group animus. Where classifications are based upon a trait that is an accident of birth—that is, an immutable trait for the purposes of the Equal Protection Clause—courts have another reason to deem the classification inherently suspect. To impose legal burdens under such circumstances would be to impose burdens on individuals for having a trait that they never could have avoided. Under such circumstances, it would be highly unlikely that the proposed burdens had a relationship to individual responsibility. Instead, they are more likely a function of inter-group animus and should therefore be subjected to heightened scrutiny. Accordingly, the immutability factor addresses the criminal problem by advancing the principle of indi-

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191 *See, e.g.*, United States v. Harris, 537 F.2d 563, 564 n.2 (1st Cir. 1976) (rejecting the application of the accident of birth classification to felons); Carbonaro v. Reeher, 392 F. Supp. 753, 757 (E.D. Pa. 1975) (same).

192 Quiban v. Veterans Admin., 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991) (internal citations and emphasis omitted); *see also* United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999) (noting that the Supreme Court rejected the idea that a classification is suspect when entry into the class is voluntary).

vidual responsibility, which the Court has understood as standing at the center of the Equal Protection Clause's process-based paradigm.

B. Necessary But Not Sufficient: Reconsidering the Alienage Classification

The criminal problem, however, was just one of the criticisms leveled by scholars against the immutability factor. In addition, scholars have expressed particular skepticism regarding the utility of the immutability inquiry, given that it does not appear to be either a necessary or a sufficient requirement for suspect classification status. As we noted above, when critics of immutability claim that immutability is not a sufficient criterion for suspect classification status, they point to a host of immutable traits that are not suspect, for example: disability, height, and age.[193] But when arguing that immutability is not necessary, only one example is ever presented: alienage.[194] The fact that alienage is the only example where immutability is not necessary for suspect classification, makes it something of an anomaly, a case worth more careful examination.[195]

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193 *See, e.g.*, Tribe, *supra* note 3, at 1073 n.51.

194 *See supra* notes 84–86.

195 In fact, its "anomaly" status has led some commentators to wonder whether alienage ever deserved suspect status. *See, e.g.*, Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1105 n.72 (1982) (describing the inclusion of alien status as "incomprehensible"); *see also* Yoshino, *supra* note 3, at 571 n.41 (arguing aliens should not be given protected status because alienage is not immediately visible). This reluctance to embrace alienage as a suspect classification also appears to have manifested itself in the "political function" exception to alienage's suspect classification status: "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives . . . . [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." Sugarman v. Dougall, 413 U.S. 634, 648 (1973) (establishing the political function exception and applying the exception to civil servants); *see also* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (applying the exception to "peace officers"); Ambach v. Norwick, 441 U.S. 68 (1979) (applying the exception to public school teachers); Foley v. Connelie, 435 U.S. 291 (1978) (applying the exception to police officers). *But see* Bernal v. Fainter, 467 U.S. 216 (1984) (refusing to applying the exception to notary publics).

The secondary literature is replete with innumerable views on the political function exception. Some authors have been generally critical of the Court's willingness to apply the political function exception. *See, e.g.*, ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 29–53 (1985); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977). Others have seen it as an important and helpful example of context-sensitive equal protection analysis. *See* Goldberg, *supra* note 8. Still others have argued that the political function exception rightfully returns authority over particular political determinations to the states. *See* Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135 (1996). And another group of scholars have, while approving of the general thrust of the Court's alienage jurisprudence, expressed

The Court first announced alienage as a suspect classification in 1971, stating the following:

> But the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority (see United States v. Carolene Products Co., 304 U.S. 144, 152–153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate.[196]

The Court did not elaborate on why alienage was like nationality and race, but the citation to *Carolene Products* does seem to indicate that the argument is being made on process-based grounds.[197] The Court has, however, on one occasion, stated that it believes alienage to be immutable:

> And the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes. See*, e.g.*, *Oyama v. California*, 332 U.S. 633 (national origin); *Graham v. Richardson,* 403 U.S. 365 (alienage); *Gomez v. Perez*, 409 U.S. 535 (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (gender).[198]

In fact, combining the Court's decisions in *Graham v. Richardson* and *Parham v. Hughes*, gives the distinct impression that the Court sees alienage as fulfilling the criteria necessary for suspect classification status under the process-plus-immutability paradigm.[199] But under conventional wisdom—which defines immutability as the inability to change[200]—it is far from clear how alienage could be considered an immutable trait.

