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The *Majoritarian* Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics

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Introduction

Conventional academic literature portrays the Supreme Court as a countermajoritarian body.[1] Alexander Bickel's research on judicial review provides the most classic explication of judicial countermajoritarianism.[2] Judicial review conflicts with democracy because it permits unelected judges to invalidate actions taken by representative branches of government.[3]

Bickel's work has led many scholars to theorize about the appropriateness of judicial review and to defend the Court against charges of countermajoritarianism.[4] Ironically, many of these efforts have, in fact, fortified the common understanding of the

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1. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) ("The 'countermajoritarian difficulty' has been the central obsession of modern constitutional scholarship.").

2. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

3. *See id.* at 16-17 (arguing that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people").

4. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 202 (2002) ("Bickel's description of the countermajoritarian problem gained prominence in the decade following publication of *The Least Dangerous Branch* and ultimately came to grip the attention of a generation of constitutional theorists." (citation omitted)); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 794 (2003) (noting that "Bickel . . . in many ways inspired the late twentieth-century concern about the legitimacy of judicial review").

Court as a countermajoritarian body.[5] For instance, John Hart Ely's representation-reinforcement theory of judicial review accepts the proposition that judicial review is undemocratic;[6] Ely argues that, as a consequence, federal courts should ordinarily defer to the democratic branches.[7] Ely, however, attempts to legitimize opportunities for more invasive judicial review: the Court should engage in exacting analysis to correct failures in the political process[8]—such as when lawmakers abandon rational and deliberative decision making and pass laws that reflect racism or other forms of prejudice against vulnerable classes[9] or infringe liberty interests related to the exercise of political freedoms, like speech and suffrage.[10] The notion that the Court protects disadvantaged classes from majoritarian abuse permeates constitutional law debates.[11]

Despite the pervasiveness of academic literature decrying the Court's supposedly countermajoritarian nature, scholarship from a substantial number of legal theorists and political scientists challenges this classical view of judicial review.[12] These scholars typically fall within three categories: traditional constitutional law scholars, critical legal theorists, and political scientists whose work analyzes legal institutions.[13] Left-leaning critical legal scholars who write in the areas of critical legal studies, critical race theory, feminist legal theory, and gay and lesbian legal theory have argued that Court doctrine privileges advantaged, dominant classes and harms subordinate and vulnerable groups.[14]

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5. *See* Friedman, *supra* note 4, at 253 ("Extended discussion of the countermajoritarian difficulty was found not in *challenges* to judicial review, but in defense of it, most notably in the writings of Eugene Rostow and Charles Black. Indeed, this was the very bulk of their scholarship, trying to respond to the countermajoritarian problem." (citation omitted)).

6. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4-5 (1980) ("[T]he central function [of judicial review] . . . is at the same time the central problem . . . : a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.").

7. *See id.* at 101-04 (discussing the undemocratic nature of judicial review).

8. *See id.* at 73-104 (discussing the role of courts in policing democratic process).

9. *See id.* at 135-79 (describing prejudice against "minority" groups as a process failure).

10. *See id.* at 73-134 (arguing that the Court should protect political freedom).

11. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1-2 (1996) (arguing that a common perception of the Court as a protector of "minority rights from majoritarian over-reaching . . . exercises a powerful hold over our constitutional discourse").

12. *See infra* Part I.B.

13. *See id.*

14. *See infra* Part I.B.2.

Furthermore, within the field of political science, an array of scholars who (unlike critical legal theorists) are not openly affiliated with any social critique of legal doctrine, have conducted empirical research on judicial decision making and have largely concluded that Court decisions roughly mirror known public opinion, the views of the democratic branches, and the positions held by powerful social institutions (such as corporations and institutions of higher education).[15] Finally, many constitutional law theorists have borrowed the insights of political scientists to contest claims of judicial countermajoritarianism in doctrinal and theoretical research.[16] The work of these scholars seeks to refute common portrayals of the Court as an undemocratic institution that utilizes the judicial review function to protect subordinate classes against majoritarian concerns.[17] According to these scholars, the Court is, unmistakably, a majoritarian institution.

Contemporary debates over recent Court decisions provide a rich context to weigh claims of judicial countermajoritarianism against the work of constitutional theorists, critical legal scholars, and political scientists who view the Court as a majoritarian body. In particular, the Court's decisions in *Lawrence v. Texas*,[18] *Gratz v. Bollinger*,[19] and *Grutter v. Bollinger*[20] have reignited arguments concerning the propriety of judicial review.[21] Prominent judicial commentators have described the decisions as important, and unexpected, civil rights victories from a markedly conservative Court.[22] Liberal and conservative scholars and activists seem to agree with this description: mainline civil rights organizations and liberal scholars view the decisions as examples of the Court protecting and advancing the interests of disadvantaged groups, while conservatives, apparently accepting this portrayal, argue that these cases demonstrate that the Court has aligned itself with leftist and elitist interests, rendering its opinions incongruent with majoritarian public thought.[23]

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15. *See infra* Part I.B.1.b.

16. *See id.*

17. *See id.*

18. 539 U.S. 558 (2003) (invalidating a state sodomy statute on due process grounds).

19. 539 U.S. 244 (2003) (invalidating a university affirmative action plan as not narrowly tailored).

20. 539 U.S. 306 (2003) (upholding a university affirmative action plan as pursuing a compelling interest in student diversity).

21. *See infra* Part II.

22. *See id.*

23. *See id.*

This Article challenges liberal *and* conservative assessments of *Lawrence*, *Gratz*, and *Grutter*. Although the outcome of these cases might indeed prove helpful to the agendas of social movements for racial and sexual justice, progressive scholars and activists should not receive these cases with elation. Instead, the research of constitutional theorists, critical legal scholars, and political scientists allows for a more contextualized and guarded account of and reaction to these decisions. Instead of representing extraordinary victories for oppressed classes, these cases reflect majoritarian and moderate views concerning civil rights, and the opinions contain many doctrinal elements that reinforce, rather than dismantle, social subordination.[24] Only a sober reading of these cases can permit equality theorists to place the decisions within a broader movement that contests narrow conceptions of legal and social equality.

This Article explicates my thesis in three parts. Part I examines the body of works by constitutional theorists, critical legal scholars, and political scientists on judicial majoritarianism in order to construct an analytical framework for considering how Court doctrine reinforces dominant interests.[25] The purpose of Part I is not to determine whether or not (or under what circumstances) the Court *should be* countermajoritarian, but instead to analyze substantial research that complicates, if not refutes, traditional understanding of the Court as undemocratic. Part II applies the analytical framework developed in Part I to *Lawrence*, *Gratz*, and *Grutter* and concludes that, contrary to popular portrayals, these decisions fortify, rather than aim to dismantle, social hierarchies of race, sexuality, class, and gender.[26] Furthermore, Part II demonstrates that the Court explicitly grounds its rulings in these cases upon democratic considerations, thus lending support to arguments that contest countermajoritarian discourse.[27] Part III utilizes social movement theory to explain the enthusiastic reaction of liberals to *Lawrence*, *Gratz*, and *Grutter*.[28] Part III argues that civil rights organizations enthusiastically received these cases, despite their limitations, because for years these groups have conducted litigation and activism within a conservative legal framework that

24. *See id.*
25. *See infra* notes 31-183 and accompanying text.
26. *See infra* notes 184-408 and accompanying text.
27. *See id.*
28. *See infra* notes 409-485 and accompanying text.

generally opposes affirmative action and gay rights agendas.[29] Part III then offers strategic considerations for legal theorists and activists who seek progressive legal change before a majoritarian Court.[30]

I. What Countermajoritarian Dilemma?: Constitutional Theory, Critical Legal Scholarship, Political Science, and Judicial Decision Making

A. *The Origins of Countermajoritarian Discourse*

Countermajoritarian criticism has existed for a large part of the nation's history.[31] The critique emerged with great intensity during the Jefferson Presidency, where political struggles between the Federalists and Republicans often placed the federal courts and the democratic branches in bitter conflict.[32] Since that time, countermajoritarian discourse has surfaced with varying degrees of intensity in constitutional law analysis. Although countermajoritarian discourse has an historical presence in constitutional law and political science debates, contemporary scholars have obsessed over the issue.[33] And while many historical events have led to the entrenchment of countermajoritarian discourse in legal theory, three judicial moments receive credit for contributing most heavily to the contemporary fixation: (1) the doctrinal recognition of economic liberty and judicial invalidation of state and federal economic regulations during the *Lochner* era; (2) the Court's hostility to New Deal legislation; and (3) the negative reaction to *Brown v. Board of Education* and other Warren Court decisions by several prominent

29. *See infra* Part III.A.

30. *See infra* Part III.B.

31. *See* Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 810 (1974) ("The reconciliation of judicial review with American representative democracy has been the subject of powerful debate since the early days of the Republic.").

32. *See* Friedman, *supra* note 1, at 356-81 (discussing conflicts between a Federalist judiciary and a Republican Congress and President).

33. *See* Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 495 (1994) (describing the "last generation of constitutional scholars" as being "[p]reoccupied with the 'countermajoritarian difficulty' posed by judicial review"); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1709 (1998) ("Contemporary constitutional law is preoccupied with the antidemocratic nature of judicial review."); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1521 (1990) (discussing "the mid-century obsession with the countermajoritarian difficulty").

legal academics.[34] In response to these three (and other) judicial moments, constitutional scholars have produced an enormity of scholarship analyzing the proper function of the federal courts in a democratic society.

1. *Lochner v. New York* and Countermajoritarianism

The story of *Lochner* is rather mundane, yet solidly a part of constitutional popular culture. The *Lochner* Court invalidated a New York law that established maximum daily and weekly hours for workers in the baking industry.[35] The Court held that the regulation infringed workers' and employers' rights of economic liberty and freedom of contract.[36] Although the Constitution does not enumerate such rights, the Court concluded that these liberty interests were protected by the Due Process Clause of the Fourteenth Amendment, thus establishing the controversial principle of substantive due process.[37]

Critics of *Lochner* vigorously asserted that the Court improperly substituted its own will for the value judgments of a democratic body.[38] From the bench, Justice Holmes offered his famous dissent that passionately accused the majority of allowing its own viewpoints to taint the judicial review function and to invade the legislative process:

> It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally

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34. Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 61-64 (1989) (describing *Lochner*, the New Deal, and *Brown* as leading moments shaping contemporary countermajoritarian discourse).

35. Lochner v. New York, 198 U.S. 45 (1905).

36. *Id.* at 53. According to the Court:

> The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.

Id.

37. *See id.*

38. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 985 (2000) ("During the Populist/Progressive, or *Lochner*, era, the criticism of constitutional courts was akin to that described by Bickel's 'counter-majoritarian difficulty'. . . . Courts regularly were attacked as interfering with, or frustrating, popular will.").

> differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[39]

Many legal academics and the popular press made similar arguments concerning the impropriety of judicial invalidation of economic regulations.[40]

2. The New Deal and Countermajoritarianism

The *Lochner* Court continued to apply stringent review of economic regulations—not only of state laws, but of federal regulations as well.[41] Narrowly construing Congress' commerce clause authority, the Court invalidated or enjoined enforcement of several federal regulatory statutes.[42] The situation came to its infamous climax when, after the Court invalidated key pieces of the New Deal legislation,[43] President Roosevelt made several scathing, public critiques of the Court, which culminated in the announcement of his controversial "court-packing" plan.[44] The Court was widely criticized during this period—although many of the criticisms targeted the age or poor decisions of the justices, rather than the propriety of judicial review.[45] Nonetheless, the New Deal conflict sparked a fair amount of antimajoritarian discourse, and, because the Court survived the battle with the popular Roosevelt, the battle may have strengthened the Court as an institution, thus making fears of countermajoritarianism more

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39. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting).

40. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1428-47 (2001) (discussing contemporaneous critiques of *Lochner* along countermajoritarian lines).

41. *See* Chemerinsky, *supra* note 34, at 50 ("[D]uring the *Lochner* era the Court aggressively protected state sovereignty by invalidating federal statutes as exceeding the scope of Congress' commerce and spending powers. The *Lochner* era Court also actively safeguarded economic liberties by ruling unconstitutional numerous state laws as interfering with freedom of contract." (citation omitted)).

42. *See id.* at 50-51 (discussing stringent exercise of judicial review during *Lochner* period).

43. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating a labor law regulating the coal industry); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (invalidating a statute authorizing the President to impose various fair competition requirements upon companies).

44. *See* William E. Leuchtenburg, *FDR's Court Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673; William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

45. *See* Friedman, *supra* note 38, at 988-1001 (discussing countermajoritarian criticism during New Deal period).

pronounced.[46]

3. *Brown v. Board of Education* and Countermajoritarianism

While the *Lochner* and New Deal era debates intensified the deployment of countermajoritarian discourse, the academic reaction to *Brown v. Board of Education*[47] would solidify the prominence of such debates in contemporary constitutional and political science theory.[48] The Court justified *Brown* on the grounds that public education is an important resource in a democratic society[49] and that racial segregation in the educational context stigmatizes black children.[50] The Court reached these conclusions despite evidence that the Framers of the Fourteenth Amendment did not necessarily view all forms of race-conscious state action, including public school segregation, as inconsistent with the notion of equal protection.[51] Several leading scholars

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46. Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2206 (1999). Kalman argues that:

> In closing off Congress as a locus for reform and helping to lessen the chance of electing a genuinely liberal President, Court-packing ensured that only an appointed body of elites, which did not serve at the pleasure of the people, could afford to redeem the "transformative promises" of Roosevelt and his "closer continuer[s]." The Court used the 1937 crisis to increase its power. Court-packing led to the revival of the "countermajoritarian dilemma."

Id. (alteration in original) (citations omitted).

47. 347 U.S. 483 (1954) (invalidating the "separate but equal" constitutional standard in the context of public schools).

48. Winter, *supra* note 33, at 1470 ("*Brown* opened up a tremendous anomaly in which judicial review was seen as increasingly undemocratic. This anomaly was so vital a threat to the paradigm that it received an official name: 'the countermajoritarian difficulty.'" (citation omitted)).

49. *See Brown*, 347 U.S. at 493 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.").

50. *Id.* at 494 (holding that racial segregation in public schools "generates a feeling of inferiority [among black children] as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

51. *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 550 (1998) ("Due to the prominence of *Brown* . . . it is widely known that the same Congresses that enacted the Civil War Amendments maintained a segregated school system in the District of Columbia."); *see also* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 432 (1997) ("In fact, nearly no one today is a true equal protection originalist, because true equal protection originalism would repudiate *Brown* . . . ."); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 269 (1997) (arguing that "the framers and ratifiers of the Fourteenth Amendment did not understand or intend its Equal Protection Clause to call into

reacted negatively to *Brown*, claiming to support the outcome of the case, but arguing that the opinion lacked a coherent theoretical basis.[52]

Alexander Bickel, a *Brown* critic, later wrote the influential book, *The Least Dangerous Branch*,[53] which portrays judicial review as inherently undemocratic.[54] The publication of *The Least Dangerous Branch* coincided with some of the more controversial decisions of the Warren Court—rulings invalidating school prayer and extending federal criminal procedural protections to individuals charged with state crimes.[55] Bickel's research served as the inspiration for much of the countermajoritarian criticism directed toward these Warren Court decisions.[56] Bickel argues that:

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in [sic] behalf of the prevailing majority, but against it. That . . . is the reason the charge can be made that judicial review is undemocratic.[57]

Bickel's work ushered in a new era of countermajoritarian discourse,[58] securing the salience of such debates in modern

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constitutional question any and all forms of race-conscious action," but maintaining that *Brown* is legitimate). Several conservative scholars have made "strained" arguments, attempting to justify *Brown* on original intent grounds. *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1929-30 (1995) (discussing conservative efforts to justify *Brown*).

52. *See, e.g.*, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957) (criticizing the Court for failing to provide adequate theories to justify desegregation decisions); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22 (1959) (questioning the existence of a theoretical basis for desegregation jurisprudence); *see also* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 248 (1991) (arguing that in response to *Brown*, "the Court endured some vicious academic criticism").

53. BICKEL, *supra* note 2.

54. *Id.* at 16-23 (describing judicial review as "counter-majoritarian").

55. *See* Friedman, *supra* note 4, at 202-15 (discussing controversial 1960s Warren Court decisions).

56. *See id.* at 202 ("Bickel's description of the countermajoritarian problem gained prominence in the decade following publication of *The Least Dangerous Branch* and ultimately came to grip the attention of a generation of constitutional theorists. His influence was evident as academics responded to the Warren Court's most active phase, during the 1960s." (citation omitted)).

57. BICKEL, *supra* note 2, at 16-17.

58. *See, e.g.*, HOWARD E. DEAN, JUDICIAL REVIEW AND DEMOCRACY 5 (1966).

constitutional law.

4. Saving *Brown*, but Reinforcing Countermajoritarian Discourse

In response to the critiques of *Brown* (and other Warren Court decisions), many liberal constitutional law scholars have attempted to justify the ruling and to carve out a space for meaningful judicial review in a democratic state.[59] Some of these commentators have argued that *Brown* has ample constitutional support as the Equal Protection Clause renders white supremacy an impermissible basis for state action.[60] Accordingly, the decision rests on a coherent constitutional theory and is not, as some critics have charged, an unprincipled exercise of judicial power.[61]

John Hart Ely's reaction to *Brown*,[62] however, has received

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Dean writes:

> The Supreme Court, its critics claim, is a veritable aristocracy of the robe, functioning as a super-legislature, yet neither chosen by the people nor politically responsible to them. Since in a democracy it is the responsibility of the people to correct the errors of the government, that vital function should never be surrendered into the hands of a body of judicial "Platonic Guardians."

Id. *See also* Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 140 ("[People] are likely to prefer legislatures more representative of contending interest groups, more mindful of social complexities, and, most important, more subject to control—legislatures, that is, whose members can be voted in and out of office.").

59. *See* Klarman, *supra* note 51, at 1929 (discussing efforts of liberal scholars to defend *Brown*).

60. *See, e.g.*, Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960) (arguing that the desegregation decisions are justified because "the equal protection clause of the fourteenth amendment [sic] should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states" and because "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law"); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 31 (1959) (arguing that the Court's desegregation cases are correctly decided because "[t]he three post-Civil War Amendments were fashioned to one major end—an end to which we are only now making substantial strides—the full emancipation of the Negro . . . .").

61. *See* Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 124 (1998) ("Pre-*Brown*, white supremacy manifested itself in the system of segregation supported by an ideology of biological determinism."); Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 76 (1998) (observing that *Brown* "has been most persuasively defended as the Court's recognition that, as actually practiced, American segregation was a crucial piece of a system of racial subordination"); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2395 (2000) ("Segregation designed to exclude blacks from equal citizenship was wrong because of its motivating ideology—white supremacy.").

62. *See generally* ELY, *supra* note 6.

the broadest attention in constitutional law discourse. Unlike other theorists whose work attempts to link *Brown* to substantive constitutional provisions (e.g., that the Equal Protection Clause deems white supremacy an illegitimate basis for state action),[63] Ely accepts the portrayal of judicial review as inherently countermajoritarian—and thus dangerous—and attempts to place limitations on its usage.[64] Ely, however, argues that the Court can question the decisions of the democratic branches in order to correct a "process failure" or a malfunctioning democratic process.[65] Drawing from footnote four of *United States v. Carolene Products Co.*,[66] Ely argues that a "process failure" results when laws curtail the exercise of political freedoms, like speech and suffrage,[67] or when legislation emanates from prejudice against politically disempowered classes rather than from a deliberative and contemplative legislative process.[68] In such instances, the Court's exacting analysis does not invade the democratic process; instead, it "reinforces" the representation of disenfranchised and vulnerable classes.[69]

Ely's theory has influenced judicial understanding of the role

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63. *See supra* note 60.

64. *See* ELY, *supra* note 6, at 101-04 (discussing dangers of judicial review in a democracy).

65. *See id.* at 73-104 (linking judicial review to correction of democratic process failures).

66. 304 U.S. 144, 153 n.4 (1938). In *Carolene Products*, the Court—retreating from the *Lochner* style of invasive judicial review—holds that it should normally presume the constitutionality of legislation. *See id.* at 152. Footnote four, however, suggests the potential for more rigorous judicial review:

> There may be a narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities . . . : whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 153 n.4 (citations omitted).

67. *See* ELY, *supra* note 6, at 73-134 (arguing that courts should protect political freedoms).

68. *See id.* at 135-79.

69. *See id.*

of federal courts in a democracy. The impact of Ely's work is perhaps most notable in equal protection jurisprudence. The Court's tiered, "class-based" equal protection doctrine (though not uniformly deployed) rests on the theory that certain classes are politically vulnerable and in need of judicial solicitude; these classes, due to historical prejudice and political disempowerment, cannot utilize the democratic process to overturn unfavorable legislation.[70]

Although Ely's work (and the scholarship of other process theorists) attempts to quell countermajoritarian critiques of judicial review, his research, ironically, has had the opposite effect: process theory has intensified debates over the appropriateness of judicial review in a democratic society.[71] Process theorists themselves acquiesce in countermajoritarian criticism,[72] and many constitutional law critics have persuasively unveiled the value-laden nature of process theories of judicial review,[73] thus sustaining the contentious debates concerning judicial review and democracy.