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concern regarding the wide ranging application of the political function exception. *See, e.g.*, Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 63 (1985); Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1532–36 (1979).

Regardless of one's view of the political function test, it seems clear that the Court has been ambivalent about how to map the tiers-of-scrutiny approach on to the alienage classification. Thus, aliens have been deemed a protected class although they often do not receive the typical protections associated with that status. Indeed, this disconnect only further raises the question of what about the alienage classification led the Court to deem it a suspect classification. This Article's analysis of immutability hopes to provide part of the answer to that question.

196 Graham v. Richardson, 403 U.S. 365, 371–72 (1971) (footnotes and citations omitted).

197 *See generally* Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 606–16 (1994) (arguing state laws based on alienage are unconstitutional unless they are narrowly tailored to meet a compelling state interest).

198 Parham v. Hughes, 441 U.S. 347, 351 (1979).

199 Carrasco, *supra* note 197, at 606–16.

200 *See supra* note 77.

Unsurprisingly, some courts have ignored the Supreme Court's conclusion and explicitly stated that alienage is not immutable.[201] In trying to reconcile the fact that one can change their alien status—an alien can become a citizen—with the Supreme Court's claim that alienage is immutable, Kenji Yoshino has stated the following: "The absence of analysis in [*Parham v. Hughes*], however, leads me to suspect that [the Supreme Court is] erroneously inferring that a group is immutable if it has received heightened scrutiny."[202] Although understandable, concluding that the Court simply made a mistake somehow seems false.

As should already be clear, under *Frontiero*'s "accident of birth" definition alienage is an immutable trait. This is because in our analysis, a trait is considered immutable in the equal protection context when the trait in question was not chosen; thus, traits that are mere accidents of birth are considered immutable. Indeed, given the principles driving the suspect classification inquiry, the fact that alienage is immutable makes good sense. To subject an individual to liabilities simply because he was born in a foreign country would run counter to the Equal Protection Clause's underlying principle: that the imposition of a burden must be a function of an individual's personal liability or wrongdoing. As a result, the immutability factor helps advance the principle underlying the Equal Protection Clause by further bolstering alienage's claim to suspect classification status.

Indeed, this same dynamic appears to have been at work in the Court's subsequent analysis of the alienage classification. In *Plyler v. Doe*, the Court dealt with a Texas statute that denied enrollment in public schools to children not legally admitted into the United States.[203] In deciding the case, the Court held that the statute did not violate the Equal Protection Clause, in part, because illegal aliens did not constitute a suspect class.[204] This holding emphasized the fact that the class in question was made up of *illegal* aliens; as repeatedly noted, aliens are a suspect classification.[205] As part of its analysis, the Court concluded that illegal alien status was not immutable. This should come as no surprise—even on the conventional account, ille-

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201 *See, e.g.*, Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997) (noting that "alienage is not immutable"); Smothers v. Benitez, 806 F. Supp. 299, 306 n.10 (D.P.R. 1992) (referencing secondary literature for the proposition that alienage is not immutable).

202 Yoshino, *supra* note 3, at 495 n.33.

203 457 U.S. 202, 205–06 (1982).

204 *Id.* at 218–24.

205 Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

gal alien status is not immutable because it is a status that can be changed.

But in making its determination that illegal alien status was not immutable, the Court did not mention the fact that such a status can be changed; instead, the Court noted the following: "Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."[206] In other words, given the option of constructing immutability as either an exit or entrance criterion, the Court chose to employ immutability as an entrance criterion.[207] Here again, the Court appears to focus its inquiry on whether the imposition of liabilities can be tied to the wrongdoing of the individuals in question.[208] In making such a determination, the Court invoked the immutability criterion to show that the imposition of liabilities was justified because it was a function of conscious and unlawful action.[209] Irrelevant to the inquiry was whether the individuals that comprised the classification could exit the class; such an inquiry did not, apparently, speak to the question of whether the imposed liabilities bore any relationship to individual responsibility or wrongdoing. In this way, it was the question of coerced entrance—and not the question of possible exit—that enabled the Court to determine whether a particular classification should be afforded the heightened protections of suspect status.