B. Critiquing the Critique: Counter-Countermajoritarian Discourse

Despite the ubiquity of countermajoritarian discourse in constitutional law debates, many scholars have questioned the legitimacy of this criticism. Rather than viewing judicial review as

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70. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (citing San Antonio Indep. Sch. Dist v. Rodriguez, 411 U.S. 1, 16 (1973) as reaffirming that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class" (citation omitted));. *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 635 ("In theory, the tiered suspect class doctrine, building upon *Carolene Products*, offers judicial solicitude to historically disadvantaged groups."); Rubenfeld, *supra* note 51, at 465 (linking the Court's application of strict scrutiny in equal protection cases to the political process theory).

71. *See* Friedman, *supra* note 4, at 228 (arguing that process theorists "were obsessed with the countermajoritarian problem").

72. *See id.*

73. *See, e.g.*, TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 44-50 (1999); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1092 (1981); Samuel Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547, 578 (1981); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980).

incongruent with democracy, these scholars contend that the Court is a majoritarian body. Three bodies of research contain the bulk of scholarship that seeks to challenge countermajoritarian discourse: (1) traditional constitutional law theory; (2) critical legal theory, including works in critical legal studies, critical race theory, feminist legal theory, and gay and lesbian legal theory; and (3) political science scholarship. This research provides an alternative reading of judicial review that offers a more nuanced and contextualized account of judicial decision making.

1. Constitutional Law and Political Science Arguments Against Countermajoritarian Discourse[74]

Constitutional law and political science scholars have actively criticized countermajoritarian discourse. Their critiques center primarily upon two fault lines in this discourse. First, the countermajoritarian critics exaggerate the extent to which the "political" branches respond to majoritarian interests.[75] Second, the critics fail to recognize the numerous majoritarian influences upon Court doctrine.[76]

a. Assumption One: The Political Branches as Majoritarian

Countermajoritarian critics assert that federal judicial review erodes democracy because it permits unelected judges to overrule actions taken by political branches of government.[77] Fundamental to this critique is the often unelaborated assumption that the political branches are majoritarian.[78] This assumption seems so patently clear to most countermajoritarians that the majority of literature on the subject fails to interrogate it

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74. Because the arguments that constitutional law scholars and political scientists make concerning judicial majoritarianism often converge and overlap, this section analyzes their claims concurrently.

75. *See* PERETTI, *supra* note 73, at 189 (arguing that critics of judicial review "overstate the degree to which the 'political' branches are subject to majoritarian influences and understate the degree to which the Court is subject to democratic influences"); Friedman, *supra* note 4, at 166. Friedman argues that research

> strongly suggests that legislative enactments often do not enjoy majority support, that judicial decisions often do, that judges tend to reflect the views of the popularly elected President that appoints them, and that most of what courts invalidate is the work not of legislative bodies anyway, but of low-level, equally unaccountable administrative actors.

Id.

76. *See infra* notes 99-115 and accompanying text.

77. *See supra* note 58.

78. PERETTI, *supra* note 73, at 190.

altogether, although some exceptions to this general trend exist.[79] Despite the pervasiveness of the idea of democratic-branch majoritarianism, an abundance of political science and constitutional law research complicates this claim for two reasons. First, measuring public opinion on a particular issue is inherently difficult. Second, several procedural and structural aspects of the democratic branches are clearly countermajoritarian.[80]

Although countermajoritarian discourse assumes that political branches inevitably operate in a majoritarian fashion, the lack of any precise tools to measure public opinion complicates this assumption.[81] Polling data constantly reveal that most Americans do not pay attention to politics,[82] and a near-majority of eligible voters have declined to vote in recent presidential elections, and even less participate in congressional elections.[83] This reality immediately problematizes claims that political outcomes represent majority will. Furthermore, when the public expresses its views, these opinions are extremely malleable and unstable.[84] Moreover, even when data can determine that the majority supported a particular candidate or issue, it is doubtful that the majority acted on the same policy preferences or had any particular policy preference at all.[85]

The procedural aspects of elections also complicate the assumption of democratic-branch majoritarianism. The lack of proportional representation in the Senate, for example, erodes majoritarian influence, as small and large states exercise equivalent power.[86] In addition, the existence of the Electoral College and the lack of a proportional award of electoral votes in

79. *See id.* (arguing that among the works of the critics of judicial review "there is often scant attention given by these scholars to their assumptions regarding the nature of American democracy, an issue that is obviously critical to determining the Court's fit with or role in that system").

80. *See infra* notes 86-91 and accompanying text.

81. *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 125-31 (1956) (discussing difficulty discerning majority will from electoral outcomes); PERETTI, *supra* note 73, at 193 ("The policy meaning of the majority's vote is necessarily ambiguous.").

82. PERETTI, *supra* note 73, at 193.

83. *Id.* at 194 (discussing low voter turnout in congressional and presidential elections).

84. *Id.* at 193 (arguing that voter views are "quite unstable").

85. *Id.* ("It is unlikely that, but in any case is impossible to know whether, each member of the majority votes for a particular candidate for the same policy reasons, even assuming that the policy differences of each candidate are perceived and used as the basis of voting.").

86. *Id.* at 194 ("[D]istortions in popular representation occur in the Senate as small states receive more representation than their population size warrants.").

most states means that the victorious presidential candidate may not receive a majority of the popular vote.[87]

Several other factors complicate the assumption of democratic-branch majoritarianism. The division of Congress into committees and subcommittees erodes democracy because these smaller units exercise a great degree of power over what issues Congress discusses.[88] The existence of the filibuster also means that a minority in Congress can subvert majoritarian interests.[89] The delegation by Congress of substantial rule-making authority to administrative agencies with unelected leaders also undermines the assumption of democratic-branch majoritarianism.[90] Finally, the financing of congressional and presidential elections by special interest groups limits the actualization of majority will because it causes national leaders to cater to these groups' interests, which may not reflect majoritarian views.[91] Due to these foregoing structural and procedural realities, constitutional law theorists and political scientists have challenged the notion of democratic-branch majoritarianism.

b. Assumption Two: The Court as Countermajoritarian

The second complicated assumption of countermajoritarian discourse is the idea that federal court review of democratic-branch decision making does not reflect majoritarian influence. Because federal judges possess lifetime tenure and the ordinary

87. *Id.* ("[T]he electoral college, particularly the winner-take-all rule, produces distortions in how the popular vote is translated into electoral votes; it may even award the presidency to a candidate who fails to win a majority, or even a plurality, of the popular votes."). Bill Clinton never won a majority of the popular vote. *See id.* at 311 n.22. Furthermore, Al Gore won the popular vote, but was not victorious. *See* David Stout, *Gore's Lead in the Popular Vote Now Exceeds 500,000*, N.Y. TIMES, Dec. 30, 2000, at A11.

88. *See* PERETTI, *supra* note 73, at 195 ("[D]ue to the workings of the norms of seniority and reciprocity, as well as the subcommittee bill of rights passed in the early 1970s, [congressional] committees have come to exercise considerable power over their policy domains, which they jealously guard.").

89. *Id.* at 195 (listing filibuster as additional impediment to majority will).

90. Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 767-68 (1997) ("The formal discretion of administrative agencies creates a profound normative problem for restraintist constitutional theory .... Indeed, on certain positive theories ... the real import of formal discretion may turn out to have highly unattractive implications for a restraintist theory premised on the majoritarian cast of lawmaking.").

91. PERETTI, *supra* note 73, at 195 ("Further complicating the picture are the growing role of political action committees in financing congressional elections and the power of interest groups in shaping legislative outcomes." (numerous citations omitted)).

democratic process cannot reverse their decisions on matters of constitutional law, the countermajoritarians assert that judicial review conflicts with democracy.[92] Political science and constitutional law research, however, challenges this popular conception of the Court.

The same factors that confound efforts to measure majoritarian will with respect to the democratic branches affect research on public opinion and the Court. Empirical studies have repeatedly demonstrated that the public pays very little attention to the Court's activities, just as it eschews political-branch concerns.[93] Furthermore, once judicial decisions reach the public eye, they do not seem to impact public opinion in any significant fashion.[94] Thus, a majority of the public tends not to care or to know much about Court activities.

While the public may not find judicial activity interesting, the Court's opinions, as several studies indicate, tend to coincide with public opinion on matters where an accurate measure of public opinion exists.[95] Empirical research finds that this pattern of majoritarian decision making holds true even in civil rights and equality jurisprudence, where conventional accounts portray the Court as a champion of minority interests.[96] Data also suggest

92. *See supra* notes 38-40, 54-58 and accompanying text.

93. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 132 (1989) ("Few Court decisions ordinarily are widely perceived and understood by most Americans. As a result, Supreme Court decisions ordinarily do not greatly affect mass public opinion in either the short term or the long term."); PERETTI, *supra* note 73, at 164-67 (discussing numerous empirical studies that demonstrate lack of public awareness concerning the Court).

94. *See* MARSHALL, *supra* note 93, at 132, 155 (finding that Court decisions do not tend to influence public opinion).

95. *See, e.g., id.* at 192 ("Overall, the evidence suggests that the modern Court has been an essentially majoritarian institution. Where clear poll margins exist, three-fifths to two-thirds of Court rulings reflect the polls."); PERETTI, *supra* note 73, at 177-79 (discussing political science scholarship demonstrating the Court's general alignment with popular opinion); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 424 (2002) ("Supreme Court decisions by and large correspond with public opinion." (citations omitted)); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decisionmaking in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985) (arguing that despite its reputation, the post-New Deal Court has been largely majoritarian or, if not, has rendered decisions consistent with emerging trends in public opinion); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 97 (1993) ("Our analyses indicate that for most of the period since 1956, the Court has been highly responsive to majority opinion."); Helmut Norpoth & Jeffrey A. Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 711 (1994) ("Numerous scholars have found that the Court is not generally out of line with public opinion.").

96. *See* Thomas R. Marshall & Joseph Ignagni, *Supreme Court and Public*

that when the Court renders decisions that deviate dramatically from known public opinion, the Court receives harsh criticism from the public and encounters difficulties enforcing its rulings.[97] Furthermore, while the Court sometimes decides cases in a manner that diverges from known public opinion, the rate at which this happens does not differ dramatically from the proportion of democratic-branch decisions that depart from majoritarian will.[98]

Although many studies demonstrate that Court doctrine typically mirrors public opinion, researchers trace the cause of this outcome to different processes. Most theorists attribute majoritarian judicial decision making to at least one of two factors: direct effects or indirect effects. The distinction is one of impact versus intent.[99]

Scholars who believe that public opinion directly impacts the Court argue that the Court intentionally conforms its decisions to known public opinion.[100] These scholars argue that because the Court lacks the force or money to enforce its rulings, its effectiveness depends, in large part, upon the existence of goodwill from the public and the democratic branches of state and federal governments.[101] In order to preserve the Court's legitimacy, Court

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Support for Rights Claims, 78 JUDICATURE 146, 151 (1994) ("By far, the most commonly cited argument for [judicial review] is that it helps protect controversial or unpopular minorities' civil liberties and rights. The results here suggest that this argument should be reconsidered.").

97. *See* Friedman, *supra* note 1, at 432 (arguing that during the Warren Court "popular defiance reappeared as a way of dealing with judicial supremacy, both flagrant (as in the aftermath of *Brown* . . .), and discrete (as in the case of the school prayer decisions)"); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 608 (1993) (arguing that while "[t]he Court's decisions banning prayer in public schools always have been contrary to relatively substantial majoritarian will . . . school prayer continues despite judicial approbation [because] when a majority strongly disagrees with a Supreme Court decision, defiance is the result").

98. *See* Marshall, *supra* note 93, at 80 ("[T]he modern Court appears neither markedly more nor less consistent with the polls than are other policy makers.").

99. *See* William Mishler & Reginald Sheehan, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 716, 716-17 (1994). According to direct effects theory, public opinion impacts the Court because the Court depends on public respect for its authority. *Id.* Indirect effects theory offer that public opinion is expressed by the Court when intended by the personal politics of individual justices. *Id.*

100. *See* William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 196 (1996) ("[A]nalysis of the decisions of individual Supreme Court justices during the 40-year period 1953-1992 provides strong support for the hypothesis that public opinion also has direct effects on the attitudes and behavior of individual justices.").

101. *See* Mishler & Sheehan, *supra* note 99, at 717.

justices endeavor to keep their decisions congruent with the range of public opinion.[102] When public opinion shifts, justices, particularly moderate justices, respond to these shifts;[103] when the Court fails dramatically to comply with majoritarian interests, the public and democratic branches harshly criticize or even ignore its decisions.[104]

Other scholars who directly link public opinion to the views of the justices argue that the Court reflects majoritarian will because justices exist in the same social context as a majority of the public.[105] The social, political, economic, and historical forces that shape majoritarian public opinion also fashion the perceptions of members of the Court.[106] If public opinion modulates, the social forces that cause this shift will impact individual justices.[107] The shared social context of justices and the public leads to similarities in viewpoint.

While some researchers conclude that public opinion directly affects Court opinions, a second school of thought attributes the correlation between public opinion and Court rulings to indirect and more subtle factors.[108] These scholars agree that Court rulings often coincide with public opinion, but they disagree with the assertion that justices actively harmonize their decisions with majoritarian views. Instead, these theorists attribute the congruence of public and judicial opinion to the ideological and political nature of the judicial appointments process.[109] The central role of the democratic branches in the judicial appointments process ensures that the opinions of the Court will not depart radically from public opinion.[110] The president nominates justices who share his or her ideology, and the Senate

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102. *Id.*

103. *See* Mishler & Sheehan, *supra* note 100, at 197 (observing that "the impact of public opinion is most pronounced for the more moderate justices").

104. *See supra* note 97.

105. *See* Mishler & Sheehan, *supra* note 99, at 717 (discussing direct effects theory which links changes in judicial opinion to forces that structure societal thought).

106. *Id.* ("[J]ustices are influenced . . . by the same forces that impinge society as a whole.").

107. *Id.*

108. *See* Norpoth & Segal, *supra* note 95, at 716 ("It is not that the justices pay keen attention to public opinion but that they have been chosen by a president (with the advice and consent of the Senate) who presumably shares the public's views.").

109. *See id.*

110. *See id.* (attributing congruence of popular opinion and Court decisions to the nature of the appointments process).

must confirm appointees.[111] Once appointed to the bench, justices tend to decide cases in a fashion that conforms to the ideology of the president who nominated them.[112]

Furthermore, most presidents have had the opportunity to appoint justices.[113] When presidents appoint new justices, adjustment in the political ideology of the Court can occur, complicating the countermajoritarian rhetoric that the Court is undemocratic because its members have lifetime tenure.[114] While an individual justice has lifetime tenure, the membership of the Court typically shifts with each presidency.[115]

The foregoing research complicates assertions that judicial review is countermajoritarian. Procedural and structural aspects of and public inattention to the democratic branches give them many countermajoritarian dimensions. The involvement of the president and Senate in the judicial selection process, judicial self-interest, and the social environment of judicial decision making lead to a congruence of Court opinions and majoritarian will. Thus, the work of constitutional and political science scholars challenges the basic assumptions upon which countermajoritarian discourse rests.

Another group of scholars has also complicated countermajoritarianism. Theorists in the fields of critical legal studies, critical race theory, feminist legal theory, and gay and lesbian legal theory (collectively, "critical theorists") have argued that Court doctrine protects and reflects majoritarian interests, rather than the perspectives of disadvantaged minorities. The next section addresses these arguments.

2. Critical Theory and Judicial Majoritarianism

Popular legal and nonlegal culture conceives of the Court as a

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111. *Id.*

112. *See* PERETTI, *supra* note 73, at 113 ("[T]he evidence rather clearly and consistently supports the conclusion that there is a strong and direct relationship between presidential expectations and judicial decisionmaking."); Mishler & Sheehan, *supra* note 95, at 95-96 (finding that "changes in the party . . . of the president" and "changes in the ideological composition of Congress significantly influence changes in the ideological composition of the Court").

113. *See* PERETTI, *supra* note 73, at 100 ("[T]urnover on the Court inevitably and regularly occurs. On average, a vacancy on the Court occurs every 1.82 years, giving a single-term president 2.2 appointments and a two-term president 4.4 appointments." (citing John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 877 (1991))).

114. *See id.* (discussing turnover on the Court).

115. *See id.*

guardian of vulnerable, disadvantaged, and powerless classes.[116] Liberal critics who acquiesce in countermajoritarian fears have, in fact, argued that the protection of politically powerless minorities justifies heightened judicial review,[117] thus contributing to the notion that the Court counters democracy to help subordinate groups. The work of critical theorists, however, complicates this prevalent image of the Court. Critical theorists argue that rather than offering solicitude to historically disadvantaged groups, Court doctrine favors majoritarian views on questions of race, gender, sexuality, and class.

Contemporary critical theorists do not view the Court as an unbiased decision maker. Influenced by postmodernism, poststructuralism, and legal realism, these scholars have uncovered the many ways in which legal analysis permits judges to impose their own ideological viewpoints, rather than reaching some "neutral," "correct" legal outcome. The critical legal studies movement[118] has made this point most persuasively and exhaustively. According to critical legal studies scholars, the law is indeterminate, malleable, open to discretionary interpretation, and, consequently, a reinforcer of social hierarchy.[119] These themes of critical legal studies mirror to a great extent the arguments made by earlier members of the legal realist

116. *See* Klarman, *supra* note 11, at 1-2 (observing that a common understanding of the Court as a protector of "minority rights from majoritarian over-reaching . . . exercises a powerful hold over our constitutional discourse").

117. *See* ELY, *supra* note 6, at 135-79 (justifying invasive judicial review on the protection of vulnerable minorities from majoritarian abuse).

118. For general discussions of the critical legal studies movement, see CRITICAL LEGAL STUDIES (James Boyle ed., 1992); CRITICAL LEGAL STUDIES (Alan Hutchinson ed., 1989); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); and ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

119. *See* Jay M. Feinman & Peter Gabel, *Contract Law as Ideology, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 373, 382 (David Kairys ed., 1990) ("The central point to understand . . . is that contract law today constitutes in large part an elaborate attempt to conceal what is going on in the world."); David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 247-49 (1984) (arguing that the "results" in legal contests "come from those same political, social, moral, and religious value judgments from which the law purports to be independent"); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 210 (1979) (arguing that Blackstone's Commentaries are "an instrument of apology—an attempt to mystify both dominators and dominated by convincing them of the 'naturalness,' the 'freedom' and the 'rationality' of a condition of bondage"); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984) ("Those of us associated with Critical Legal Studies believe that law is not apolitical and objective: Lawyers, judges, and scholars make highly controversial political choices, but use the ideology of legal reasoning to make our institutions appear natural and our rules appear neutral.").

movement, who uncovered the judicial biases of the *Lochner* Court and urged judges to utilize social science research to provide empirical justification for their decisions.[120]

Critical legal studies, however, has less faith than legal realists in the ability of law to find the "right" outcomes, arguing that the structure of law itself is ideological and a mask for majoritarian concerns.[121] Some critical legal studies scholars, embracing a more cynical approach to the law, believe that the law is inherently biased and that the existence of "rights" deadens progressive activism, a result of false consciousness among subordinate classes who incorrectly believe that the law protects them.[122] Consequently, many critical legal studies scholars have argued that critical theorists should abandon a rights-centered approach to social justice, replacing it with more informal, often undefined, mechanisms for the attainment of justice.[123]

Critical race theorists,[124] feminist legal theorists,[125] and gay and lesbian legal theorists[126] accept many of the arguments of

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120. Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 977 (1999) ("The legal realists, who began to enter the scene during the *Lochner* era, also stridently emphasized the importance of facts in legal interpretation. The realists recommended that the judiciary openly base their decisions on current social scientific, economic, and psychological understandings.").

121. *See* John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 97 (1995). Hasnas indicates that:

> The Crits regard themselves as more radical than the realists because they employ the indeterminacy argument to attack the concept of the rule of law itself . . . . By disguising the value choices inherent in the judicial process, legal rulings are made to look like the necessary outcome of the play of natural forces rather than an exercise of will by those who control the political machinery of society.

Id.

122. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386-94 (1984) (critiquing rights as an impediment to progressive social change).

123. *Id.* at 1398-1403 (justifying lack of concrete agenda for a post-rights society).

124. For representative works in critical race theory, see CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1995); CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002).

125. For a sampling of feminist literature, see FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Roseanne Kennedy eds., 1991); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997).

126. *See generally* PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT (2000); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999);

critical legal studies scholars: they distrust legal structures and believe that law reinforces power inequities, constructs race, gender, sexuality, and class hierarchies and changes sluggishly, if at all.[127] Yet these scholars depart from critical legal studies because, despite their skepticism, they embrace law as a vehicle for social change. Critical race theorists, in particular, have openly discussed the complexity of their approaches to law,[128] and a body of works in feminist and gay and lesbian legal theory embraces law as an instrument of social change. Nevertheless, these critics have also deconstructed legal structures, demonstrating how Court doctrine preserves majoritarian privilege against the efforts of subordinate groups to challenge this privilege through civil rights litigation.

Doctrine in the equal protection context vividly portrays the Court's majoritarianism. Ironically, equal protection jurisprudence is commonly understood as a legitimate site of judicial countermajoritarianism.[129] Under the tiered equal

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EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION (1999); RUTHANN ROBSON, SAPPHO GOES TO LAW SCHOOL (1998); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

127. For an example in critical race theory, see Richard Delgado, Review Essay, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1152-53 (1993) (arguing that "[f]acially neutral laws cannot redress most racism, because of the cultural background against which such laws operate" (quotations omitted)). For an example in feminist legal theory, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237 (1989) (arguing that "[i]n male supremacist societies, the male standpoint dominates civil society in the form of the objective standard—that standpoint which, because it dominates in the world, does not appear to function as a standpoint at all"). For an example in gay, lesbian, bisexual, and transgender theory, see ESKRIDGE, *supra* note 126, at 1 (arguing that "[t]he law was a chief mechanism for the 1950s Kulturkampf, or state-sponsored culture war, against homosexuals and other gender-benders, yet simultaneously became the hunted's chief refuge from that assault.").

128. *See* Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987) (collecting critical race theory arguments against critical legal studies, including debasement of rights by the latter); Angela P. Harris, *Foreward: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 748-54 (1994) (discussing postmodern and liberal strands of critical race theory and distinguishing its multidimensional character from critical legal studies).

129. *See* Rubenfeld, *supra* note 51, at 465 (linking heightened scrutiny in equal protection context to the protection of disadvantaged classes); Marshall & Ignagni, *supra* note 96, at 151 ("By far, the most commonly cited argument for [judicial review] is that it helps protect controversial or unpopular minorities' civil liberties and rights. The results here suggest that this argument should be reconsidered."). *See generally* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1993) (arguing that the Court serves majoritarian interests and that persons of color should seek solicitude in the

protection analysis, the Court ordinarily defers to the democratic branches unless a law discriminates against a "suspect class" or "quasi-suspect class."[130] The suspect class doctrine carves out a space for judicial countermajoritarianism: it allows the Court to exercise invasive judicial review to protect politically vulnerable and marginalized classes, such as persons of color, women, persons who are gay, lesbian, bisexual, or transgender, and the poor.[131] Nevertheless, in its equal protection review, the Court does not live up to its reputation as the guardian of minority interests. The Court has instead inverted the common conception of its judicial role. In its equal protection jurisprudence, the Court reserves heightened scrutiny for advantaged classes and applies deferential review to the claims of disadvantaged groups.[132]

Three important doctrinal developments have transformed the Equal Protection Clause from a constitutional provision that benefits abused classes into one that protects dominant groups. As several critical theorists have observed, the colorblindness principle,[133] the discriminatory intent rule,[134] and the Court's refusal to announce new suspect classes[135] all reflect majoritarian

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democratic branches); Hutchinson, *supra* note 70 (critiquing equal protection doctrine as protecting dominant, rather than minority, interests).

130. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973))).

131. *See* Hutchinson, *supra* note 70, at 634-36 (discussing the Court's application of rigorous scrutiny to equal protection claims brought by politically powerless classes).

132. *See generally* Hutchinson, *supra* note 70.

133. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (applying strict scrutiny to a state affirmative action plan); Gratz v. Bollinger, 539 U.S. 244 (2003) (same); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (establishing strict scrutiny for federal and state race-based affirmative action programs); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to a municipal affirmative action plan).

134. For cases where the Court found that equal protection violations turn on purposeful discrimination, rather than discriminatory effects, see McCleskey v. Kemp, 481 U.S. 279 (1987); Pers. Adm'r v. Feeney, 442 U.S. 256 (1979); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); and Washington v. Davis, 426 U.S. 229 (1976).

135. *See* GERSTMANN, *supra* note 126, at 39 ("Conservative justices developed the three-tiered framework to beat back the then-rapid expansion of the equal protection clause [sic]."); 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, 562-63 (1998) (discussing "gatekeeping" role of heightened scrutiny formula); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445-46 (1985) (declining to apply heightened scrutiny because it would be "difficult to find a principled way to distinguish [the developmentally disabled from] a variety of other

views concerning the status of race, gender, and sexual identity relations. Application of these doctrines has led to anomalous outcomes. For example, although women and persons of color qualify as suspect classes, the Court typically reviews race and sex discrimination claims under rational basis review.[136] Furthermore, the Court has concluded that the poor,[137] the elderly,[138] and the developmentally disabled[139] do not warrant special protection from majoritarian discrimination, and every federal court of appeals that has considered whether gays and lesbians constitute a suspect class has concluded that they do not.[140] When given the opportunity to decide this question, the Court has refrained from doing so.[141]

The colorblindness doctrine reflects majoritarian interests because courts deploy it to limit the ability of states to remedy the effects of racial discrimination.[142] Although the suspect class doctrine strongly suggests that the Court should apply either rational basis review or intermediate scrutiny when whites challenge remedial usages of race by state actors,[143] the Court has

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groups [like] the aging, the disabled, the mentally ill, and the infirm").

136. *See infra* notes 162-168 and accompanying text.

137. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("[T]he class [of poor individuals] is not 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.").

138. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) ("[O]ld age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.'" (citation omitted)).

139. *Cleburne*, 473 U.S. at 443-45 (pointing to scattered laws that protect developmentally disabled persons from discrimination and holding that these laws "negate[ ] any claim that [these individuals] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers").

140. *See* GERSTMANN, *supra* note 126, at 60 ("The appellate courts have consistently rejected the argument that gays and lesbians are a suspect class . . . . Every court that has considered the issue has stated that gays and lesbians simply do not meet the criteria for a suspect class."). While the Ninth Circuit once ruled that gays and lesbians are a suspect class, the court later vacated its decision. *See* Watkins v. United States Army, 847 F.2d 1329, 1349 (9th Cir. 1988), *vacated by* 875 F.2d 699, 711 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

141. Romer v. Evans, 517 U.S. 620, 631-36 (1996) (avoiding the heightened scrutiny question but holding that a state constitutional amendment that banned state and municipal laws prohibiting sexual orientation discrimination lacked a rational basis).

142. *See* Girardeau Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 65-66 (1995) ("Justice O'Connor and the other members of the *Adarand* majority virtually always vote to invalidate an affirmative action program if they reach the merits of the constitutional issues presented by that program.").

143. Hutchinson, *supra* note 70, at 639 ("Whites are not a politically vulnerable class by any serious theory of political power."); Rubenfeld, *supra* note 51, at 465

determined that the Constitution requires symmetry: all racial classifications, whether invidious or remedial, warrant strict judicial scrutiny.[144] To justify this doctrine, the Court cites to the "universal" language of the Fourteenth Amendment[145] and argues that racial classifications are almost always injurious.[146] Members of the Court have also explicitly described whites as subjugated and blacks as powerful in affirmative action cases.[147] Furthermore, the mere application of strict scrutiny to whites' claims of discrimination implies a judicial effort to assist a vulnerable group, given a legal culture that expects heightened scrutiny only to protect suspect classes.[148]

(arguing that "whites never could have been deemed a suspect class under equal protection doctrine as that concept was consistently developed and articulated prior to the affirmative action cases"); *see also* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 553-54 (1989) (plurality opinion) (Marshall, J., dissenting) (critiquing application of strict scrutiny to equal protection claims brought by whites on grounds that it is inconsistent with suspect class doctrine).

144. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) ("We have held that all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-24 (1995) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification." (quoting *Croson*, 488 U.S. at 494)).

145. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978) (Powell, J.) ("Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority,' the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude." (citation omitted)).

146. *See Adarand*, 515 U.S. at 236. In *Adarand*, the Court held that:

> Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate .... [R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

Id. (quoting Fullilove v. Klutznick, 448 U.S. 448, 533-35, 537 (1979) (Stevens, J., dissenting) (citations omitted)).

147. *See Croson*, 488 U.S. at 495–96 (justifying strict judicial review of a municipal affirmative action plan on grounds that blacks "constitute approximately 50% of the population of the city" and occupy "[f]ive of the nine seats on the city council"); *Bakke*, 438 U.S. at 295 (observing that "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals" (Powell, J.)); *see also* Hutchinson, *supra* note 70, at 639-47 (discussing the doctrinal treatment of whites as subordinate and persons of color as powerful in affirmative action cases).

148. Hutchinson, *supra* note 70, at 639-40 (discussing the prevalent assumption in legal culture that the Court reserves heightened scrutiny for vulnerable groups and concluding that "[g]iven this cultural backdrop, the extension of judicial solicitude to privileged classes falsely implies that these groups are politically vulnerable. . . .").

The colorblindness principle responds to majoritarian interests in another important respect: although the Court has held that remedying discrimination is a compelling state interest to justify racial classifications, it has narrowly defined the possible scope of remedial discrimination.[149] In order to satisfy strict scrutiny, governmental racial classification must remedy either the government's own discrimination or discrimination that has a close relationship to state action.[150] Neither states nor Congress, however, can remedy societal discrimination,[151] or the broad, "everyday indignities"[152] that people of color endure in a racially hierarchical culture. Compounding this problem, state actors must prove with highly convincing evidence that racial discrimination has actually occurred.[153] This burdensome evidentiary requirement has proved difficult to meet because the Court often questions and dismisses statistical studies that demonstrate racial discrimination.[154] By placing substantial burdens on governmental efforts to combat the effects of racial discrimination, the Court has sided with majoritarian interests over the interests of disempowered groups.[155]

Colorblindness also reflects majoritarian interests because it freezes existing social, economic, and political inequities that result from racism.[156] No serious advocate of colorblindness

149. Ian Ayres & Fredrick Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1579-84 (1998) (discussing permissible remedial uses of race).

150. *Id.*

151. *See Croson*, 488 U.S. at 498–99.

152. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003) (discussing subtle, though injurious, discrimination against persons of color).

153. *See, e.g.*, *Croson*, 488 U.S. at 499 (dismissing city's finding of racial discrimination based on statistical evidence as "sheer speculation").

154. *See id.* at 498-500 (rejecting city's evidence of discrimination used to justify affirmative action plan).

155. *See* Jake Tapper, *Fade to White: The Only African American Republican in Congress Is Headed Home*, WASH. POST MAGAZINE, Jan. 5, 2003, at 6, 21 (noting "broad and vociferous support [for affirmative action] within the black community"); David Von Drehle, *Court Mirrors Public Opinion*, WASH. POST, June 24, 2003, at A1 (noting broad public opposition to racial preferences).

156. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 45-46 (1991) ("[T]he Court often invokes the metaphor of the 'equal starting point' when analyzing social problems. This metaphor ignores historical-race and the cumulative disadvantages that are the starting point for so many Black citizens."); Girardeau Spann, *supra* note 142 at 13-14 ("If one elects . . . to establish the baseline for making equality determinations at a point after the elimination of official segregation, thereby taking pre-existing differences in the allocation of resources as a given, affirmative action seems like a racially discriminatory deviation from the principle of prospective neutrality.").

disputes the reality that a history of racial subordination has caused enormous inequalities of wealth, political power, educational opportunity, and inequities in many other measures of well-being. Colorblindness advocates, however, demand neutrality now that formal, overt efforts to subjugate persons of color have dissipated.[157] The decontextualized, undifferentiated demand for colorblindness in a society marked by vast racial inequity accepts current conditions as a legitimate baseline; it compels prospective equal treatment, but prohibits affirmative steps to dismantle historical and present-day maltreatment.[158] In other words, colorblindness preserves status quo racial inequity. Only whites benefit from such an approach to equality.

The discriminatory intent rule also mirrors majoritarian views. Although legal theorists have historically treated the Equal Protection Clause as prohibiting certain forms of discriminatory state action, neither the text of the Fourteenth Amendment nor the history surrounding its ratification can lead to an indisputable conclusion as to what state action qualifies as impermissible "discrimination."[159] At several points in the Court's history, however, doctrine has construed equal protection as guarding against the enactment of neutral laws that give rise to racially disparate effects or that otherwise reinforce the socially subordinate status of persons of color.[160] These moments

157. Spann, *supra* note 142 at 10-13.

158. *See* Gotanda, *supra* note 156, at 3; Spann, *supra* note 142, at 13-14.

159. *See* David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 940-45 (1989) (discussing a variety of doctrinal articulations of equal protection); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's* Social Statics, 88 MICH. L. REV. 1366, 1367 (1990) ("The urge to identity a single animating philosophy or an overarching theory of equal protection is understandable but misguided.").

160. These doctrinal approaches are typically referred to by legal scholars as "antisubordination" or "antisubjugation" theories. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21 (2d. ed. 1988) ("The antisubjugation principle is faithful to the historical origins of the Civil War amendments."); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) ("The Civil War Amendments were based on a wholesale rejection of the supposed naturalness of racial hierarchy."). For critical theory research on antisubordination equality doctrines, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986) (embracing antisubordination theory which finds it "inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole"); Hutchinson, *supra* note 70, at 681-98 (advocating reformation of equal protection doctrine to embrace antisubordination theory); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1453–54 (1991) (articulating antisubordination theory which "considers the concrete effects of government policy on the substantive conditions of the disadvantaged."); Robin West, *Equality Theory, Marital Rape, and the Promise*

immediately followed the ratification of the Fourteenth Amendment[161] and resurfaced during the Warren Court, particularly in desegregation cases.[162] The modern Court, however, has settled on a requirement of discriminatory intent: in order to prove an equal protection violation, a plaintiff must demonstrate discriminatory purpose, not simply discriminatory effects.[163] While disparate effects or other factors might serve as helpful circumstantial evidence of purposeful discrimination,[164] the Court ultimately requires a showing of intent, and it has routinely rejected impact evidence as probative of an impermissible motive.[165] This is true even when the proven

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of the Fourteenth Amendment, 42 FLA. L. REV. 45, 71 (1990) (proposing "antisubordination model, which targets legislation that substantively contributes to the subordination of one group by another").

161. *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (finding unconstitutional facially neutral criminal law administered in a manner that statistically harmed Chinese Americans).

162. *See, e.g.*, N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (invalidating facially neutral busing statute which the Court found sought to maintain racial segregation in public schools); Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 432-33, 440-42 (1968) (invalidating parental "school choice" plan that caused vast racial disparities); Gomillion v. Lightfoot, 364 U.S. 339, 341, 347-48 (1960) (finding unconstitutional Alabama law that shifted boundaries of city so as to exclude virtually all black voters from municipal election).

163. *See* McCleskey v. Kemp, 481 U.S. 279, 297-99 (1987) (reiterating *Feeney* standard and upholding death sentence despite proven racial disparity in administration of death penalty statute); Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (legitimating preference for veterans in state civil service employment despite its foreseeable and stark negative impact on women, and finding that: "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-66, 270-71 (1977) (reiterating intent rule and validating municipal zoning decision that had racially disparate impact); Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." (emphasis omitted)).

164. *See Arlington Heights*, 429 U.S. at 266 (holding that impact is not irrelevant because "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."); *id.* at 267-68 (discussing circumstantial evidence of discriminatory intent); *Davis*, 426 U.S. at 242 ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)).

165. *See, e.g.*, Damon J. Keith, *What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington*, 19 HARV. C.R.-C.L. L. REV. 469, 476 (1984) (observing that "the Court has imposed

impact closely parallels the most perilous forms of historical racial subjugation,[166] when the impact is foreseeable and inevitable,[167] or when the plaintiff supplies highly sophisticated statistical models that isolate improper motive.[168]

Because the Court refuses to infer improper motive from laws that disparately affect vulnerable classes or to make impact actionable on its own terms, the Court typically applies ordinary rational basis to claims of discrimination brought by women[169] and

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on the aggrieved party an almost insurmountable burden of proving discriminatory intent."); Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1404–05 (1988) (asserting that the intent rule requires equal protection plaintiffs to prove "that officials were 'out to get' a person or group on account of race"); Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 135-36 (1987) ("Because a discriminatory intent standard has led to insurmountable barriers against equal protection relief, and does not even measure unconscious motivation, a new test for calibrating the appropriate level of judicial review may be indispensable for security against modern wrongs.").

166. *See McCleskey*, 481 U.S. at 286-89, 292-99 (upholding imposition of death penalty despite severe racial impact and parallels between administration of capital punishment statute and historical racial subjugation). The criminal law has been the historical site of extreme racial domination. *See* Korematsu v. United States, 323 U.S. 214 (1944) (legitimating imprisonment of Japanese Americans during World War II); Powell v. Alabama, 287 U.S. 45 (1932) (reversing conviction and death sentence of black males accused of raping white woman because defendants had one-day trial with all-white jury and without defense counsel); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (finding unconstitutional criminal ordinance enforced in a discriminatory fashion against Chinese Americans and in favor of whites); *see also* MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 75 (1973) (observing that 405 of 455 men executed in the United States for rape from 1930 to 1967 were black and all victims were white); A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The "Law Only As An Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 984 (1992) ("Characterizing the judiciary's treatment of slaves and free blacks as a 'system of justice' is almost a semantic illusion. Free whites were guaranteed an elaborate system of procedural rights and protections, but blacks suffered under an equally elaborate regime of injustice and harsh penalties.").

167. *See Feeney*, 442 U.S. at 280-81 (upholding preference for veterans in state civil service employment despite its inevitable and stark discrimination against women).

168. *See McCleskey*, 481 U.S. at 286 (denying claim of racial discrimination despite describing statistical study as "sophisticated"); *see also* Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1073 (1998) (discussing the Court's rejection of "sophisticated and comprehensive statistical evidence" under intent rule).

169. Some might argue that women themselves constitute a majority and thus patriarchal state action serves majoritarian interests. *See* United States v. Virginia, 518 U.S. 515, 574-75 (1996) ("[I]t is perfectly clear that, if the question of the applicable standard of review for sex-based classifications were to be regarded as an appropriate subject for reconsideration, the stronger argument would be not for elevating the standard to strict scrutiny, but for reducing it to rational-basis

persons of color. In a society that disapproves of discrimination and that favors "formal equality," however, discrimination will occur subtly.[170] The Court's doctrine does not reflect this reality. Discounting impact and finding no illegitimate purpose, courts routinely validate laws and policies that have a harmful impact upon traditionally disadvantaged classes.[171] While whites and men who challenge remedial usages of gender and race receive heightened judicial scrutiny of their discrimination claims,[172] women and persons of color who seek judicial solicitude, but who lack proof of specific intent, or the elusive "smoking gun," only receive rational basis review.[173]

In addition to failing to protect traditional suspect classes, the Court has declined to apply heightened scrutiny to equal protection claims brought by the poor, the elderly, and the developmentally disabled.[174] Furthermore, all of the federal courts of appeals that have considered whether gays, lesbians, bisexuals, and transgendered persons qualify as a "suspect class" have unanimously held that they do not warrant special judicial solicitude.[175] Several of these courts have specifically held, pointing to scattered statutory enactments that prohibit sexual orientation discrimination, that gays and lesbians possess too much political power to qualify as a suspect class.[176] Yet the vast

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review.") (Scalia, J., dissenting); ELY, *supra* note 6, at 164-70 (noting that women are not a minority group but offering tentative support for elevated scrutiny of gender discrimination). If we define political power by considering the degree of social, economic, and political marginalization, then the application of heightened scrutiny to women's claims of discrimination seems nonproblematic. *See generally* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983) (discussing the subordination of women and the Court's treatment of sex discrimination cases).

170. *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1169 (1991) ("Where discrimination is illegal or socially disapproved, social scientists predict that it will be practiced only when it is possible to do so covertly and indirectly."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (observing that the Court "define[s] discriminatory purpose in terms that are extraordinarily difficult to prove in the constitutional culture its modern equal protection opinions have created—a culture that now embraces 'equal opportunity' and 'nondiscrimination' as a form of civic religion.").

171. *See supra* notes 163-168 and accompanying text.

172. *See supra* notes 142-148 and accompanying text.

173. *See supra* notes 163-169 and accompanying text.

174. *See supra* notes 137-139 and accompanying text.

175. *See supra* notes 140-141 and accompanying text.

176. High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 574 (9th Cir. 1990) (after noting some state and municipal laws protecting gays and lesbians from discrimination, concluding that "homosexuals are not without political power"

array of statutes that prohibit race and sex discrimination also apply to white men, and courts, nevertheless, apply strict scrutiny to their racial discrimination claims.[177] Furthermore, the juridical portrayal of gay power itself rests on a false construction of the gay and lesbian community as white, wealthy, upwardly mobile, and politically powerful.[178] This contradictory and shifting jurisprudence clearly caters to majoritarian interests, rather than to the needs of vulnerable minority groups.

Polling data suggest an overlap between the Court's colorblindness and intent rules and popular public opinion. Available data, for example, overwhelmingly indicate that persons of color believe that race discrimination occurs pervasively, while whites believe it rarely happens.[179] The intent and colorblindness rules rest on this same conception of discrimination as aberrational. Because the Court, like the predominant culture,

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because "they have the ability to and do 'attract the attention of the lawmakers,'" (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985)); Ben-Shalom v. Marsh, 881 F.2d 454, 466 n.9 (7th Cir. 1989) (citing to popular magazine and newspaper articles for legal conclusion that "[h]omosexuals are not without political power."); *see* Darren Lenard Hutchinson, *Gay Rights for Gay Whites?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1372-75, 1378-82 (2000) (discussing anti-gay activists' "special rights" agenda and how special rights discourse has led to adverse Court rulings); *see also* Hutchinson, *supra* note 70, at 658-62 (discussing distorted conservative portrayal of gays and lesbians as a politically powerful class undeserving of civil rights protection); *cf.* Romer v. Evans, 517 U.S. 620, 645-46 (1996) (Scalia, J., dissenting) (arguing that "those who engage in homosexual conduct . . . have high disposable income [and] . . . possess political power much greater than their numbers" (citation omitted)); *id.* at 636 (Scalia, J. dissenting) (describing Colorado state constitutional amendment that prohibited extension of civil rights protections to gays, lesbians, and bisexuals as "a modest attempt by seemingly tolerant Coloradans to preserve traditional mores against the efforts of a politically powerful minority to revise those mores through use of the laws").