Thus, applying the "accident of birth" definition of immutability addresses the critique that immutability is not a useful doctrinal tool because it is neither a necessary nor sufficient criterion for suspect-classification status. Once we understand why the Supreme Court understood alienage to be immutable, then all classes that have been deemed suspect are immutable, including alienage. In other words, immutability is not simply a factor; it is a wholesale side constraint on suspect status. Accordingly, understanding immutability as applying to entrance cases avoids one of the most pronounced criticisms in the secondary literature, solidifying immutability's place in equal protection doctrine.[210]

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206 *Plyler*, 457 U.S. at 220.

207 *Id.* at 219 n.19 ("Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action.").

208 *Id.* at 220.

209 Indeed, the Second Circuit has cited *Plyler* for this proposition in concluding that cocaine dealers, in challenging the Sentencing Guidelines, could not be considered a suspect classification. *See* United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999).

210 It is also worthwhile to note that using immutability to focus on entrance into classifications as opposed to exit from them obviates the need to discuss how high exit costs must be in order for a classification to be immutable. Although the need to make such a de-

But linking immutability to the overall purposes of the Equal Protection Clause in this way leaves Ely's critique unanswered. If the immutability factor was intended to allow courts to better determine whether or not a particular classification was legitimately relevant to individual responsibility, then why not consider relevance directly?

VII. IMMUTABILITY VS. RELEVANCE: RESPONDING TO ELY'S CONCERNS

Claiming that immutability is best understood as a coerced entrance problem does alleviate some of the doctrinal difficulties discussed above. It avoids the criminal problem, explains why the Court has understood alienage as immutable, and allows the immutability factor to act as a necessary condition for suspect-classification status. What it does not do, however, is explain another core perplexity regarding immutability's role in equal protection doctrine. Why not, as Ely suggests, simply use relevance instead of immutability in tandem with process-based indicia as a barometer for suspect classification status?[211] If courts, on our account, are meant to use immutability to help determine whether a classification is relevant to the legal burdens being imposed, then why use a proxy, when you can have the real thing?

To understand why courts cannot consider relevance directly requires thinking about the overall purpose of the Equal Protection Clause's process-based paradigm. Ultimately, the purpose of the Court's employing its tiers of scrutiny structure is to determine whether laws have been motivated by invidious discriminatory intent.[212] The Court has focused on suspect classifications as a way of isolating cases where it thinks it is likely that discriminatory intent was driving the drafting of a statute or regulation.[213] A classification is

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termination is not a problem in and of itself, the difficulties inherent in such a doctrinal task make eliminating the need a clear virtue of the immutability-as-coerced-entrance definition. Indeed, it is difficult to develop a principled theory on why sex is immutable while homelessness is not; both seem to be classes that are difficult, but not impossible, to exit. However, an individual's sex is undoubtedly assigned at birth, rendering it immutable for the purposes of the Equal Protection Clause.

211 ELY, *supra* note 3, at 150.

212 *See, e.g.*, Vill. of Arlington Heights v. Metro. Hous. Dev. 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."); Washington v. Davis, 426 U.S. 229, 242 (1976) ("Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

213 *Davis*, 426 U.S. at 242 ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the dis-

deemed suspect when courts have good reason to believe—based on a history of discrimination and current political powerlessness—that legal burdens are being imposed on a group because of inter-group animus.[214] Such circumstances represent instances of process-failure—where a certain group is simply not able to get a fair shake in the political process because of its limited size or because of the pervasiveness of bias against it.

The focus on suspect classifications is meant to avoid focusing on the substance of the statute or regulation in question. Courts are meant to consider the use of a particular classification without considering how exactly it has been used in the statute or regulation. To allow courts to simply pass on the relevance of a classification to the statute's stated purpose would be to fail to take seriously the potential indications that some sort of underlying discriminatory intent was at work. Equal protection doctrine leans on its suspect classification methodology in order to ensure that courts consider the way in which histories of discrimination and the current political power structure might have played a role in the statute or regulation under consideration. In this way, suspect classifications allow courts to focus on the process through which legislation has been passed in order to provide heightened procedural protections to the groups who most need them.[215]

This is why considering relevance directly would be so problematic. In the construction of suspect classifications, courts are supposed to consider the process-based hurdles faced by certain groups. Considering whether a particular classification was relevant would entail passing judgment on whether it was legitimate to impose a particular legal burden on the classification in question; put differently, it would allow courts to ignore the procedural inquiry and determine whether the statute was constitutional on the substance. Doing so would strip precariously positioned groups of the procedural protections captured by the suspect classification inquiry. Indeed, this is why courts are supposed to consider the relationship between the

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criminatory impact—in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires—may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.").

214 *See supra* note 44.

215 *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").

classification and the goal of the statute only *after* determining what level of scrutiny the classification deserves. To allow relevance to become part of the suspect classification inquiry would be to undermine the process-based protections incorporated into current equal protection doctrine.[216]

Of course, as we have noted, the traditional indicia of suspectness do not, on their own, provide an adequate framework for considering the existence of process failures. By themselves, they leave open the possibility for criminals to become a suspect classification. As a result, the traditional indicia of suspectness turned out not to be good enough indicators that inter-group animus was motivating a particular statute. This is because in some instances there was good reason for imposing legal burdens on a group—like criminals—that historically had been the subject of discriminatory legislation. Thus, courts needed another indicator in order to better isolate classifications where it was even more likely that inter-group animus played a role in the legislative process.

Immutability is able to play that role. As opposed to relevance, immutability can serve as a good indicator of whether discriminatory intent has motivated a statute without requiring a court to consider the substance of the statute. Immutability, understood as concerned with accidents of birth, helps courts determine whether a statute, which employs a classification, is likely the result of inter-group animus. In this way, it enables courts to evaluate whether the imposition of legal burdens on a particular group is the result of inter-group animus. In turn, courts can determine what level of scrutiny to employ in considering the connection between the ostensible purpose of the legislation and the use of the classification. As a result, immutability can further the overall purposes of the process-based paradigm.

VIII. CONCLUSION: THINKING ABOUT IMMUTABILITY AND SAME-SEX MARRIAGE

This Article has advanced two primary propositions. First, that the definition of immutable is contextual. This became clear when we considered the definition of immutability in both asylum law and Title VII. In each context, the term immutability took on a different meaning, depending on the principles the immutability factor was meant to advance.

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216 Janet Halley makes a similar point, claiming that such reasoning is implicit in the Supreme Court's decision in *Mathews v. Lucas*, 427 U.S. 495, 505 (1976). *See* Halley, *supra* note 3, at 928–29.

We then considered how to define immutability in the equal protection context. In doing so, we looked to the principles animating equal protection analysis, focusing on the Supreme Court's introduction of the immutability factor in *Frontiero v. Richardson*.[217] The conclusion of our analysis was that, in the context of the Equal Protection Clause, immutability was concerned not with whether or not a trait could be changed, but whether the trait was voluntarily adopted. This definition tracked both the Court's "accident of birth" language and drew upon the immutability factor's roots in the Court's illegitimacy cases.[218] Focusing on immutability as an accident of birth helped explain why criminals should not be counted among the suspect classifications; in addition, it also explained why the Court has described alienage as an immutable trait, rendering the immutability factor a necessary condition for suspect-classification status.

Reconsidering the meaning and purpose of the immutability factor is particularly important at this juncture given the rise in litigation over same-sex marriage. Courts, in assessing whether statutory schemes prohibiting same-sex marriage are constitutional, invariably delve into an analysis of whether sexual preference can be considered immutable. Understanding immutable traits as accidents of birth changes the terms of the debate over same-sex marriage in a number of important ways.

First, it renders analysis over whether sexual preference can be changed moot. This is an important development not simply from a legal perspective. From Michel Foucault's repressive hypothesis[219] to Kenji Yoshino's theory of covering,[220] scholars have worried about the

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217 411 U.S. 677, 686–87 (1973).

218 Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972); *see also* Jimenez v. Weinberger, 417 U.S. 628, 631–32 (1974).