177. *See* GERSTMANN, *supra* note 126, at 83. Gerstmann observes that:

> In the context of affirmative action and in other cases, the courts have applied strict scrutiny to laws that discriminate against *whites* and *males*. This has produced the bizarre result that gays and lesbians are considered too politically powerful to receive the benefit of strict scrutiny, but whites and males are not.

Id.

178. *See* Hutchinson, *supra* note 176, at 1372-75, 1378-82 (discussing stereotype of gay and lesbian privilege in political and legal discourse); *see also* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 293-94 (discussing the anti-gay movement's claim that gay civil rights laws are an illegitimate way of seeking "special rights").

179. *See* JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS UNIV., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 8 (Jan. 17, 2002) (reporting that ten percent of whites versus fifty percent of blacks believe that blacks experience workplace discrimination, although only sixty-three percent of whites reported working in environments with blacks).

believes discrimination occurs sporadically, it demands indisputable evidence of discriminatory motive in intent cases and requires governmental actors to meet the same rigorous evidentiary standards when they justify their use of race consciousness as an effort to remedy or correct discrimination.[180]

Despite ubiquitous portrayals of the Court as a countermajoritarian body and as a defender of minority interests against dominant group mistreatment, constitutional law, political science, and critical theory research offers a persuasive alternative depiction of judicial review. Rather than subverting democracy, judicial review implements the will of the majority. Although scholars continue to debate the merits of this research and the proper role of the Court in a democracy, this scholarship complicates arguments that judicial review erodes democracy.

Recent Court opinions provide the opportunity to reexamine the debate over judicial integrity and to test the claims of scholars who argue that the Court largely reflects majoritarian concerns. Specifically, the Court's decisions in *Lawrence v. Texas*,[181] *Grutter v. Bollinger*,[182] and *Gratz v. Bollinger*[183] have reignited debates over the proper role of the Court in a democratic society. While many commentators, both liberal and conservative, have described the decisions as protecting minority interests, these cases, as Part II demonstrates, invariably reflect majoritarian views about race, sexuality, and gender, and could even fortify social inequality.

II. Protecting Minorities or Privileging the Majority?: The Sodomy and Affirmative Action Decisions

Several cases in the Court's 2003 term captured the attention of activists, scholars, and jurists across the political spectrum. The decisions in *Lawrence, Grutter*, and *Gratz* stand out as the cases that have generated extraordinary attention from political activists, legal theorists, and traditional Court commentators. And when the Court rendered its decisions in these cases, conservatives complained, and liberals rejoiced.[184] Conservatives

180. *See, e.g.*, *Croson*, 488 U.S. at 499 (dismissing city's finding of racial discrimination based on statistical evidence as "sheer speculation").

181. 539 U.S. 558 (2003) (invalidating state same-sex sodomy statute on due process grounds).

182. 539 U.S. 306 (2003) (upholding state law school admissions policy that considers race of applicants in order to achieve diversity among students).

183. 539 U.S. 244 (2003) (finding unconstitutional state university admissions policy that considers race of applicants because plan not narrowly tailored).

184. *See infra* notes 198-201, 203-206 and accompanying text.

charged the Court with judicial overreach *and* abdication, while liberals argued that the Court had advanced the interests of subordinate groups.[185] Both camps share a view that the Court does something quite remarkable in these cases. This Article, however, disputes these common interpretations of the sodomy and affirmative action decisions. These cases do not represent judicial countermajoritarianism, nor do they in themselves do much to advance the interests of subordinate minorities. Instead, these cases reflect majoritarian views about race and sexuality, and a reasonable reading of the decisions supports the conclusion that they reinforce social hierarchies of race, class, and sexuality.

A. Lawrence v. Texas

In *Lawrence*, the Court invalidated a Texas statute that criminalized "deviate sexual intercourse."[186] The relevant portion of the statute defined deviate sexual intercourse as "[a]ny contact between any part of the genitals of one person and the mouth or anus of another person. . . ."[187]

Houston police discovered the two male petitioners engaged in an act of consensual anal sex in the residence of petitioner John Geddes Lawrence.[188] The police arrived at the home ostensibly to investigate a report of a "weapons disturbance."[189] Police arrested petitioners and charged them with violating the statute.[190] During their criminal trial, petitioners argued that the statute violated both the Equal Protection Clause of the Fourteenth Amendment and an analogous provision of the Texas constitution.[191] After the trial court rejected the equality claims, petitioners appealed on federal due process and equal protection grounds, but the court of appeals rejected petitioners' constitutional arguments and affirmed the convictions.[192] The appeals court adhered to the

185. *See infra* notes 198-201, 203-206 and accompanying text.

186. *Lawrence*, 539 U.S. at 563.

187. *Id.* (quoting Tex. Penal Code Ann. § 21.06(a) (2003)).

188. *Id.* at 562-63.

189. *Id.* at 562. News reports have stated that the report of a weapon's disturbance was false and that the caller was arrested for filing a false police report. *See* Linda Greenhouse, *Justices, 6-3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, N.Y. TIMES, July 27, 2003, at A1 ("The police entered through an unlocked door after receiving a report from a neighbor of a 'weapons disturbance' in the apartment. The neighbor was later convicted of filing a false report.").

190. *Lawrence*, 539 U.S. at 563.

191. *Id.*

192. *Id.*

Court's decision in *Bowers v. Hardwick*,[193] which held that the Constitution does not confer a fundamental right to engage in homosexual sodomy.[194] The Court granted certiorari to entertain petitioners' equal protection and due process claims and to consider whether it should overrule *Bowers*.[195] Limiting its review to petitioners' due process claim,[196] the Court invalidated the statute and held that "[t]he Texas statute furthers no legitimate state interest. . . ."[197]

Lawrence has engendered passionate commentary from conservatives and liberals alike. Many of these responses describe the decision as a remarkable advancement for gay and lesbian rights; conservatives lament the advance and liberals praise it. Justice Scalia's dissent, for example, accuses the Court of engaging in countermajoritarian excess in order to advance a "homosexual agenda":[198]

> Social perceptions of sexual and other morality change over time, and every group has the right to persuade its fellow citizens that its view of such matters is the best . . . . But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. . . . What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change.[199]

Justice Scalia believes that the Court's "activist" posture in *Lawrence* portends a future of dramatic judicial overreach—particularly, that it compels judicial invalidation of laws that prohibit same-sex marriage[200] and "fornication, bigamy, adultery, adult incest, bestiality, and obscenity."[201]

While Scalia frequently hurls countermajoritarian criticism toward members of the Court,[202] liberals have also treated the

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193. 478 U.S. 186 (1986) (sustaining state sodomy law challenged on due process grounds).

194. *Id.* at 192-96.

195. *See Lawrence*, 539 U.S at 564.

196. *Id.* at 564, 574-75 (declining to engage in equal protection analysis and deciding claim solely on the question of the validity of *Bowers*).

197. *Id.* at 578.

198. *See id.* at 602 (Scalia, J., dissenting).

199. *Id.* at 603 (Scalia, J., dissenting).

200. *Id.* at 604 (Scalia, J., dissenting) (arguing that "[t]oday's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

201. *Id.* at 599 (Scalia, J., dissenting).

202. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1988) (plurality)

decision as signaling a sharp departure from majoritarian sexual norms that marginalize gay, lesbian, bisexual, and transgendered people. After the Court announced the decision, many advocates for gay, lesbian, bisexual and transgender equality held public celebrations of the ruling.[203] Some of the earliest published liberal legal scholarship on *Lawrence* evinces similar jubilation and optimism. Wilson Huhn, for example, argues that *Lawrence* and *Grutter*[204] "represent a revolutionary shift in the interpretation of the Constitution of the United States"[205] and that the decisions "both confirm and anticipate far-reaching changes in our society by recognizing certain aspects of human potential."[206]

Conservative and liberal accounts of *Lawrence*, however, distort the significance of the decision. Rather than undoing societal disapprobation of homosexuality, *Lawrence* moderately advances social justice for gay, lesbian, bisexual, and transgendered individuals, and may ultimately harm political efforts to eradicate heterosexism. *Lawrence* has a restricted reach because it reflects the views of a dominant heteronormative culture concerning sexuality and because the immediate practical implications of the decriminalization of sodomy are themselves limited.

Although *Lawrence* contains many conservative dimensions, it is impossible to ignore the case's potential benefit to social justice movements that advocate for sexual equality and autonomy. Examining the positive and negative dimensions of *Lawrence* will permit legal theorists who advocate social justice for gay, lesbian, bisexual, and transgendered individuals to make an honest appraisal of the value of this decision and to determine how the case might fit within ongoing efforts to advance the legal, political, social, and economic status of gay, lesbian, bisexual, and transgendered individuals.

(criticizing the "general" concept of liberty embraced by Justice Brennan and asserting instead that in a substantive due process analysis, judges must define tradition at its "most specific" level because "general traditions . . . permit judges to dictate rather than discern the society's views").

203. *See* Dean E. Murphy, *Gays Celebrate, and Plan Campaign for Broader Rights*, N.Y. TIMES, June 27, 2003, at A20 ("Gay men and lesbians poured into the streets today to celebrate a Supreme Court decision striking down or strictly limiting the country's last remaining sodomy laws in 13 states.").

204. 539 U.S. 306 (2003).

205. Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 66 (2003).

206. *Id.* at 65.

1. Positive Aspects of *Lawrence*

The elation and horror that liberals and conservatives express regarding *Lawrence* arises, in part, from the several positive aspects of the decision. Although this Article ultimately takes a limited view of the progressive impact of *Lawrence*, to some extent the social context of the decision supports the significance that commentators have given it. *Lawrence* can positively affect sexual liberty doctrine in several important ways; nevertheless, other aspects of the decision cabin, if not negate, these important gains.

a. Overruling Bowers

Lawrence overrules *Bowers*.[207] The *Bowers* decision is highly flawed and harmful to justice claims because it rests on explicitly homophobic language,[208] construes liberty in an extremely narrow fashion,[209] contains gross misstatements of history,[210] and permits states to satisfy rational basis review by simply asserting that their laws advance some undefined, ambiguous conception of "morality."[211] *Bowers* and the criminalization of sodomy have also justified the maltreatment of gay, lesbian, bisexual, and

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207. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers* . . . should be and now is overruled.").

208. *See, e.g.*, Mary C. Dunlap, *Gay Men and Lesbians Down by Law in the 1990's USA: The Continuing Toll of* Bowers v. Hardwick, 24 GOLDEN GATE U. L. REV. 1, 10 (1994) ("The inescapable conclusion is that the result in [*Bowers*] is about homophobia . . . ."); Thomas B. Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655 (1987) (criticizing the "utter lack of reasoning" in *Bowers* and arguing that the "explanation" for the opinion "lies in the emotional response of five justices to the subject matter underlying the case as they perceived it, or rather, as they reconstituted it: the subject of homosexuality"); Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of* Bowers v. Hardwick, 79 VA. L. REV. 1805, 1828 (1993) (arguing that *Bowers* "discursively makes and marks the sexual difference between heterosexuality and homosexuality that makes homophobia possible").

209. James Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 58 (1995) ("In *Bowers* . . . the Court . . . narrowly conceived the due process inquiry as a backward-looking question concerning historical practices, stripped of virtually any aspirational force or critical bite with respect to the status quo.").

210. *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 VA. L. REV. 1721, 1750-68 (1993) (criticizing the historical analysis in *Bowers*); *see also Lawrence*, 539 U.S. at 567-68 ("In academic writings, and in many of the scholarly amicus briefs filed to assist the Court in this case, there are fundamental criticisms of the historical premises relied upon by the majority and concurring opinions in *Bowers*.").

211. *See Bowers*, 478 U.S. at 196 ("The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.").

transgendered persons in a host of contexts unrelated to sodomy. Courts have utilized *Bowers* and the sodomy laws that it legitimized to deny heightened scrutiny of heterosexist state action,[212] deprive gays and lesbians of custody of their children,[213] and to generally sustain laws that regulate sexual conduct.[214] Because *Bowers* has served as doctrinal justification for many laws that injure gay, lesbian, bisexual, and transgendered persons, its demise can certainly provide the opportunity for undoing some of this harm.

b. Broad Construction of Liberty

Lawrence also contains broad language construing Fourteenth Amendment liberty. The extent of liberty under the Fourteenth Amendment depends upon the doctrinal test used to interpret liberty and upon judicial framing of the right at issue. Courts have utilized several tests to determine whether an asserted interest qualifies as a fundamental liberty interest under a due process analysis. They have considered, primarily, whether the right is "deeply rooted in this [n]ation's history and tradition,"[215] "implicit in the concept of ordered liberty,"[216] or whether it resides in a "zone of privacy" conferred by Fourteenth

212. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 640-41 (1996) (Scalia, J., dissenting) (arguing that *Bowers* is "most relevant" to the equal protection question in *Romer*); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (relying on *Bowers* to reject an argument that gays and lesbians constitute a suspect or quasi-suspect class and holding that "[i]f the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious"); *see also* Nan D. Hunter, *Life after* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531, 543 (1992) (arguing that the conflation of gay and lesbian identity with sodomy "is premised on a radical imbalance" under which "[t]he act of homosexual sodomy 'defines the class' of gay men and lesbians"); Darren Lenard Hutchinson, *"Closet Case": Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 144 (2001) (criticizing conflation of gay identity and sodomy because "[w]hile sexual identity certainly involves sexual intimacy and practice, there are other dimensions that define and construct sexuality").

213. Bottoms v. Bottoms, 444 S.E.2d 276, 279 (Va. Ct. App. 1994) ("I will tell you first that the [lesbian] mother's [sexual] conduct is illegal. . . . I will tell you that it is the opinion of the court that her conduct is immoral. And it is the opinion of this court that the conduct of Sharon Bottoms renders her an unfit parent." (quoting opinion of trial court but reversing its decision), *rev'd*, 457 S.E.2d 102 (Va. 1995)).

214. *See Lawrence*, 539 U.S. at 589-90 (Scalia, J. dissenting) (listing sexual conduct cases relying on *Bowers*).

215. *E.g.*, *Bowers*, 478 U.S. at 192.

216. *Id.* at 191; *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (plurality) (embracing both tests).

Amendment liberty.[217] In its application, however, this latter test seems only to serve as a restatement of the first two.[218]

Substantive due process doctrine makes historical inquiry an important element in determining whether an asserted liberty interest warrants special constitutional protection. When engaging in an historical analysis, courts can view history as narrow, stagnant, and specific,[219] or they can treat history as a "living thing" in an evolutionary fashion,[220] describing historically recognized freedoms in broad terms in order to connect them more easily to specific contemporary liberties that might not have received explicit historical recognition.[221] *Bowers* and other cases have rested on narrow constructions of history and liberty.[222]

Lawrence, however, contains language supporting a liberal construction of personal liberty. Relying on a broad description of liberty set forth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[223] *Lawrence* finds that Fourteenth Amendment autonomy protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[224] *Lawrence* then quotes *Casey* for the following proposition:

> These [personal decisions], involving the most intimate and personal choices a person may make in a lifetime, choices

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217. Roe v. Wade, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

218. *See id.* ("These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' are included in this guarantee of personal privacy." (citation omitted)).

219. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1988) (plurality) (criticizing the "general" concept of liberty embraced by Justice Brennan and asserting instead that in a substantive due process analysis judges must define tradition at its "most specific" level because "general traditions . . . permit judges to dictate rather than discern the society's views").

220. *See* Poe v. Ulman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that courts should look to history and tradition in Fourteenth Amendment liberty analysis but remember to treat tradition in an evolutionary fashion).

221. *See Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting) ("In a community such as ours, 'liberty' must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.").

222. *See Bowers*, 478 U.S. at 194 (narrowly construing history as not supporting a right of sexual privacy that extends to homosexual conduct); *Michael H.*, 491 U.S. at 124 (narrowly reading history and finding that biological parent who fathered child in adulterous relationship had no right of access to child).

223. 505 U.S. 833 (1992) (invalidating and upholding portions of state abortion regulation).

224. *Lawrence*, 539 U.S. at 574 (citing *Casey*, 505 U.S. at 851).

> central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[225]

This language supports a broad construction of liberty that could potentially advance the interests of social movements for sexual justice.

c. Decriminalization of Sodomy

Finally, *Lawrence* has the practical effect of decriminalizing sodomy, which may engender tangible and symbolic gains. The petitioners in this case faced criminal liability and would suffer collateral sanctions under Texas law, in addition to facing sexual offender registration requirements in at least four states.[226] Although Texas, like many other states, has not actively enforced its sodomy statute,[227] the state pressed charges against petitioners. Thus, petitioners benefited, in practical terms, from *Lawrence.*

The Court's ruling in *Lawrence* might also symbolically improve the status of gay, lesbian, bisexual, and transgendered persons.[228] As many scholars have argued, the criminalization of homosexual conduct socially constructs gay, lesbian, bisexual, and transgendered persons as deviate and subordinate, thus providing legal justification for their mistreatment.[229] The fact that so many courts have relied upon *Bowers* to legitimate antigay discrimination[230] buttresses this argument: *Bowers* made gays and lesbians *legal outsiders.* Accordingly, *Lawrence* might aid efforts to transform the stigmatized social status of gay, lesbian, bisexual, and transgendered persons.

Although *Lawrence* might advance antiheterosexist politics both materially and symbolically, many negative aspects of the decision overshadow its positive content. Because *Lawrence*

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225. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

226. *Id.* at 575-76.

227. *See id.* at 573 ("The State of Texas admitted in 1994 that as of that date it had not prosecuted [any adults engaging in consensual, private sodomy].").

228. *Id.* at 575-76 (discussing the stigmatic harm of sodomy statutes).

229. *See* Thomas, *supra* note 208, at 1828 (arguing that *Bowers* constructs gays as deviate and deserving of "homophobia").

230. *See Lawrence*, 539 U.S. at 589-90 (Scalia, J. dissenting) (listing sexual conduct cases relying on *Bowers*).

responds, in many ways, to majoritarian and heterosexist interests, it can only moderately advance sexual equality and liberty.

2. *Lawrence*, Liberty, and Judicial Review

The Court's affirmation of the broad description of liberty developed in *Casey* will not necessarily lead to the recognition of new fundamental liberty interests. While *Casey* defines liberty in extraordinarily liberal terms, the decision itself was a political compromise brokered by moderates on the Court.[231] In the extremely divided *Casey* decision, the Court claims to affirm the "essential holding" of *Roe v. Wade*,[232] but it upholds several abortion regulations that were previously invalidated under the *Roe* trimester approach.[233] Furthermore, in *Washington v. Glucksberg*,[234] in which respondents challenged on substantive due process grounds a state law that prohibited physician-assisted suicide,[235] a plurality of the Court narrowly construed liberty under the traditional tests: whether the asserted right is "implicit in the concept of ordered liberty" or "deeply rooted in this nation's history and traditions."[236] The plurality also expressly limited *Casey*'s broad language describing personal liberty, finding that this definition of liberty does not imply a sweeping recognition of rights.[237]

Lawrence might not necessarily lead to judicial recognition of new fundamental interests for two very important additional reasons. In *Lawrence*, as in *Casey*, the Court does not describe the right at issue as a "fundamental right" nor does it apply "strict

231. Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1 (reporting that Justice Blackmun's files indicate that moderates on the Court successfully lobbied Justice Kennedy for his vote in *Casey*).

232. *Casey*, 505 U.S. at 869. The majority stated that:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.

Id.

233. *See generally id.* (upholding several portions of statute similar to provisions that had been invalidated under the analysis set forth in *Roe*).

234. 521 U.S. 702 (1997).

235. *Id.* at 705-08.

236. *Id.* at 721.

237. *Id.* at 727 ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise." (citation omitted)).

scrutiny."[238] Under existing precedent, the Court applies strict scrutiny if a challenged law or policy burdens a fundamental right or discriminates against a suspect class.[239] The Court, however, has moved away from this principle. In equal protection jurisprudence, the Court applies heightened scrutiny to whites' and men's claims of discrimination, although whites and men cannot qualify as suspect classes under existing doctrinal requirements.[240] Furthermore, with respect to substantive due process, the Court in both *Lawrence* and *Casey* does not describe the protected activities as fundamental rights but simply as "liberty."[241] This rhetorical shift has great significance given the Court's failure in both cases to apply a formal strict scrutiny analysis. In *Casey*, the Court subjects abortion regulations to an "undue burden" test,[242] while *Lawrence* utilizes the language of rational basis review, finding that the Texas sodomy law lacks a "legitimate" purpose.[243] Although the impact of this rhetorical move away from strict scrutiny remains unclear,[244] in *Casey*,

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238. This fact does not go unnoticed by the dissenters in *Lawrence*. *See Lawrence*, 539 U.S. at 586 (Scalia, J. dissenting) (arguing that "nowhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' . . . nor does it subject the . . . law to . . . strict scrutiny").

239. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (explaining that strict scrutiny applies only where the law burdens a "fundamental right" or a "suspect class").

240. *See supra* notes 134 and 172 and accompanying text.

241. *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (noting that the majority does not describe the right to sodomy as "fundamental"); *Casey*, 505 U.S. at 980 (Scalia, J. dissenting in part, concurring in part). Scalia argued:

> That is, quite simply, the issue in these cases: not whether the power of a woman to abort her unborn child is *a 'liberty'* in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States.

Id. (emphasis added).