219 *See* MICHEL FOUCAULT, *The Repressive Hypothesis*, *in* THE FOUCAULT READER 301 (Paul Rabinow ed., 1984). Foucault's concern stems from the Enlightenment's fascination with science; in turn, this fascination gave birth to a "new persecution of the peripheral sexualities," which "entailed an *incorporation of perversions* and a new *specification of individuals*." *Id.* at 322. Nowhere, on Foucault's account, was this mechanism more evident than in the reconceptualization of homosexual conduct into a category of homosexuality:

> Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away.

Id. This reconceptualization—the shift from conduct to status—empowered Enlightenment scientists to employ science as a tool to exercise power over these new statuses to manipulate, control, and cure the members of these "deviant" status groups. *Id.* at 322–23.

220 *See generally* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); Yoshino, *supra* note 153, at 772. Yoshino's primary concern is the way in which

effects of implying that sexual preference is something that requires modification. To provide lesser protections to traits that can be changed implies some sort of expectation that such a trait can and should be modified.[221] However, understanding immutability as concerned not with the ability to change a trait, but with whether a trait was voluntarily adopted, ensures that equal protection analysis avoids such implications. In this way, our definitional shift ensures that the immutability factor is not deployed as a tool to ensure conformity and assimilation.

Second, understanding immutability as focused on entrance into the classification moves us away from the identity-based arguments deployed by courts considering the constitutionality of legislation that prohibits same-sex marriage. As noted above, while differing in approach, the California, Connecticut and Iowa Supreme Courts all focused on the way in which sexual orientation plays an important role in the constitution of individual identity.[222] In turn, all three courts reasoned that the important role sexual orientation plays in the constitution of individual identity should affect the way in which we understand sexual orientation to be a trait that can be changed.[223] However, if we understand the immutability inquiry as focused not on the ability to change a trait, but whether the trait is an accident of birth,[224] identity-based arguments lose much of their traction as related to suspect classification analysis.[225]

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the law protects traits, but not actions. In turn, individuals are forced to mute some of their own behavioral traits—to "cover" their true identities. *Id.* at 771–73. Yoshino expresses particular concern over the fact that traits that are mutable are not given the same protections as immutable traits; this distinction implies an expectation that individuals with mutable traits should in fact change them. *Id.*

221 Yoshino, *supra* note 153, at 877 ("Put differently, the descriptive claim that the group *can* assimilate because of the mutability or invisibility of its defining trait transmutes into the prescriptive claim that the group *should* assimilate with very little intervening investigation by a court. Because of this, the immutability factor in equal protection analysis effectively translates into a demand that mutable groups convert, and the visibility factor effectively translates into a demand that invisible groups pass." (emphasis in original)).

222 *See In re* Marriage Cases, 183 P.3d 384, 441 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009).

223 *See supra* note 222.

224 To be sure, identity arguments could play a prominent role in determining whether sexual orientation is an accident of birth. *See generally* Stein, *supra* note 41 (discussing the immutability factor in equal protection jurisprudence as the central legal context for the "born that way" arguments for gay rights); Wardle, *supra* note 41 (focusing on the biological effects of homosexual behavior on human health). However, as demonstrated by the recent spat of state supreme court decisions, identity arguments have been deployed to meet arguments about the ability to change sexual orientation. It is these arguments that an "accident of birth" focus renders irrelevant.

On the other hand, shifting immutability's focus away from exit and towards entrance leads to other important questions. To say that immutability is concerned with accidents of birth does not tell us what an accident of birth is. Applying our definition of immutability is particularly difficult once we begin to think about genetic dispositions. Should we consider people as being homosexual from birth? Are some people simply wired, from birth, to be criminals? While such individuals might only act on genetic predispositions later in life, nothing in our analysis thus far precludes understanding such traits as immutable. Indeed, given the volatile dispute over whether sexual orientation ought to be considered a suspect classification, this may be one of the central questions in future equal protection litigation.