242. *See Casey*, 505 U.S. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

243. *Lawrence*, 539 U.S. at 578.

244. Given the embryonic nature of the Court's rhetorical shift away from "fundamental rights," I hesitate to conclude that it has abolished the fundamental liberty doctrine or the imposition of strict scrutiny in the substantive due process context. Nevertheless, my concerns merit consideration, as one federal appeals court has already cited the lack of a fundamental rights or strict scrutiny analysis in *Lawrence* in upholding antigay state action. *See* Lofton v. Sec'y of Dept. of Children and Family Servs., 358 F.3d 804, 816-17 (11th Cir. 2004) (holding that a Florida law, which prohibits adoption by gay and lesbian individuals, but not unmarried heterosexuals, does not interfere with any rights of sexual intimacy possibly held by gay, lesbian, bisexual individuals because *Lawrence* neither applies strict scrutiny nor announces any fundamental right to engage in homosexual conduct).

undue burden permits abortion regulations that strict scrutiny rejected,[245] and traditional rational basis review typically validates the challenged law or policy.[246] *Casey* and *Lawrence* could provide the doctrinal basis for lower courts to uphold laws that restrict liberty, when such regulations might not have survived a strict scrutiny analysis.

The absence of an explicit reference to fundamental rights or to strict scrutiny in *Casey* and *Lawrence* responds to countermajoritarian discourse. The limitation of strict scrutiny to state action that burdens suspect classes or that infringes fundamental rights evolved as a reaction to countermajoritarian criticism. Commentators have justified strict scrutiny for suspect classes because exacting review protects vulnerable classes from abusive, majoritarian politics,[247] while fundamental rights analysis extends heightened scrutiny to rights bearing some relation to historical and traditional views of liberty.[248] Yet, these justifications have not satisfied countermajoritarian critics. Many Court critics have unveiled the substantive dimensions of Ely's process theory[249] and continue to accuse the Court of *Lochner*izing in the substantive due process context.[250] By departing from the framework of strict scrutiny in both *Casey* and *Lawrence*, the Court is likely trying to quell, even if unsuccessfully, ongoing democracy critiques of judicial review.

The shift away from strict scrutiny and fundamental rights in *Lawrence* also responds to majoritarian disfavor of gay, lesbian, bisexual, and transgender politics. Polling data indicate that the

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245. *See Casey*, 505 U.S. at 879-901 (upholding most of the provisions of a Pennsylvania law regulating abortion).

246. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

247. *See supra* notes 6 and 9 and accompanying text.

248. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting) (arguing that judges avoid simply imposing their own views by "having regard to what history teaches are the traditions from which [this Nation] developed as well as the traditions from which it broke").

249. *See* sources cited *supra* note 73.

250. Justice Scalia suggests the same in *Lawrence*, despite his observation that the Court only applied rational basis review and failed to announce a new fundamental right. *See Lawrence*, 539 U.S. at 592 (Scalia, J., dissenting) (arguing that the Texas sodomy law "undoubtedly imposes constraints on liberty" but "so do laws prohibiting . . . working more than 60 hours per week in a bakery," a subtle reference to the statute invalidated in *Lochner*).

public largely supports the outcome in *Lawrence*.[251] This result is not surprising, given the utter lack of enforcement and the judicial invalidation or legislative repeal of sodomy statutes within the states. The Court, in fact, justifies its ruling by citing to the decriminalization movement in the states; by counting the number of states that have decriminalized sodomy, the Court clearly seeks to link its ruling to majoritarian views.[252]

Although public opinion supports the decriminalization of sodomy, the public remains uncomfortable with and divided by efforts to dismantle most heterosexist laws.[253] The Court responds to majoritarian support of antigay legislation and to countermajoritarian discourse by cabining the reach of *Lawrence*. The Court's application of rational basis review limits the impact of the decision because under a traditional rationality inquiry, the Court defers to state actors and tends to uphold the challenged law or policy. Although *Lawrence* might arguably apply a more rigorous level of rational basis review, the Court explicitly states that its decision does not signal the general impermissibility of heterosexist state action. For example, both the majority decision and the concurring opinion of Justice O'Connor seek to distance *Lawrence* from efforts to legalize same-sex marriage, which a broad majority of the public does not support.[254] While strict scrutiny would have broadly jeopardized heterosexist state action, the application of rational basis review has a more modest impact.[255]

3. *Lawrence* and Heteronormativity

As the previous section demonstrates, *Lawrence* responds to majoritarian heterosexism by declining to subject the sodomy

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251. Neil A. Lewis, *Conservatives Furious Over Court's Direction*, N.Y. TIMES, June 27, 2003, at A19 (observing that polls show that majority of Americans support legalizing consensual, adult homosexual conduct).

252. *See Lawrence*, 539 U.S. at 573 ("The 25 states with laws prohibiting the relevant conduct referenced in . . . *Bowers* . . . are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.").

253. *See id.*; Lisa M. Farabee, Note, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 270 n.174 (1996) (discussing polling data showing increasing tolerance for gay and lesbian equality initiatives but indicating that majority opinion does not yet equate civil rights for gays and lesbians as equal rights).

254. *See infra* notes 268-269 and accompanying text.

255. *See Lawrence*, 539 U.S. at 585 (O'Connor, J. concurring) ("That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review.").

statute to a strict scrutiny analysis. The Court also reinforces and illuminates societal discomfort with homosexual conduct in its description of the liberty interest at stake in the litigation, by limiting the reach of the decision, relying upon a strict public/private distinction, and failing to conduct an equal protection analysis.

a. Lawrence *and Marital Imagery: Respectable Homosexuality*

The relevant facts of *Lawrence* are scant: "The officers observed Lawrence and another man, Tyron Garner, engaging in a sexual act. The two petitioners were arrested, held in custody over night, and charged and convicted before a Justice of the Peace."[256] The factual record does not contain much more information. It does not reveal whether the petitioners were in a long-term intimate relationship or whether they were discovered engaging in casual, even anonymous, sexual conduct. Such matters are in fact irrelevant to the challenged statute, which generally proscribes same-sex sodomy.

The Court, however, fills this factual void in *Lawrence* by constructing the petitioners as an intimate couple, even as it attempts to distinguish its ruling from efforts to legalize same-sex marriage.[257] The opinion marries the petitioners in several places. The Court first relates petitioners' conduct to marriage in its critique of the substantive due process analysis applied in *Bowers*. The *Bowers* Court narrowly frames the liberty interest infringed by the Georgia sodomy statute as a right of "homosexuals to engage in sodomy."[258] *Lawrence* criticizes the conception of liberty in *Bowers* by deploying a marital metaphor: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[259] The right at issue in *Bowers* and *Lawrence*, therefore, transcends a right to engage in certain sexual conduct; instead, it relates to marital, or marriage-like, intimacy. Antigay sodomy statutes "seek to control a *personal relationship* that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose

256. *See id.* at 563.
257. *See id.* at 577-78.
258. *Bowers*, 478 U.S. at 190.
259. *Lawrence*, 539 U.S. at 567.

without being punished as criminals."[260] As the following extended quotation vividly illustrates, the Court portrays the petitioners as a married couple most dramatically as it summarizes its perception of the connection between sexual conduct and romantic intimacy. The Court states:

> [That sodomy statutes affect a personal relationship] should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. *When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.* The liberty protected by the Constitution allows homosexual persons the right to make this choice.[261]

The Court's frequent reference to marriage and personal relationships is somewhat artificial and irrelevant. While many people certainly organize their intimate personal relations around sexual conduct, the Texas sodomy statute regulates *all* same-sex sodomy, whether it attaches to a "personal bond that is more enduring" or to a casual encounter. Although some substantive due process cases considering rights of sexual autonomy have indeed turned on marital privacy,[262] the Court's jurisprudence has moved far beyond limiting sexual and procreative liberty to married couples.[263] Indeed, the broad statement of liberty developed in *Casey* and cited approvingly in *Lawrence* never links personal autonomy in sexual matters to marital intimacy, and the *Lawrence* Court itself references the development of sexual autonomy jurisprudence outside of the marital context.[264]

Lawrence's marital trope has contributed to the politicization of same-sex marriage by antigay organizations and state actors[265]

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260. *Id.* (emphasis added).

261. *Id.* (emphasis added).

262. *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (finding right to marital sexual privacy).

263. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (invalidating a state law prohibiting sale or distribution of contraception to persons under sixteen years of age); Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right of privacy "encompass[es] a woman's decision whether or not to terminate her pregnancy").

264. *Lawrence*, 539 U.S. at 565-66 (discussing *Eisenstadt*, *Roe*, and *Carey*).

265. Murphy, *supra* note 203, at A20 (noting that Texas State Representative

and to criticism from conservative jurists.[266] Gay and lesbian rights organizations, on the other hand, view this language as judicial recognition of gay and lesbian relationships.[267] Both sides overstate the value of this language. Clearly, the Court has distinguished, even if insufficiently, the statute in *Lawrence* from prohibitions of same-sex marriage,[268] and given public resistance to this issue,[269] it is highly doubtful that the Court will invalidate prohibitions of same-sex marriage in the near future. Thus, conservative fears of same-sex marriage, based solely on *Lawrence*, are misplaced.

The pro-gay and lesbian belief that *Lawrence* can lead to validation of same-sex relationships warrants similar contextualization. Rather than signaling judicial recognition of same-sex intimacy, the Court's construction of the petitioners as an intimate couple mirrors a conservative and centrist effort by advocates of gay and lesbian equality to appease majoritarian discomfort with homosexual conduct. This strategy may have "prevailed" in *Lawrence*, but it leaves open the question of how the

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Warren Chisum is concerned that *Lawrence* will lead to a legal challenge of the state's "Defense of Marriage Act," which prohibits state recognition of same-sex unions performed in other states); Johanna Neuman, *Gay Conservatives Fight Bush on Wedding Vow*, L.A. TIMES, Feb. 26, 2004, at A14 (observing that "since [*Lawrence*], evangelical Christians have been pressing the administration to intervene [to prevent same-sex marriage]").

266. *See Lawrence*, 539 U.S. at 604 (Scalia, J. dissenting) ("Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.").

267. *See* Murphy, *supra* note 203, at A20 ("The court understands gay sexuality is not just about sex, it is about intimacy and relationships. Now there is a real respect for our relationships, as us almost as families, that is not seedy or marginal but very much a part of society." (quoting Paula Ettelbrick, Executive Director of the International Gay and Lesbian Human Rights Commission)); David Von Drehle, *Justices Overturn Texas Sodomy Ban: A Debate on Marriage, And More, Now Looms*, WASH. POST, June 27, 2003, at A1 ("[*Lawrence*] 'begins an entirely new chapter' in the campaign for gay rights, including the right to marry . . . . 'This historic civil rights ruling promises real equality to gay people in our relationships, our families and our everyday lives.'" (quoting Kevin Cathcart, Executive Director of Lambda Legal Defense and Education Fund)).

268. *See Lawrence*, 539 U.S. at 578; *id.* at 585 (O'Connor, J. concurring).

269. *See* Elisabeth Bumiller, *Bush Backs Ban in Constitution on Gay Marriage*, N.Y. TIMES, Feb. 25, 2004, at A1 ("Recent opinion polls have consistently found that the majority of Americans oppose gay marriage."); Tim Craig, *GOP Forces Controversial Issues: Panel Sidestepped on Marriage, Immigration Proposals*, WASH. POST, Mar. 10, 2004, at B5 (noting that a "majority of the public" opposes same-sex marriage); Charles Lane, *Mass. Court Backs Gay Marriage 'Civil' Unions Rejected; Same-Sex Couples to Have Equal Status for First Time*, WASH. POST, Feb. 5, 2004, at A1 ("Like his predecessor, Bill Clinton, President Bush has declared that he is part of the majority of Americans who, according to polls, oppose same-sex marriage.").

Court will treat sexual practices that do not conform to its narrative of marital intimacy. In a heteronormative society, same-sex sexuality is disparaged and suppressed.[270] Societal stereotypes provide a justificatory rhetoric for heterosexist domination. Gay men are often socially depicted as wanton and promiscuous,[271] while lesbians are "men-haters," who need a "real man" to lead them away from their deviant sexual practice.[272] In order to counter heterosexist portrayals of gay male sexuality, many gay male theorists have advocated marriage. William Eskridge, for example, has argued that same-sex marriage will "civilize" gay men who, in his analysis, seemingly lack any internal restraint in matters concerning sex.[273] Eskridge utilizes a Homerian metaphor to defend passionately the legalization of same-sex marriage:

> In order to achieve committed relationships gay men need the discipline of marriage more than lesbians do. Gay men are like Ulysses, who directed that he be bound to the ship's mast as it passed the Sirens, sea creatures whose seductive voices enticed men to their deaths. Likewise, gay men realize that they tend to lose their balance and succumb to private sirens if they are not socially and even legally constrained.[274]

Eskridge's analysis acquiesces in the "gay as promiscuous" stereotype and constructs a false dichotomy between heterosexual and gay men, between married and unmarried men, and between nonmonogamy and civility.[275] Eskridge's arguments, along with those of other advocates for same-sex marriage, stigmatize nonmarital, nonmonogamous sexual conduct. Marriage implies

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270. *See* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 4 n.10 (1999) ("'Heteronormativity' describes the 'normalcy' of heterosexuality. In a heterosexist society, heterosexuality serves as the transparent norm that shapes ideology, politics, culture and social relations." (citation omitted)).

271. Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 550 (1992) (discussing stereotype of gay promiscuity).

272. Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 L. & SEXUALITY 195, 241 (1994) ("Lesbians are often stereotyped as men-haters.").

273. WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 84 (1996) (arguing that marriage will "civilize" gay men).

274. *Id.* at 83; *see also* Andrew Sullivan, *Here Comes the Groom: A Conservative Case for Gay Marriage*, THE NEW REPUBLIC, Aug. 28, 1989, available at http://www.andrewsullivan.com/homosexuality.php ("Marriage provides an anchor, if an arbitrary and weak one, in the maelstrom of sex and relationships to which we are all prone. It provides a mechanism for emotional stability, economic security . . . .").

275. I have criticized Eskridge's acceptance of the "gay as promiscuous" stereotype in a previous work. *See* Hutchinson, *supra* note 126, at 594-95 n.138.

intimacy, stability, monogamy, responsibility, and civility; unpartnered gay men, by contrast, lack control of their sexuality and behave recklessly and irresponsibly.[276] As lesbian and gay, feminist, critical race, and poverty theorists have demonstrated, pro-marriage discourse, same-sex or otherwise, often stigmatizes poor single mothers,[277] marginalizes the familial arrangements in communities of color,[278] taints gay male sexual practice,[279] overstates the economic value of marriage to poor persons of color,[280] and uncritically accepts the legitimacy of an institution that has historically supported the domination of women.[281]

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276. *See id.* at 594 n.138. *See generally* MICHAEL WARNER, THE TROUBLE WITH NORMAL (1999) (critiquing gay, lesbian, bisexual, and transgender rights movement for failing to advocate sexual liberty and defining gay rights in assimilationist terms).

277. *See* Dorothy E. Roberts, *The Value of Black Mothers' Work,* 26 CONN. L. REV. 871, 873 (1994) ("Although marital status does not determine economic well-being, there is a strong association between black single motherhood and family poverty. The image of the lazy black welfare queen who breeds children to fatten her allowance shapes public attitudes about welfare policy."); *see also* Nancy E. Dowd, *Stigmatizing Single Parents,* 18 HARV. WOMEN'S L.J. 19 (1995) (discussing the stigmatization of poor, single-mother families in poverty debates); Martha L. Fineman, *Images of Mothers in Poverty Discourses,* 1991 DUKE L.J. 274 (same); Linda C. McClain, *"Irresponsible" Reproduction,* 47 HASTINGS L.J. 339 (1996) (same).

278. *See* Hutchinson, *supra* note 176, at 1371 (critiquing marriage discourse for failing to acknowledge diverse familial relationships that are race- and class-specific). The work of Dorothy Roberts exhaustively analyzes the devaluation of black motherhood in family policy debates. *See, e.g.*, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy,* 104 HARV. L. REV. 1419 (1991); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood,* 1 AM. U. J. GENDER & L. 1 (1993); Roberts, *supra* note 277; Dorothy E. Roberts, *Unshackling Black Motherhood,* 95 MICH. L. REV. 938 (1997).

279. *See generally* WARNER, *supra* note 276.

280. *See, e.g.*, Lisa Catanzarite & Vilma Ortiz, *Family Matters, Work Matters? Poverty Among Women of Color and White Women, in* RACE, CLASS, AND GENDER: AN ANTHOLOGY 156 (Margaret L. Andersen & Patricia Hill Collins eds., 1998) (observing that poverty diminishes economic benefits of marriage for women of color); WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 91 (1987) (observing that poverty diminishes economic benefits of marriage among urban poor blacks); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 104 (1996) (same).

281. *See, e.g.*, Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?, in* LESBIANS, GAY MEN, AND THE LAW 401, 402 (William B. Rubenstein ed., 1993) (asserting that marriage is "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis"); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage",* 79 VA. L. REV. 1535, 1536 (1993) (observing that the "desire to marry . . . betrays the promise of . . . radical feminism"). Regardless of whether marriage inherently facilitates patriarchy, pro-marriage theorists should consider the option of detaching important social benefits from marriage and distributing them generally

Lawrence, like proponents of same-sex marriage, "civilizes" the petitioners by marrying them.[282] Societal disapprobation of gay male sexuality provides a context for understanding the Court's utilization of a marital trope. Although sexual conduct certainly fortifies enduring bonds, the facts and doctrinal framework of the case do not warrant such an extended discussion of marriage and relationships. By framing the liberty interest around relationships rather than sexual conduct, which the statute regulates, the Court constructs a narrative of gay respectability: while "promiscuous" gay men cause unease in a heteronormative society, partnered, monogamous gay sex receives greater tolerance in the dominant culture.

b. Lawrence*'s Disclaimers*

Lawrence also responds to majoritarian heterosexism in its frequent disclaimers that limit the societal and legal impact of the decision. Although liberals and conservatives predict that *Lawrence* will lead to the dismantling of legal and social stigmatization of gay, lesbian, bisexual, and transgendered persons, the Court takes a more modest stance. Seeming to anticipate conservative outcry over the potential doctrinal reach of the decision, the Court tries to dispel the notion that *Lawrence* portends the general impermissibility of laws and policies that discriminate against gay, lesbian, bisexual, and transgendered persons. For example, the Court attempts to distance *Lawrence* from debates over same-sex marriage,[283] an issue that a majority of the public strenuously opposes.[284] And Justice O'Connor's concurrence, which does not overrule *Bowers*,[285] distinguishes the

throughout society. *See* Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321, 324 (1991) ("It makes more sense to change institutions so that their benefits are not marriage-dependant rather than make lesbian and gay people eligible for those benefits only by getting married."); Polikoff, *supra*, at 1549 ("Advocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all.").

282. *See supra* notes 259-261 and accompanying text.

283. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) (arguing that antigay sodomy statutes "seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of persons to choose without being punished as criminals" (emphasis added)); *id.* at 578 (noting that its ruling "does not involve whether the government must give *formal recognition to any relationship* that homosexual persons seek to enter" (emphasis added)); *id.* at 585 (O'Connor, J., concurring) (observing that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group").

284. *See supra* note 269 and accompanying text.

285. *See Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) (declining to "join

Texas sodomy statute from the illegality of same-sex marriage, the exclusion of gays and lesbians in the military, and from other antigay state action that might survive if reviewed under her interpretation of the Equal Protection Clause. She states:

> That this law as applied to private, consensual conduct is unconstitutional under the Equal Protection Clause does not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.[286]

O'Connor never describes the "other reasons" that legitimize the prohibition of same-sex marriage, but she seems to validate the blanket and unspecific "national security" justification for excluding gays and lesbians from the United States armed forces.[287] As her opinion acknowledges, O'Connor's application of rational basis review to gay and lesbian equal protection claims would not lead to the general invalidation of heterosexist laws and policies.[288] The numerous disclaimers in *Lawrence* severely undermine the positive language and outcome of the decision.

c. Public/Private Distinction

Although *Lawrence* rests upon a vague notion of "liberty" and not upon a "right of privacy,"[289] the illegal sexual conduct in this

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the Court in overruling [*Bowers*]").

286. *Id.* at 585 (O'Connor, J., concurring).

287. *See id.* Although national security has been a longstanding reason for excluding gays and lesbians from the military, recent regulations have deemphasized this justification. *See* Yoshino, *supra* note 135, at 553 ("The current policy is remarkable in that it does not rely on any of the traditional stereotypes that gays constitute security risks, are mentally unfit, and are more likely to spread sexually transmitted diseases. Instead, the justifications for 'don't ask, don't tell'—unit cohesion, privacy, and sexual tension—primarily focus not on the gay servicemember but on the straight servicemember." (citations omitted)).

288. *See supra* note 285 and accompanying text.

289. *See supra* notes 217-218 and accompanying text; *see also supra* note 264 and accompanying text. The Court's decision makes numerous references to a general concept of "liberty," rather than to "fundamental rights" or to a "right of privacy." *See, e.g.*, *Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); *id.* ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."); *id.* at 564 ("We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause . . . ."); *id.* at 567 ("The liberty protected by the Constitution allows

case occurred in a private home.[290] The liberty interest in the case seems ultimately to turn on the private nature of petitioners' sexual conduct. The Court held that:

> The petitioners are entitled to respect for their private lives. The state cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[291]

Privacy clearly impacts the Court's analysis, and the Court implies that the policing of "public" sex would withstand a constitutional challenge.[292]

The doctrinal distinction between "public" and "private" has received substantial criticism from critical theorists, particularly feminist legal theorists who argue that limiting legal remedies to state-inflicted or publicly imposed harms ignores the injuries that occur in the private sphere, like domestic violence and discrimination.[293] Furthermore, the symbiotic relationship between state and private actors counsels against a rigid separation of private and public; ultimately, the law, rather than

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homosexual persons the right to [engage in private, adult, consensual sodomy]."). The dissenting justices make a similar observation. *See id.* at 592-93 (Scalia, J., dissenting) (criticizing the Court for basing its ruling on "liberty" because "there is no right to 'liberty' under the Due Process Clause, though today's opinion repeatedly makes that claim" and arguing that substantive due process cases generally protect "*fundamental* liberty interests," rather than simply liberty, from state infringement absent compelling justification).

290. *See id.* at 562-63 (observing that police were sent to a "private residence" where they found the petitioners engaging in sexual conduct).

291. *Id.* at 578; *see also id.* at 567 (arguing that sodomy laws affect "the most private human conduct . . . in the most private of places, the home"); *id.* at 569 ("Laws prohibiting sodomy do not seem to have been enforced against consenting adults acting in private."); *id.* at 578 (distinguishing *Lawrence* from other factual settings where states could presumably regulate sexuality, including "public conduct or prostitution"). The Court, however, recognizes that Fourteenth Amendment liberty transcends the home. *See id.* at 562 ("In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the Sate should not be a dominant presence. Freedom extends beyond spatial bounds.").

292. *See id.* at 578.

293. *See* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991) ("The concept of marital privacy, established as a constitutional principle in *Griswold*, historically has been the key ideological rationale for state refusal to intervene to protect battered women within ongoing intimate relationships." (citation omitted)); *see also* Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1672 (1990) ("The language distinguishing public from private separates law from violence. Yet judicial inaction, as well as action, can be violent."). *See generally* Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992) (discussing critiques of the public/private distinction).

nature, constructs the boundaries of what is private or public.[294] *Lawrence* redeploys the public/private distinction by holding that liberty guards against state intrusion into private, consensual sexual conduct and strongly implying that this protection does not extend to public sex.[295] While state interests might validly support regulation of public sexual conduct, the distinction between public and private is not as obvious as *Lawrence* implies, and the policing of public sex has caused the same harms to dignity that the Court in *Lawrence* says its ruling seeks to prevent.[296] As in the feminist context, the privacy rationale does not fully account for the variety of social forces that shape the domination of gay, lesbian, bisexual, and transgendered persons, nor does it capture the interconnected nature of public and private spheres.[297]

By rigidly demarcating the boundaries of public and private, privacy discourse does not permit a thorough analysis of the harms that heterosexist state action imposes upon gay, lesbian, bisexual, and transgendered individuals. For example, while legal prohibitions of public sex apply formally to heterosexual and homosexual conduct, the enforcement of these laws have followed a markedly heterosexist pattern—a pattern that results from the targeting of gay men.[298] Furthermore, police have employed invasive and highly questionable tactics to police gay public sex,[299]

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294. *See supra* note 293.

295. *See Lawrence*, 539 U.S. at 578.

296. *See id.* at 575 (deciding the case on due process grounds because even if homosexual conduct were criminalized under an evenly drawn statute, "that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres").

297. *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1440-41 (1992). According to Thomas:

> My image of homosexual sodomy statutes as the site of a 'constellation' of practices is intended to capture the essential inseparability of these laws from the actual methods—public or private, official or unofficial, sanctioned or unsanctioned, act-based or identity-based, instrumental or symbolic—by which the social control of those to whom they are directed is undertaken and achieved.

Id.

298. *See, e.g.*, Douglas NeJaime, Note, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-based Advocacy*, 38 HARV. C.R.-C.L. L. REV. 511, 543 (2003). Nejaime writes:

> In fighting against harassing and humiliating police tactics used by the Los Angeles County Sheriff's Department, Lambda [Legal Defense and Education Fund] points to the targeting of gay men for behavior also engaged in by women and straight men, arguing that police focused exclusively on areas where gay men congregate and lured gay men with sexually suggestive advances.

Id.

299. *See id.* NeJaime quotes a letter submitted by Lambda Legal Defense and

which often occurs in locations that are debatably private, such as enclosed restroom stalls, remote areas of parks, and bathhouses.[300] To the extent that gay men engage more frequently in public sex, criminalization does not undermine the roots of this phenomenon: societal disapprobation of homosexuality closets gay, lesbian, bisexual, and transgendered persons, making anonymous encounters preferable to those seeking to avoid the debilitation of antigay prejudice.[301] To others, public sex is itself an expression of identity.[302]

Privacy discourse also legitimizes the closeting of gay, lesbian, bisexual, and transgendered persons. The policing of homosexual, but not heterosexual, public sexual conduct expresses the view of a dominant culture that homosexuality should remain invisible or not practiced at all.[303] The criminal law constructs the

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Education Fund to the Los Angeles Police Department to complain against the department's discriminatory and invasive enforcement of public sex laws:

> In one case, the officer followed a petitioner from one restroom to another, and in another, one officer stood at a distance from the urinal with his hands on his penis, but not urinating. Additionally, officers loitered around the restroom for lengthy periods of time—sometimes shirtless, often with the pants unbuttoned and penis exposed, and sometimes with pants lowered and buttocks exposed. Finally, officers made eye contact with suspects, smiled at them, engaged in hand gestures with them, and engaged in small talk with them, all in the restroom.

Id. (quoting Letter of Amicus Curiae Lambda Legal Defense and Education Fund, to the Honorable Ronald George, Chief Justice, Cal. Supreme Court, re Tucker v. Municipal Court (No. S080680) (Apr. 16, 1999)).

300. *Id.* at 542-43 ("Of course, the private/public distinction is not this easy, since gay men engaging in public sex often do so in areas they conceive of as private, hiding themselves yet keenly aware of the potential of watchful eyes, whether from voyeuristic gay men or law enforcement." (citing WARNER, *supra* note 276, at 173)).

301. *See* Cathy A. Harris, Note, *Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights*, 65 GEO. WASH. L. REV. 248, 266 (1997) ("Although the lack of comprehensive studies makes it difficult to gauge the demographics of the people who utilize public sex areas, it is a popular perception that these individuals are men, and that these men who have sex in public areas are actually among the most closeted."). Although legal academics have paid very little attention to the important issue of public sex regulations, two excellent student notes, along with nonlegal academic literature, have begun such an exploration. *See id.* at 265-67; NeJaime, *supra* note 298. *See generally* PUBLIC SEX/GAY SPACE (William L. Leap ed., 1999) (collecting numerous articles providing ethnography of "public" sex and gay culture).

302. *See* NeJaime, *supra* note 298, at 543-44 (discussing "public sexual culture of urban gay men in Los Angeles" and contending that such activity "resonates . . . with a queer analytic that values the preservation of sexual counter-publics"). *See generally* PUBLIC SEX/GAY SPACE , *supra* note 301.

303. *See* ESKRIDGE, *supra* note 126, at 7 ("The idea of the closet . . . is not just the idea that deviant gender or sexuality must be secret . . . but is more centrally a complex product of society and the law, which in the 1950's sought to enforce compulsory heterosexuality as a pervasive public policy.").

closet through the criminalization of public or private homosexual conduct and in its recognition of the "homosexual panic" defense.[304]

The Court also constructs the metaphorical closet in civil rights cases. In its budding sexual orientation jurisprudence, Court doctrine stigmatizes open, public expressions of gay, lesbian, bisexual, or transgender identity. For example, in *Boy Scouts of America v. Dale*[305] and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*,[306] the Court held that the First Amendment legitimizes the defendants' antigay discrimination, finding that public expression of homosexuality conflicted with the defendants' speech and associational freedom.[307] The Court rejected claims, however, that the defendants engaged in status-based discrimination against gays and lesbians "as such."[308] Even if the First Amendment legitimizes discrimination in these cases, the discrimination is status- or identity-based because expression and

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304. This defense allows defendants charged with killing gay, lesbian, bisexual, or transgender victims to mitigate a charge of murder to manslaughter by proving that the victim acted in a sexually suggestive, but nonviolent, manner toward the defendant. For critiques, see Gary David Comstock, *Dismantling the Homosexual Panic Defense*, 2 L. & SEXUALITY 81, 86-89 (1992); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

305. 530 U.S. 640 (2000) (finding that the right of expressive association shields Boy Scouts from application of a state law that forbids antigay discrimination in places of public accommodation).

306. 515 U.S. 557 (1995) (holding that the First Amendment protects parade organizers from the application of state law that forbids antigay discrimination in places of public accommodation).

307. *See Dale*, 530 U.S. at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' right to freedom of expressive association."); *Hurley*, 515 U.S. at 572-81 (holding that inclusion of contingent of gays, lesbians, and bisexuals in parade would impermissibly alter the content of the parade organizers' speech).

308. *See Dale*, 530 U.S. at 653. In *Dale*, the Court distinguished between gay "expression" and gay "status" as follows:

> [Our opinion does not mean] that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation."

Id. And in *Hurley*, the Court ruled that the parade organizers who excluded the gay, lesbian, and bisexual contingent did not mean to discriminate against "homosexuals as such," but simply did not want them in the parade identifying themselves as gay, lesbian, bisexual Irish-Americans. *See Hurley*, 515 U.S. at 572. I have criticized these rulings elsewhere for bifurcating identity and expression. *See* Hutchinson, *supra* note 212 (criticizing *Dale*); Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85 (1998) (criticizing *Hurley*).

identity are intertwined.

In *Romer v. Evans*,[309] by contrast, the Court found Amendment 2[310] unconstitutional because it narrowly focused on gay, lesbian, and bisexual status,[311] while in *Lawrence*, the private nature of petitioners' sexual conduct validates the Court's ruling.[312] Furthermore, although *Lawrence* extends protection to private homosexual conduct, the Court warns that its decision does not necessarily compel "formal recognition" of gay and lesbian relationships.[313] State recognition, however, would bring gay and lesbian relationships squarely within the "public" domain, making them visible and open.[314] *Lawrence* is therefore consistent with Court precedent and dominant societal forces that closet gay, lesbian, bisexual, and transgender identity and expression.

d. Lawrence *and Lack of Equal Protection Analysis*

Finally, *Lawrence* legitimates heterosexist state action by failing to engage in an equal protection analysis in addition to its due process discussion.[315] The Court held that it preferred due process to equal protection because even a neutral law that prohibited sodomy would stigmatize homosexuality and because gays and lesbians would suffer collateral sanctions if convicted

309. 517 U.S. 630 (1996).

310. *See id.* at 620 (describing that Amendment 2 is an amendment to the Colorado state constitution that precludes all state or local government action aimed at protecting individuals on the basis of sexual orientation).

311. *See* Janet E. Halley, Romer *v.* Hardwick, 68 U. COLO. L. REV. 429, 438-45 (1997) (arguing that *Romer* focused on gay and lesbian "status" but not "conduct"); *see also Romer*, 517 U.S. at 633 (arguing that the state constitutional amendment violates equal protection in part because "[i]t identifies persons by a single trait").

312. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

313. *Id.*

314. *See* Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1232 (1998) ("While same-sex marriage is not capable of making all gay people full legal subjects, it would increase the cultural visibility of gay men and lesbians generally." (citation omitted)).

315. *See Lawrence*, 539 U.S. at 574-75 (avoiding equal protection discussion). Although the Court typically resists deciding unnecessary constitutional questions, see Burton v. United States, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."), both due process and equal protection seem relevant in *Lawrence* because the challenged statute impedes liberty and discriminates against gays *and* lesbians. Also, precedent exists to support engaging in both analyses in this case. *See* Loving v. Virginia, 388 U.S. 1 (1967) (striking down antimiscegenation statute on equal protection or, alternatively, on due process grounds). Furthermore, the Court does not cite this justiciability rule in declining to reach the equal protection issue. *See Lawrence*, 539 U.S. at 574-75. Although Texas now cannot constitutionally apply the statute, the question of the general permissibility of antigay discrimination remains unanswered. *Id.*

under an amended, gender-neutral statute.[316] Although due process and equal protection inquiries sometimes overlap, the doctrines serve distinct purposes.[317] Furthermore, an equal protection analysis could have broader implications for antigay legislation than the Court's low-level liberty analysis. As the opinion concedes, most states do not enforce laws regulating sodomy or have decriminalized consensual private sodomy altogether.[318] While the remaining statutes may nonetheless stigmatize gay and lesbian individuals, their immediate impact is mainly symbolic. Gays and lesbians, however, suffer concrete and tangible discrimination from private and public actors in a host of settings. In most state and federal jurisdictions antigay discrimination remains permissible under statutory or constitutional law.[319] Equal protection analysis more readily addresses these pervasive forms of discriminatory state action than does due process jurisprudence. Even when due process inquiry addresses discrimination, as in the constitutional analysis of discriminatory federal governmental action, this analysis simply borrows from existing equal protection discourse.[320] The absence of an equal protection analysis in *Lawrence* leaves open the question of whether antigay discriminatory practices generally violate the Constitution.

O'Connor's concurrence, which utilizes an equal protection approach, does very little to advance antiheterosexist legal agendas and politics. While O'Connor would find the Texas

316. *See Lawrence*, 539 U.S. at 575.

317. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."); *see also* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (analyzing the doctrinal distinctions between equal protection and due process).

318. *See Lawrence*, 539 U.S. at 573 (discussing decriminalization of sodomy in the states since *Bowers*).

319. *See* Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory, and Politics of "Sexual Orientation"*, 48 HASTINGS L.J. 1293, 1335 (1997) (noting that "'sexual orientation discrimination' is not formally prohibited by federal antidiscrimination statutes"); Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation* (Jun. 24, 2004), http://www.lambdalegal.org/cgi-bin/pages/states/antidiscri-map (last visited Sep. 14, 2004).

320. *See* Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.").

sodomy statute unconstitutional on equal protection grounds, her preference for rational basis review, as her opinion states, would legitimize a variety of antigay laws and policies.[321]

Had the Court conducted an equal protection analysis in *Lawrence*, it probably would have applied rational basis "with a bite," the level of review most scholars agreed the Court applied in *Romer*, rather than finding that gays and lesbians constitute a "suspect class."[322] The Court has effectively ceased recognizing new suspect classes.[323] The Court's resistance to suspect class analysis allows majoritarian mistreatment of disempowered groups to escape judicial invalidation, and it responds to countermajoritarian critics' fears of judicial review. A suspect class analysis, unlike rational basis review, would broadly threaten antigay state action.

But even a redeployment of the *Romer* standard in *Lawrence* could have provided lower courts with additional precedent to invalidate heterosexist state action. Language in *Romer* suggests that the Court's decision turns, in part, on the breadth of Amendment 2, which prohibited the State of Colorado or any subdivision thereof from protecting gays, lesbians, and bisexuals from discrimination.[324] At least one federal court of appeals has distinguished Amendment 2 from another rights-stripping antigay law on the grounds that the breadth of that law was not as extensive as Amendment 2.[325] Application of the *Romer* standard in *Lawrence* could have countered the attempt to discount *Romer*'s relevance to more discrete forms of discrimination, like the discrimination mandated by the Texas sodomy statute. Furthermore, affirmation of the *Romer* standard would reaffirm

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321. *See Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring).

322. In fact, the petitioners argued only that the Court should apply the *Romer* standard. *See id.* at 574 ("As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause."). Many commentators believe that this standard is a higher level rational basis review. *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 327 (1997) (including *Romer* on a list of cases representing "rational basis review with a bite"); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 399 (1998) (same).

323. *See supra* notes 133-140 and accompanying text.

324. *See Romer*, 517 U.S. at 632 (holding that the "sheer breadth [of Amendment 2] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects").

325. *See* Equal. Found. v. City of Cincinnati, 128 F.3d 289, 295-301 (6th Cir. 1997) (distinguishing *Romer* on the grounds that Amendment 2 was broader in reach).

and fortify the constitutional disfavor of antigay discrimination.[326]

Although Lawrence contains several positive aspects, its value to gay and lesbian rights agendas is overstated due to its many conservatizing dimensions. A similar observation applies to the Court's important recent affirmative action rulings.

B. Grutter v. Bollinger *and* Gratz v. Bollinger

The constitutionality of race-based affirmative action has always divided the Court, but it tends to invalidate such policies rather than sustain them.[327] The Court has established that all affirmative action plans, whether state or congressional, receive strict scrutiny,[328] and it has isolated only two interests that can support the usage of affirmative action: remedying discrimination[329] and achieving diversity in educational settings.[330] The Court, however, has severely limited the availability of the remedial justification. Governmental actors can only remedy their own discrimination or private discrimination connected to the state, as in discrimination by a participant in a procurement program.[331] Governments, however, cannot remedy "societal discrimination,"[332] or the broad microaggressions[333] that

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326. Subsequent to *Lawrence*, and during the completion of this Article, at least one state court has distinguished *Lawrence* on the grounds that it did not conduct an equal protection analysis. *See* Kansas v. Limon, 83 P.3d 229, 235 (Kan. Ct. App. 2004), *reh'g granted*, 2004 Kan. LEXIS 284 (Kan. May 25, 2004) (upholding disparate sentence for same-sex forcible sodomy and distinguishing case from *Lawrence* and *Romer*). The Court of Appeals for the Eleventh Circuit distinguished *Romer* as being concerned with sweeping, rather than discrete, antigay state action. *See* Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 826 (11th Cir. 2004), , *en banc reh'g denied*, 377 F.3d 1275 (11th Cir. 2004) ("In contrast to this 'broad and undifferentiated disability,' the Florida classification is limited to the narrow and discrete context of access to the statutory privilege of adoption and, more importantly, has a plausible connection with the state's asserted interest." (citation omitted)).

327. *See supra* note 142.

328. *See* cases cited *supra* note 133.

329. *See* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION 168-69 (2000) (discussing justifications for affirmative action recognized in Court precedent).

330. *See* Grutter v. Bollinger, 539 U.S. 306, 323-25 (2003) (describing diversity as a compelling state interest in the educational setting).

331. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (stating that state actor can remedy its own discrimination or private discrimination connected to the state such as in a procurement or other spending power program).

332. *See id.* at 505 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group.").

333. Peggy Cooper Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (defining microaggression as "subtle, stunning, often automatic, and non-verbal exchanges which are 'put downs' of blacks by offenders").

people of color endure daily and which cause material deprivation and stigmatic harm. Furthermore, although the diversity rationale has been widely accepted since the Court's decision in *Bakke*, many scholars, prior to *Grutter*, have questioned the legitimacy of the diversity justification, noting that Justice Powell's discussion of diversity in *Bakke* did not receive support from any other justice on the Court and arguing that subsequent personnel changes on the Court strongly suggest the illegitimacy of the diversity principle.[334] Accordingly, when the Court granted certiorari in *Grutter* and *Gratz*, many observers believed that the Court would invalidate the challenged plans and announce a new doctrine that would further restrict the ability of state actors to utilize race-based affirmative action.[335]

Given this historical context, the Court's ruling in *Grutter*, which sustains the legitimacy of the diversity rationale in the higher academic context, has generated relief and elation among liberals and civil rights organizations, while conservatives have lamented the decision as a setback.[336] *Grutter*, like *Lawrence*, contains liberal and conservative strands, but ultimately the decision represents majoritarian views about racial justice.

1. Positive Aspects of *Grutter*

a. Affirmation of Diversity Rationale

In *Grutter*, the Court affirms the diversity rationale first articulated in Justice Powell's lone opinion in *Bakke*.[337] The University of Michigan Law School considers the race of applicants in order to foster diversity of ideas in the classroom and to enhance the ability of students of color to participate freely in class discussions.[338] Although most colleges and universities have

334. *See Grutter*, 539 U.S. at 322-23 (noting confusion over the applicability of *Bakke*).

335. *See, e.g.*, SPANN, *supra* note 329, at 190 (arguing that "it is realistically unlikely that any meaningful affirmative action programs will be upheld by the Supreme Court in the absence of a political realignment produced by new Supreme Court appointments").

336. *See* Charles Lane, *Affirmative Action for Diversity Is Upheld*, WASH. POST, June 24, 2003, at A1 ("Supporters of affirmative action, who had been bracing for the possibility that the court could strike down both programs, were jubilant [after the Court decided *Grutter*]."); Dana Milbank, *Affirmative Action Opponents Preparing for a Ballot Battle*, WASH. POST, July 4, 2003, at A7 ("Opponents of affirmative action, angered by a recent Supreme Court decision, are planning to launch a flurry of ballot initiatives for 2004 in presidential battleground states.").

337. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (Powell, J.).