In answering this question, different elements of the current doctrine point us in different directions. On the one hand, the Supreme Court has, at times, emphasized the fact that certain immutable traits are also "visible." For example, the Supreme Court, in finding that "close relatives" did not constitute a classification, explained its holding by saying that close relatives "do not exhibit *obvious*, immutable, or distinguishing characteristics that define them as a discrete group."[226] In *Frontiero* itself, the Court noted that "it can hardly be doubted that, in part because of the *high visibility* of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena."[227]

Focusing on visible immutable traits is understandable. Only allowing the traits we can see—like race and sex—to count as immutable traits takes courts out of the business of trying to determine how people are genetically wired. It therefore would allow courts to simply take traits like sexual preference and criminality and deem them

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225 Of course, identity arguments will likely continue to play a prominent role in legislative initiatives providing for same-sex marriage. *See, e.g.*, An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, No. 09-13 2009 Conn. Acts (Reg. Sess.) (removing gender identity requirements from the state statute governing marriage); An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom, Me. L.D. 1020 (124th Legis. 2009) (to be codified at Me. P.L. 2009, ch. 82, § 650 et seq.) (same); An Act Affirming Religious Freedom Protections With Regard to Marriage and Prohibiting the Establishment of Civil Unions On or After January 1, 2010, N.H. H.B. 73 (2009) (same); An Act to Amend the Domestic Relations Law, In Relation to the Ability to Marry, N.Y. Assem. Bill No. A7732 (2009) (attempting the same).

226 Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (internal citations omitted) (emphasis added).

227 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (emphasis added).

mutable; they are simply not the types of traits that are imposed, in an obvious manner, at birth. Thus, by emphasizing some of the Court's gestures toward a "visibility factor,"[228] courts could avoid deciding whether some genetic traits qualify as accidents of birth for the purposes of the immutability inquiry.

But the visibility factor itself stands on uneven foundations. Most notably, alienage is far from visible,[229] and yet the Court has both deemed alienage immutable[230] and found alienage to be a suspect classification.[231] In doing so, the Court has expressed serious concern that aliens might not receive fair representation in the political process, constituting one of the discrete and insular minorities current equal protection doctrine was built to protect.[232] Again, this is despite the fact that alienage is not a visible trait.

Therefore, applying our definition of immutability in the same-sex marriage context does not end the conversation; it actually begins the conversation. But it does so in a way that constitutes a significant improvement. First and foremost, it instructs courts to get out of the business of asking whether sexual orientation can be changed. Indeed, in this way, our own definition of immutability tracks some of the identity arguments currently deployed by courts in cases addressing same-sex marriage.[233]

Moreover, defining immutability as coerced entrance explains why the immutability inquiry is relevant to equal protection analysis. In turn, it draws our attention to the way in which immutability, along with the traditional indicia of suspectness, can be used to determine when certain groups are not able to avail themselves of the benefits typically afforded by the democratic process. By reconnecting immutability to the process-based focus of equal protection doctrine, we have framed the question courts must ask when considering whether sexual preference is immutable: Is sexual preference the type of trait

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228 *See generally* Yoshino, *supra* note 3, at 492 (describing the courts' definition of visibility and arguing that "visible groups are uniquely vulnerable in the political process").

229 *But see* Victor C. Romero, *The Congruence Principle Applied: Rethinking Equal Protection Review of Federal Alienage Classifications After* Adarand Constructors, Inc. v. Peña, 76 OR. L. REV. 425, 455 (1997). In his conclusion, Romero states that aliens are a "readily identifiable group of people, composed mostly of people of color." *Id.* It is not clear, however, if he is making an argument that alienage should be considered a visible trait, especially given the piece's focus on intersectionality.

230 Parham v. Hughes, 441 U.S. 347, 351 (1979).

231 Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

232 *Id.*

233 *See generally, In re* Marriage Cases, 183 P.3d 384, 441 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009).

that is simply thrust on the individual from birth? In answering this question, courts should consider whether imposing legal burdens for sexual preference bears some relationship to individual responsibility. As we have seen, a tenuous link between the imposition of legal burdens on a group and the "basic concept of . . . individual responsibility"[234] provides a strong indication that the statute or regulation in question was not the result of properly functioning democratic decision-making, but of inter-group animus.[235] It is here that our inquiry regarding whether sexual orientation should be deemed a suspect classification should begin. Does what we know about the origins of sexual orientation, combined with the history of discrimination against homosexuals and their current share of political power lead us to believe that legal burdens imposed based upon sexual orientation are the result of democratic deliberation or inter-group animus? It is in the answer to this question that the future of same-sex marriage resides.

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234 Frontiero v. Richardson, 411 U.S. 677, 686 (1973)

235 Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.").