338. *See Grutter*, 539 U.S. at 317-20 (discussing asserted interest in affirmative

centered their admissions policies around *Bakke*, scholars and courts have questioned the continuing validity of diversity as a compelling state interest because no other justices joined in Justice Powell's discussion of diversity and because subsequent opinions by several members of the Court seriously called diversity into doubt.[339]

The Court nevertheless sustains the diversity justification for utilizing race consciousness in the higher education context. In fact, the Court explicates the value of racial diversity in an academic setting more comprehensively than Justice Powell. The Court accepts the Law School's argument that it needs a "critical mass" of students of color in order to "ensure their ability to make unique contributions to the character of the Law School,"[340] and it finds additionally that:

> [T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables students to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."[341]

The Court also accepts the testimony of expert witnesses and arguments in amicus briefs from numerous corporations and governmental leaders (including former military officers), which assert that diversity prepares students for a diverse and global workforce.[342] Finally, the Court finds that the nation's leadership will only have legitimacy if "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity."[343] Diversity in higher education effectuates this compelling goal. The Court's ruling in *Grutter* sustains the ability of colleges and universities to foster diversified learning environments and to afford educational opportunities to students from communities of color.

b. Flexibility in Scrutinizing Progressive Race Consciousness

Grutter also provides doctrinal support for flexibility in the judicial review of affirmative action programs. Some scholars

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action).

339. *See supra* note 334 and accompanying text.

340. *Grutter*, 539 U.S. at 316.

341. *Id.* at 330 (quoting App. to Pet. for Cert. 244a and 246a).

342. *Id.* at 330-31.

343. *Id.* at 332.

have criticized the Court's affirmative action jurisprudence for its unyielding rigor. More often than not, they argue, the Court invalidates affirmative action plans.[344] In *Grutter*, however, the Court announces that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,"[345] and it specifically "defers" to the Law School's conclusion that racial diversity will enhance its educational environment.[346] Furthermore, the Court held, despite language implying the contrary in prior precedent, that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative."[347] The Court held that its doctrine only "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[348]

The Court's previously rigid stance toward affirmative action has limited the ability of governmental actors to provide needed resources to subordinate communities. Thus, the flexible approach to race consciousness applied in *Grutter* could improve social justice efforts. Despite these positive dimensions, *Grutter* and *Gratz* respond to majoritarian ideas concerning race, reaffirm negative doctrines that ultimately harm persons of color, and only moderately advance social justice.

2. *Grutter*, *Gratz*, and Strict Scrutiny

Although *Grutter* holds that context matters when the Court reviews race-based affirmative action plans, both *Grutter* and *Gratz* subject the challenged plans to strict scrutiny.[349] Strict scrutiny, especially in the context of affirmative action, has often been rigid and fatal.[350] The symmetrical application of strict scrutiny to both invidious and remedial usages of race has severely limited the ability of states and Congress to address racial inequality.[351] Furthermore, strict scrutiny falsely implies that whites need protection from domination by persons of color, as

344. *See* Spann, *supra* note 142, at 65-67.

345. *Grutter*, 539 U.S. at 327.

346. *Id.* at 328.

347. *Id.* at 339.

348. *Id.*

349. *See id.* at 325 (applying strict scrutiny); Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (same).

350. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 123-24 (2000) (criticizing rigid strict scrutiny analysis in affirmative action cases).

351. *See* Hutchinson, *supra* note 70, at 640-47 (criticizing strict scrutiny in affirmative action cases).

indicated by the Court's creation of tiered equal protection to guard against abusive legislation that harms "suspect classes."[352] *Grutter* and *Gratz* perpetuate this problematic equal protection doctrine.

While the Fourteenth Amendment certainly evolved in order to prevent racial discrimination, the Court's decisions have not interrogated the rich academic literature which undermines the Fourteenth Amendment's hostility to *all* race consciousness. From an original intent perspective, the historical record surrounding the Fourteenth Amendment complicates the judicial treatment of all forms of race consciousness as presumptively unconstitutional.[353] Also, as many scholars have theorized, the Equal Protection Clause seeks to end racial subjugation, not laws that use race to eradicate racial subjugation; the constitutional guarantee of equality prohibits state subjugation on the basis of race, not all forms of racial differentiation.[354] Furthermore, by applying strict scrutiny to all race-conscious state action, whether invidious or progressive, the Court ignores its own message in *Grutter* that context matters. If the Court takes context seriously, then it would adopt a lower standard of review for noninvidious usages of race.

In addition, the introduction of deference in the strict scrutiny context can impede, rather than advance, social justice concerns. Strict scrutiny exists because the Court treats certain forms of discrimination as presumptively unconstitutional. Deference to a discriminator, however, undermines the rigorous review contemplated by strict scrutiny. While deference advances civil rights agendas under the facts of *Grutter*, other factual patterns might occur in which a deferential analysis would hinder equality efforts. In *Boy Scouts of America v. Dale*,[355] for example, the Court considered a case of discrimination on the basis of sexual orientation, which a state statute made illegal.[356] The Court credits the defendant's argument that its discriminatory policy furthers speech interests—despite the thin and contrived evidence supporting this claim.[357] The Court held that it must defer to the defendant's view as to both the content of and barriers

352. *Id.* at 640.

353. *See* sources cited *supra* note 51.

354. *See* Colker, *supra* note 160, at 1016 (discussing permissibility of affirmative action under antisubordination theory of equality).

355. 530 U.S. 640 (2000).

356. *Id.* at 645.

357. *See id.* at 644.

to the expression of its First Amendment expression.[358] Although *Dale*, unlike *Grutter*, was a case of discrimination made impermissible by statute and involved a more explicit First Amendment analysis, the two cases overlap because in both, the parties' discrimination was generally impermissible and the Court considered whether the expressive interests shielded the defendant from liability.[359] In both cases, the speech argument justified discrimination, in part, because the Court deferred to the defendants. *Dale* demonstrates that deference to discriminators can undermine the advancement of civil rights goals.[360]

In order to contextualize its analysis of race consciousness and to justify its deference to policymakers, the Court could apply a lower level of review in affirmative action cases rather than clouding the meaning of strict scrutiny. By adhering to a symmetrical equal protection analysis, the Court legitimizes a doctrine that hinders efforts to eradicate racial inequality.

Furthermore, although the Court deferred to the state in *Grutter*, the diversity justification rests on grounds of academic freedom and diversity. While *Dale* presumably justifies the accordance of deference when construing these interests, it is unclear whether the Court would apply deference and a contextualized analysis if a state actor utilized race in order to remedy discrimination. The Court has severely narrowed the permissible usages of race in the remedial context[361] and has held that it must subject congressional and state racial classifications to the same level of judicial scrutiny.[362] Sound arguments,

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358. *Id.* at 651-53.

359. The Law School's interest in diversity is a part of "academic freedom," which rests on First Amendment grounds. *See Grutter*, 539 U.S. at 329. The Court finds that:

> In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: "The freedom of a university to make its own judgments as to education includes the selection of its student body."

Id. (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).

360. At least one other commentator has linked *Dale* to the educational diversity rationale, even though the Court failed to do so in *Grutter*. *See* David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 634 (2001) ("Just as employing *Dale* would have diluted the Boy Scouts' anti-homosexual activity message, forcing private universities to adopt race-neutral admissions policies would dilute their pro-diversity message.").

361. *See supra* notes 331-333 and accompanying text.

362. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

however, support differential treatment for Congress. Section Five of the Fourteenth Amendment specifically authorizes congressional enforcement of the provisions of the amendment.[363] This unique constitutional role should compel the Court's deference to Congress' identification of racial victims and to its construction of remedies for racial injustice.[364] Because the Court's deference to the Law School in *Grutter* seems to rest on the nature of the specific interest advanced in the case, and because the Court reaffirms its commitment to strict scrutiny of all race classifications, it remains unclear how the Court will approach remedial usages of race. However, given the existing precedent and majoritarian views on race, it is likely that the Court will not provide much more latitude for remedial usages of race.

3. Diversity vs. Remedy

The defendants in *Gratz* and *Grutter* declined to defend their usage of race on remedial grounds[365] and instead advanced only the diversity rationale. This was likely a result of the facts of the cases and the extremely difficult doctrinal barriers in the area of remedial uses of race. Although the diversity justification prevailed, the emphasis on racial diversity and the dismissal of racial remedies disadvantage oppressed minorities and coincide with majoritarian views concerning race.

The resistance to race-based remedies stems from a doubt concerning the necessity of such remedies. A careful review of the Court's equal protection jurisprudence demonstrates that the Court, like a majority of whites,[366] believes that the United States has largely transcended its racially discriminatory "past" and that racism today exists as isolated incidents committed by aberrant bad actors. The discriminatory intent rule, for example, evinces the Court's belief in a post-racist society. Because society has

363. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

364. The Court equivocates on this issue in *Adarand* even as it says that it must apply the same level of review to state and federal race-based affirmative action plans:

> And, while the *Adarand* Court emphasized 'congruence' in applying strict scrutiny to both state and federal affirmative action programs . . . it did not repudiate the principle that Congress deserves greater deference than states because Congress is a co-equal branch of government and explicitly charged with enforcement power by Section 5 of the Fourteenth Amendment.

Ayres & Vars, *supra* note 149, at 1580 n.12 (citation omitted).

365. *See Grutter*, 539 U.S. at 319; *Gratz*, 539 U.S. at 257 n.9.

366. *See infra* notes 369 and 371.

transcended racism, the logic goes, laws that have a discriminatory effect were not enacted with the intent to discriminate and thus are only coincidentally harmful.[367]

The intent rule infests the colorblindness doctrine as well. While state actors can utilize race to correct racial discrimination, they must prove with seemingly indisputable evidence that racism has actually occurred in the policy sector subject to the affirmative action plan.[368] Court doctrine therefore mirrors white public opinion with respect to race. While persons of color believe that racism remains prevalent, whites believe it rarely occurs.[369]

A battery of social statistics, however, demonstrates that racial discrimination and inequality remain salient features of American life. People of color, as Justice Ginsburg's dissent in *Gratz* noted, are subordinate in virtually every social and economic measure of well-being.[370] Furthermore, polling data and an abundance of social science and psychological research indicate that many whites, despite their belief in a post-racist society and adherence to formal equality, cling to harmful racial stereotypes and practices and do not widely support enforcement of antidiscrimination measures.[371]

In addition to causing discriminatory treatment, racism has structural dimensions. Historical and ongoing racial subordination have harmed persons of color economically, thus exacerbating their inability to access important social resources.[372] Indeed, racial inequality and poverty in the educational context

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367. Barbara J. Flaag, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 988 (1993) ("The requirement of discriminatory intent also legitimates unconscious race discrimination by reinforcing a popular white story about progress in race relations. The central theme of this story is that our society has an unfortunate history of race discrimination that is largely behind us.").

368. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498-500 (1989) (rejecting every reason the city offered to justify affirmative action plan).

369. *See* JOHN J. HELDRICH CTR. FOR WORKFORCE DEV., *supra* note 179, at 8 (reporting that 10% of whites versus 50% of blacks believe that blacks experience workplace discrimination); Flaag, *supra* note 367, at 981 (arguing that "whites tend to adopt the 'things are getting better' story of race relations, which allows us to suppose that our unfortunate history of socially approved race discrimination is largely behind us").

370. *See Gratz*, 539 U.S. at 299-301 (Ginsburg, J., dissenting) (discussing socioeconomic factors that correlate with race to the detriment of persons of color).

371. David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 946-58 (1996) (examining numerous polls and psychological studies documenting pervasiveness of racism and discontentment with enforcement of antidiscrimination laws).

372. *See Gratz*, 539 U.S. at 299-301 (Ginsburg, J., dissenting) (discussing racial barriers to social advancement).

cause the lack of diversity that affirmative action plans seek to remedy.[373] The lack of student-body diversity, in other words, is intimately connected to poverty, racial discrimination, and subordination.[374]

The emphasis on diversity, rather than on undoing subordination, allows the Court to evade questions of ongoing racial discrimination and the harmful effects of intersecting racism and poverty. Diversity is a safer concept than remedies because it is a concept that the President,[375] powerful corporations, leading colleges and universities, and the public[376] can openly embrace.[377] Diversity serves majoritarian interests and only indirectly advances the interests of persons of color, who would benefit not only from diversity but from a constitutional discourse that permits willing state actors to tailor comprehensive remedies to racial inequality and poverty. In order to confront issues of educational access, state actors must consider race and class as a part of social policy because these factors directly affect the quality and availability of educational resources. The Court's hostility to remedial usages of race, however, presents formidable barriers to such efforts.

The closing passage of *Grutter* powerfully illustrates the

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373. *See* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003) (arguing that in *Grutter* "it was diversity in the classroom, on the work floor, and in the military, not the need to address past and continuing racial barriers, that gained O'Connor's vote").

374. *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272-96 (1999) (discussing racial and socioeconomic barriers to education).

375. The amicus brief submitted by the United States makes the following observation:

> Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective . . . . Nowhere is the importance of such openness more acute than in the context of higher education . . . . If undergraduate and graduate institutions are not open to all individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and the professions will be closed to some.

Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Grutter* (No. 02-241). *But cf. infra* note 441 (noting that the Bush Administration opposed the use of race in the University of Michigan's affirmative action programs).

376. *See Grutter*, 539 U.S. at 331-32 (reviewing academic, corporate, and military arguments supporting diversity).

377. *See* Charles Lane, *Civil Liberties Were Term's Big Winner*, WASH. POST, June 29, 2003, at A1 (observing that "the public appears to oppose racial quotas, but also wants racially integrated elite universities"); Von Drehle, *supra* note 155, at A1 (noting broad public support for educational diversity but broad opposition to racial preferences). Neal Devins has similarly argued that *Grutter* reflects powerful majoritarian interests. *See* Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347 (2003) (discussing majoritarian influences that explain the ruling in *Grutter*).

Court's perception that society has largely transcended racism. After noting that twenty-five years have passed since the Court decided *Bakke*, the Court expresses the following aspiration: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[378] The Court's dictum expresses weariness toward the use of race consciousness. But if racism is pervasive, then such impatience toward the use of race consciousness is misplaced. As Justice Ginsburg states in her concurrence, *Brown*, which invalidated racial discrimination against persons of color in the educational setting, was only decided twenty-five years prior to *Bakke*, and "conscious and unconscious race bias" continue to create and reinforce racial inequity.[379] The majority, however, discounts the relevance of ongoing and prior discrimination in shaping inequality of educational opportunity and instead takes a position that parallels majoritarian discomfort with measures designed to deal with the intractable problem of racial inequality.

The Court's misunderstanding of or lack of concern for the severity of racism mirrors nineteenth-century jurisprudence that curtailed Congress' ability to remedy and prevent discriminatory treatment of the newly freed slaves.[380] In the *Civil Rights Cases*,[381] the Court invalidated the first federal public accommodations statute. The Court found that Congress lacked authority to enact the statute under its Thirteenth Amendment enforcement powers.[382] The finding rested on two grounds: first, that post-bellum racial discrimination lacked a connection to slavery, and second, that the Fourteenth Amendment could not provide authority because it regulates only state action and the statute touched upon private behavior.[383]

The closing passage of the *Civil Rights Cases* strikingly resembles the closing passage of *Grutter*. In these passages both opinions grossly underestimate the severity of racism and the inability of United States society to transcend its racist culture. Both Courts express growing impatience with measures designed to remedy racial subjugation. In the *Civil Rights Cases*, the Court observed that:

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378. *Grutter*, 539 U.S. at 343.

379. *Id.* at 345 (Ginsburg, J., concurring).

380. *See* Siegel, *supra* note 170, at 1119-29 (discussing the Court's role in preserving racial subordination during the Reconstruction era).

381. 109 U.S. 3 (1883).

382. *Id.* at 11, 21.

383. *Id.* at 11, 21.

> It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theat[er], or deal with in other matters of intercourse or business. . . .
>
> *When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .*[384]

Just eighteen years after the abolition of slavery, the Court assumes a hostile and impatient posture toward governmental remedies for racial subjugation. Now, fifty years after *Brown*, but not necessarily after desegregation,[385] the Court in *Grutter* takes a similarly antagonistic stance toward governmental efforts to address educational inequality.

4. *Grutter* v. *Gratz* (or Intent vs. Impact)

Grutter and *Gratz* parallel majoritarian views concerning race and hinder social justice in another important way: by implicitly ratifying the Court's doctrinal requirement of discriminatory intent. As this Article has demonstrated, the Court requires plaintiffs to establish that defendants acted with discriminatory purpose in order to prove an equal protection violation.[386] In addition to placing tremendous obstacles before civil rights litigants, this doctrine reflects the views of a dominant culture that American society has essentially transcended racism, such that facially neutral state action that engenders racially discriminatory effects does not generally manifest an intent to discriminate.[387] *Gratz* and *Grutter* reinforce this viewpoint.

In *Grutter*, the Court found that the Law School permissibly used race because race consciousness allowed the defendant to pursue a compelling interest in diversity and because the usage of

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384. *Id.* at 24-25 (emphasis added).

385. *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION 7-8 (1996) ("By 1964 only one-fiftieth of Southern black children attended integrated schools. Northern segregation, meanwhile, was virtually untouched until the mid-1970s."); *see also* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., *BROWN* AT 50: KING'S DREAM OR *PLESSY*'S NIGHTMARE 17 (2004), *at* http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf (last visited Sept. 24, 2004) (reporting substantial resegregation in American schools, particularly among blacks and Latinos who, on average, attend schools with over two-thirds black or Latino students).

386. *See supra* notes 163-168 and accompanying text.

387. *See supra* notes 367-371 and accompanying text.

race was narrowly tailored.[388] The ambiguous role that race played in the admissions process was essential to the conclusion that the Law School's utilization of race was narrowly tailored. Although the Law School admitted that race was *a* factor in its admissions policy, the extent to which the Law School utilized race remained unquantified and nonmechanical.[389] Because the Law School's usage of race was amorphous, the Court could not conclude that race was outcome determinative with respect to admissions decisions:

> [T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable.[390]

The Law School's nonmathematical usage of race distinguished its admissions policy from the quota invalidated in *Bakke* and from the set-aside invalidated in *Croson*.[391] Despite admitting to engaging in racial classification, the Law School plan survived because the Court concluded that race was neither implicitly nor explicitly central to the admissions process.

The Court, however, invalidated the University of Michigan's undergraduate admissions policy because that policy assigned a specific quantity to race: applicants received 20 points toward a total of 150, if they were from "underrpresented minority" groups.[392] The Court held that this plan amounted to automatic admission (a quasi-quota) for all qualified minorities and, as such, was not narrowly tailored:

> The current . . . policy does not provide . . . individualized consideration [of applicants]. The . . . policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group as defined by the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. . . . [This distribution] has the effect of making "the factor of race . . . decisive" for virtually every

388. *See supra* Parts II.B.1.a & II.B.1.b.

389. *Grutter*, 539 U.S. at 337 ("Unlike the program at issue in *Gratz*, the Law School awards no mechanical predetermined diversity 'bonuses' based on race or ethnicity." (citation omitted)).

390. *Id.*

391. *Id.* at 335 (distinguishing Law School plan from plans in *Bakke* and *Croson*).

392. *See Gratz*, 539 U.S. at 273.

minimally qualified underrepresented minority applicant.[393]

As the *Grutter* and *Gratz* dissenters argue, however, the difference between the two plans is more formal than substantive, for it is possible to achieve the same results with either the ambiguous "plus" system legitimated in *Grutter* or the mathematical system invalidated in *Gratz*.[394] The *Grutter* dissenters rely primarily on statistical evidence of the racial impact of the Law School's plus plan to contest its validity, even though these same members of the Court routinely discount statistical analysis when persons of color and women pursue equal protection claims by asserting discriminatory impact.[395] For example, Justice Scalia, dissenting in *Grutter*, argues that "[t]he admissions statistics show [the Law School's plus program] to be a sham to cover a scheme of racially proportionate admissions."[396] Similarly, Chief Justice Rehnquist argues that "the ostensibly flexible nature of the Law School's admissions program that the Court finds appealing appears to be, in practice, a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."[397] Justice Kennedy observes, moreover, that the "concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[398] Finally, the liberal *Gratz* dissenters argue that "[e]qual protection cannot become an exercise in which the winners are the ones who hide the ball"[399] and that "[i]f honesty is the best policy, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises."[400]

Equal protection doctrine, however, legitimizes this exact practice by requiring overwhelming evidence of specific racial intent, while discounting statistical evidence of disparate racial effect,[401] as the Court does in *Grutter*. Thus, while these cases do not explicitly turn on the impact/intent distinction, the analytical

393. *Id.* at 271-72.

394. *Id.* at 294-98 (Souter J., disseting); *Grutter*, 539 U.S. at 385-87 (Rehnquist, C.J., dissenting).

395. *See supra* note 168 and accompanying text.

396. *Grutter*, 539 U.S. at 347 (Scalia, J., dissenting).

397. *Id.* at 385-86 (Rehnquist, C.J., dissenting) (citation omitted).

398. *Id.* at 389 (Kennedy, J., dissenting).

399. *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

400. *Id.* at 305 (Ginsburg, J., dissenting).

401. *See supra* notes 153-154, 163-168 and accompanying text.

process for determining the role of race in each case is virtually indistinct from the finding of intent in the disparate impact cases. While the Law School conceals and masks the extent to which race factors in the admissions process, the policy in *Gratz* makes open, explicit racial calculations. The impermissibility of explicit racial discrimination and the permissibility of ambiguous, concealed discrimination are hallmarks of the intent rule. As these cases illustrate, however, the material consequences of subtle and overt discrimination are the same: in both cases, the policies treat minority and white applicants differently.[402] These two cases demonstrate the disutility of and unfairness perpetuated by the intent rule. For the most part, antidiscrimination claims rely upon evidence of discriminatory impact, which the majority rejects as unpersuasive, as in *Grutter*.[403] While the principles underlying the intent standard help justify *Grutter*'s positive results, in the typical antidiscrimination case, this rule burdens minority plaintiffs seeking redress from racial discrimination and subordination.

The decisions in *Grutter* and *Gratz* legitimate the intent doctrine in another important way: they do not question admissions practices that negatively affect applicants who are poor and of color. The defendants utilized affirmative action because their admissions policies disparately impacted persons of color.[404] Substantial empirical research demonstrates that standardized testing has a negative disparate effect upon persons of color and the poor.[405] Expensive test preparation courses lead to higher scores and educational inequality, as the poor and communities of color do not have the same access to these courses and are thereby limited in their ability to compete for admission to institutions of higher learning.[406] Furthermore, empirical

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402. One commentator has argued:

> Both schemes are designed to [take race into account]. The fact that one accomplishes the objective by formally awarding points to candidates of desired races or ethnicities, while the other accomplishes it by informally taking race and ethnicity into account (together with other factors), does not distinguish the schemes at the level of principle.

Robert P. George, Gratz *and* Grutter*: Some Hard Questions*, 103 COLUM. L. REV. 1634, 1635 (2003).

403. *See supra* notes 160-168 and accompanying text.

404. *See, e.g.*, *Grutter*, 539 U.S. at 318 (citing testimony claiming that "a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores").

405. *See* Bell, *supra* note 373, at 1630-31 (discussing race and class impact of standardized testing).

406. *See id.*

research indicates that standardized tests are highly imperfect predictors of performance in college and in graduate and professional schools.[407] Despite these facts, colleges and universities, like the University of Michigan, still rely on standardized entrance requirements. This practice, in addition to societal racism, contributes to the lack of diversity that affirmative action plans seek to rectify. Yet, the remedial usage of race, rather than the employment of "neutral" admissions standards that privilege whiteness and wealth, triggers strict judicial review.[408] Because *Gratz* and *Grutter* legitimate a constitutional jurisprudence that permits state actors to discriminate through "neutral," subtle, or covert means, the decisions hinder efforts of progressive legal scholars to push the Court toward a more substantive equality doctrine.

Lawrence, Grutter, and *Gratz* stand as small advancements of social justice agendas, with many elements of the decisions actually fortifying social inequality and hierarchy. Thus, while conservatives view the Court as siding with the agendas of subordinate classes in these cases, a sober reading reveals that the decisions actually correspond with majoritarian views concerning sexuality and race. *Lawrence* does not broadly implicate heterosexist state action, and *Grutter* and *Gratz* do not revive the dying "remedying discrimination" rationale for affirmative action. Instead, these three decisions approach sexual and racial discrimination in a manner that corresponds with majoritarian views. In *Lawrence*, the Court overturns heterosexist laws that most states have either already invalidated or have chosen not to enforce; in *Grutter* and *Gratz*, the Court legitimates the importance of diversity, which the President, corporations, universities, and the general public support, but warns that in twenty-five years race conscious admissions should be unnecessary. These decisions contain much about which to celebrate, but ultimately, critical scholars must press for a more substantive and meaningful civil rights jurisprudence. The next

407. *Id.* at 1631.

408. *See Grutter*, 539 U.S. at 370 (Thomas, J., dissenting). Although Justice Thomas's lengthy dissent in *Grutter* realizes that the Law School needs to engage in affirmative action because its admissions standards disproportionately exclude persons of color, Thomas does not find this result troubling; only the explicit usage of race violates the Equal Protection Clause. *See id.* (Thomas, J., dissenting). (arguing that the Law School uses "measures it knows produce racially skewed results" but finding that "[t]he Law School may freely continue to employ the LSAT and other allegedly merit-based standards in whatever fashion it likes. What the Equal Protection Clause forbids, but the Court today allows, is the use of these standards hand-in-hand with racial discrimination.").

Part of this Article contextualizes the response of civil rights organizations to the *Lawrence*, *Grutter*, and *Gratz* decisions and sketches out possible strategic parameters for civil rights lawyering before a majoritarian federal judiciary.

III. Beyond *Lawrence*, *Grutter*, and *Gratz*: Civil Rights Lawyering Before a Majoritarian Court

A. *Explaining Liberal Excitement Surrounding* Lawrence, Grutter, *and* Gratz

This Article has argued that *Lawrence*, *Grutter*, and *Gratz* only slightly advance civil rights agendas and that the decisions contain many conservative elements that could hinder progressive social change. Nevertheless, many civil rights groups received these decisions with enthusiasm.[409] Although the positive outcomes of the decisions partially explain the optimistic reaction of civil rights groups, this singular explanation does not fully account for the groups' exuberance. Instead, civil rights organizations likely responded with such excitement because for years, they have conducted litigation and activism before a conservative and hostile federal judiciary; *Lawrence*, *Grutter*, and *Gratz* facially appear to signal a loosening of this conservatism and to provide greater opportunities for progressive social change. In other words, these cases cause excitement more for what changes they *might* engender, rather than for what changes they have already created. Social movement theory helps to illuminate this hypothesis.

1. Social Movement Theory and the Concept of Political Opportunity Structure

Sociologists who study politics and organizational behavior define a social movement as "a purposive and collective attempt of a number of people to change individuals or societal institutions and structures."[410] Participants in social movements organize around "common purposes and solidarity in sustained interaction with elites, opponents, and authorities."[411] Progressive social movements seek to end discriminatory practices that have contributed to inequality based on race, gender, sexuality, class,

409. *See supra* note 336.

410. Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327, 329 (1965).

411. SIDNEY TARROW, POWER IN MOVEMENT 3-4 (1994) (emphasis omitted).

and disability. Social movements, in their effort to change societal institutions, interact with law and legal actors because law regulates important social institutions and because law plays an important role in defining and constructing gender, race, sexuality, and class.[412] Law is therefore a critical site for social movement activity.[413] Antiracist, feminist, and gay rights movements have all organized for the purpose of promoting progressive legal change.

The ability of a social movement, legal or otherwise, to engender societal change depends upon the existence of a positive "political opportunity structure."[414] Political, social, economic, and cultural forces shape the potential success or failure of social movement activism.[415] If an event or set of events disrupts political institutions and makes them more receptive to the agendas of social movements, then a "political opportunity" exists for successful activism.[416] In the context of antiracist politics, for example, several scholars have argued that Cold War politics created an opportunity structure for progressive racial change in the United States. Though the country portrayed itself as a guardian of liberty in the global context, the existence of domestic

412. *See* Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1204 (1991) ("It is . . . impossible to understand the American struggle for equal opportunity without focusing on the courts and on activities intended to influence judicial decisions."); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 424-59 (2001) (discussing the role of law in fortifying social movement activity in antiracist, feminist, and gay, lesbian, bisexual, and transgender contexts).

413. *See generally* Burstein *supra* note 412.

414. *See* David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOC., 1628, 1633-35 (1996) (discussing concept of political opportunity structure).

415. *See id.* While some researchers limit the concept of political opportunity to factors within formal political institutions, current research examines political opportunity in a more dynamic fashion, examining social, cultural, economic, and formal political factors that create opportunities for social movement success. *See* Holly J. McCammon et al., *How Movements Win: Gendered Opportunity Structures and U.S. Women's Suffrage Movements, 1866-1919*, 66 AM. SOC. REV. 49, 50-51 (2001) (critiquing conventional approach to political opportunity structure); *see also* Meyer & Staggenborg, *supra* note 414, at 1633-34 (discussing "dynamic model of political opportunity").

416. *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970 41 (2d ed. 1999) (arguing that "*any* event or broad social process that serves to undermine the calculations and assumptions on which the political establishment is structured occasions a shift in political opportunities"); TARROW, *supra* note 411, at 85 ("By political opportunity structure, I mean consistent—but not necessarily formal or permanent—dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure.").

racial apartheid undermined this message.[417] Thus, the convergence of interests between white majoritarian political structures and persons of color helped create opportunities for progressive social change.[418]

Similar opportunity structures have existed in the context of feminism. Many legal advancements in the status of women occurred because antiracist activism created greater receptivity toward civil rights enforcement among legal actors.[419] But feminism and suffrage movements have certainly not depended exclusively upon antriacism for political opportunity; instead, the success of gender-based social movements is much more dynamic and multidimensional than this common explanation implies. In addition to utilizing more receptive political opportunity structures produced by antiracism, political organizing among women during the suffragist movement and during the campaign to ratify the Equal Rights Amendment also caused legal actors to embrace a more progressive stance toward gendered inequality.[420]

When political opportunities decline or do not exist, social scientists predict that social movement organizations will adjust their activism by shifting the content of their agendas—often in a conservative direction[421]—curtailing activism, or even entering into a period of abeyance or inactivity.[422] In order to prolong their

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417. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that *Brown* "helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples" and that "this argument was advanced by lawyers for both the NAACP and the federal government"); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64-65 (1988) (discussing Justice Department brief in *Brown* linking desegregation to anticommunist foreign policy and describing media reaction to the decision which described it as undermining communism).

418. *See* Bell, *supra*, note 417, at 523 ("The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

419. *See* ANNE N. COSTAIN, INVITING WOMEN'S REBELLION 9 (1992) (arguing that the women's movement "used legislative gains of the civil rights movement to add protection to women").

420. *See* McKammon et al., *supra* note 415, at 65-66 (discussing opportunity structures created by suffragist activism). *See generally* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (discussing relationship among suffrage and feminist politics and judicial approaches to sex discrimination).

421. *See* COSTAIN, *supra* note 419, at 120 (arguing that with the defeat of the Equal Rights Amendment and the election of President Reagan, the political opportunity structure for feminism turned hostile and that in response, "[m]ost [feminist] groups tried to pursue women's issues that were acceptable to conservatives").

422. *See* Verta Taylor, *Social Movement Continuity: The Women's Movement in*

institutional life, appease powerful political actors, or to secure a "victory," some social movement organizations might compromise and accept equality on more conservative or moderate terms.[423] A social movement with moderate aims and with leaders whose backgrounds and perspectives reflect majoritarian interests might have greater institutional longevity and political success than groups with more progressive agendas.[424]

1. Gay Rights Litigation in a Conservative Political Opportunity Structure

Contemporary legal movements for gay, lesbian, bisexual, and transgender rights illustrate the relationship between the agendas of social movements and the broader political opportunity structure. After the Court decided *Bowers*, for example, gay and lesbian civil rights organizations worked within the conservative framework established by the Court and bifurcated gay or lesbian "status" and "conduct."[425] While *Bowers* holds that states can criminalize homosexual conduct, the opinion, they argued, does not condone discrimination based on status or identity alone.[426]

Although the narrowness of *Bowers* provides some context for understanding (and appreciating) the severing of status and conduct by gay rights advocates, this approach conceives of equality in a limited fashion. As several theorists have argued, identity is not fixed, biological, innate, static, or silent; instead,

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Abeyance, 54 AM. SOC. REV. 761, 761-62 (1989). Taylor discusses "abeyance" or "a holding process by which movements sustain themselves in nonreceptive political environments and provide continuity from one stage of mobilization to another". *Id.* at 761.

423. *See* TARROW, *supra* note 411, at 113 ("And at times, to win policy success that supporters demand or authorities proffer, leaders move from confrontation to cooperation.").

424. *See* Zald & Ash, *supra* note 410, at 332 (discussing but remaining neutral toward sociological literature which contends that "[i]n the process of accommodating to the society, the goals of the [social movement organization] become watered down" and that the organization will "shift to moderate goals or even to goals of maintaining the status quo").

425. *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1617 (1993) (arguing that gay and lesbian civil rights litigations developed a strategy of "litigat[ing] around" *Bowers* by making a distinction between status and conduct); Taylor Flynn, *Of Communism, Treason, and Addiction: An Evaluation of Novel Challenges to the Military's Anti-Gay Policy*, 80 IOWA L. REV. 979, 979 (1995) (noting that some litigants challenging the military's heterosexist policy have distinguished sexual conduct and status); Jonathan Pickhardt, *Choose or Loose: Embracing Theories of Choice in Gay Rigths Litigation Strategies*, 73 N.Y.U. L. REV. 921, 931 (1998) (discussing status/conduct distinction subsequent to Bowers).

426. *See* Cain, *supra* note 425, at 1617-18.

identity is expressed and practiced.[427] Thus, sexual identity includes expression (such as coming out) and conduct (such as sexual intimacy). An equality doctrine that separates identity and conduct restricts equality because it allows state actors to penalize conduct or expression that closely correlates with (and that constitutes) gay and lesbian identity, while disclaiming any intention to discriminate on the basis of gay or lesbian status. The military's "Don't Ask, Don't Tell" policy and the Boy Scouts of America's antigay discriminatory rules illustrate the limitations of a pure status-based approach to gay rights: these institutions penalize gay conduct and expression, but not gay or lesbian status that remains closeted, hidden, or "unavowed." The two types of discrimination, however, are indistinct given their impact upon gay, lesbian, bisexual, and transgendered individuals. On the other hand, some conservative federal judges have resisted the bifurcation, conflated sodomy and status, and have held that *Bowers* broadly justifies antigay state action.[428]

Because the heterosexist doctrine in *Bowers* heavily influenced federal court jurisprudence concerning gay and lesbian issues, pro-gay social movements adopted a new strategy. They pursued litigation in state courts and the exertion of influence in those state and municipal legislatures that were receptive to antiheterosexist politics.[429] As a result, when the Court decided *Lawrence*, most states had decriminalized sodomy;[430] the Court could thus render a decision that roughly reflected perceived majoritarian viewpoints. The state-centered agenda of social movements for gay and lesbian equality provided the political

427. *See* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 9 (2000) ("Expression is the crucible in which identity is formed. Identity cannot exist subjectively without the constitutive impact of complex discursive systems, one of which is expression."); Hutchinson, *supra* note 212, at 111 ("Because identity often forms the basis for social marginalization, statements and expressions of identity become methods of contesting oppression and reconstructing identity in a more positive light.").

428. *See* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (arguing that if the Court allows states to criminalize the essence of homosexual status, then gays and lesbians cannot qualify for heightened scrutiny). Arguments like this narrowly equate sexual identity with sodomy. *See supra* notes 212-214 and accompanying text.

429. *See* Kenneth D. Wald et al., *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*, 40 AM. J. POL. SCI. 1152 (1996) (attributing success of gay rights initiatives in state and municipal politics to a variety of factors, including urbanization, the existence of an organized gay and lesbian community, and receptive political opportunity structures).

430. *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003) (noting only thirteen states with sodomy statutes).

opportunity for a successful challenge to the Texas sodomy statute in *Lawrence*. The success of the strategic modulation in gay rights activism frames the enthusiastic response to *Lawrence*: activists are celebrating the fruits of their arduous strategy and the possible benefits it portends.[431]

2. Antiracist Litigation in a Conservative Political Opportunity Structure

Similar calculations have affected contemporary antiracism movements. The Civil Rights Movement responded to and created opportunities for progressive change in United States race relations, including the adoption of doctrines prohibiting formal race discrimination.[432] Latter twentieth-century politics, however, turned increasingly more conservative. The elections of Presidents Reagan and Bush, in particular, led to the appointment of conservative federal judges, including Justices O'Connor, Scalia, Kennedy, and Thomas to the Supreme Court, and to the enactment of federal policy that reversed civil rights gains.[433] These political changes made the environment for civil rights litigation in the federal courts significantly more difficult. The Court applied doctrines such as standing,[434] colorblindness,[435] and discriminatory intent[436] that curtailed civil rights enforcement in the federal courts and that placed substantial barriers before state actors who wished to remedy racial discrimination.

While antiracist civil rights organizations have continued to press for substantive legal change,[437] they too have recognized the

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431. Comments by several members of gay and lesbian civil rights organizations reacting to *Lawrence* provide anecdotal support for this theory. *See, e.g*, Murphy, *supra* note 203, at A20 ("The arsenal used against us, with sodomy laws being the foremost weapon, has been neutralized." (quoting Kate Kendell, Executive Director of the National Center for Lesbian Rights)).

432. *See Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiv (Kimberlé Crenshaw et al. eds., 1995).

433. *See id.* at xvi-xix (discussing the changing political climate after the decline of the Civil Rights Movement and describing critical race theory as a reaction to conservative legal doctrine and policy).

434. *See* Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422 (1995) (arguing that the Court applies standing doctrine selectively to deny judicial remedies to persons of color in civil rights litigation).

435. *See supra* notes 142-158 and accompanying text.

436. *See supra* notes 163-170 and accompanying text.

437. For example, in *Gratz*, the NAACP Legal Defense & Educational Fund intervened on behalf of a class of students, who asserted a remedial justification for affirmative action. Gratz v. Bollinger, 539 U.S. 244, 252 n. 4, 257 n.9 (2003); Gratz v. Bollinger, 80 Fed. Appx. 417, 418 (6th Cir. 2003). The Court summarily agreed, without discussion, with a lower court ruling that remedying discrimination was

perils of advancing progressive interests before a conservative federal judiciary. In *Taxman v. Board of Education of Piscataway*,[438] the Court of Appeals for the Third Circuit held that a race-based affirmative action plan to preserve teacher diversity violated federal and state antidiscrimination law.[439] The Court subsequently granted the defendant's petition for certiorari, but fearing that the Court would effectively render affirmative action impermissible in all but extreme cases, several civil rights organizations agreed to pay most of the judgment awarded by the district court, thus disposing of the case.[440] The settlement negotiation represents the strategic calculations of antiracist social movement organizations in a limited political opportunity structure.

The *Grutter* and *Gratz* litigation reached the Court in a similar, perhaps more intense, climate of heightened fear. With President Bush opposing Michigan's usage of race,[441] several lower courts curtailing the availability of affirmative action,[442] and states, like California, Texas, and Florida, abolishing race-based affirmative action,[443] the apprehension of civil rights groups prior to *Grutter* and *Gratz* was warranted. Furthermore, given this

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not the "real justification" for the admissions policy. *See Gratz*, 539 U.S. at 257 n.9.

438. 91 F.3d 1547 (3d Cir. 1996) (en banc).

439. *Id.*

440. Linda Greenhouse, *Settlement Ends High Court Case on Preferences*, N.Y. TIMES, Nov. 22, 1997, at A1 (reporting that "[a] coalition of leading civil rights groups, not directly involved in the case but increasingly concerned that a broadly worded Supreme Court decision could prove disastrous for affirmative action, agreed to provide the major share of a $433,500 settlement that the Piscataway Township Board of Education will pay to [plaintiff]"); *see also* Joan Biskupic, *On Race, a Court Transformed*, WASH. POST, Dec. 15, 1997, at A1 (discussing the fear among civil rights groups concerning the Court's hostility to affirmative action); Kathleen M. Sullivan, *Supreme Court Avoidance*, WASH. POST, Dec. 7, 1997, at C1 (justifying settlement in case as classic defense lawyer technique).

441. *See* Lane, *supra* note 336 (noting the Administration's opposition to the affirmative action programs in both *Grutter* and *Gratz*). *But cf. supra* note 375 (illustrating that the President supports the rationale of diversity underlying these types of programs).

442. For example, in *Hopwood v. Texas*, the Fifth Circuit held:

> In summary, we hold that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.

78 F.3d 932, 962 (5th Cir. 1996).

443. *See* Grutter v. Bollinger, 539 U.S. 306, 340 (2003) (discussing "race-neutral" percentage plans adopted by California, Florida, and Texas to create educational diversity but finding that the Law School was not required to try these plans before explicitly considering race).

contentious climate, the outcome in *Grutter* signals to some an improvement in the opportunity structure—or at least maintenance of the status quo. Considering the alternatives, *Grutter* is a "good" decision.

3. The Complexity of Legal Victories

The collective experiences of pro-gay and antiracist social movements prior to the decisions in *Lawrence*, *Gratz*, and *Grutter* have important implications for civil rights advocacy and for the utilization of legal structures as targets of social movement activity. Legal change occurs at a slow and incremental pace. Furthermore, because the Court often responds to majoritarian interests, its decisions can directly impede (or just modestly improve) the progress toward equality and liberty for subordinate groups. Legal victories can also reflect compromise positions staked out by moderate elements within social movements and dominant political actors. Social movement theory, for example, would strongly suggest that *Lawrence* represents a middle-ground position designed through litigation by moderates on the Court and centrist leaders of gay and lesbian political organizations. The decision rejects more progressive forms of sexual liberty and equality, but carves out a narrow space for unregulated sexual expression (private, consensual, adult, marital, etc.).[444] *Lawrence* advances gay rights agendas to some degree, but its many negative elements—a reflection of majoritarian influence—restrict its doctrinal reach.

The *Grutter* and *Gratz* decisions lend themselves to a similar analysis. *Grutter* rests on a socially palatable state interest: diversity in higher education. Powerful corporations, institutions of higher education, many state governments, and esteemed leaders of the United States armed forces vigorously defended diversity as a compelling state interest before a Court that had become increasingly more hostile to affirmative action.[445] The remedial usage of race, however, does not factor in the litigation at all. Reparative race consciousness does not appeal to white America, which generally believes that America has transcended its racist past.[446] Thus, while an amicus brief submitted by the NAACP defends affirmative action by the University of Michigan as a tool to remedy Michigan's racial discrimination in the

444. *See supra* Part II.A.3.

445. *See supra* notes 375-377 and accompanying text.

446. *See supra* notes 179 and 369 and accompanying text.

educational setting,[447] the Court, influenced by the centrist positions of the university and the amici, settles on the diversity rationale, but with a strong caveat: progressive race consciousness must meet strict scrutiny.[448] The outcome in the case likely benefits antiracist social movements, but the compromise position reached in these cases does not elaborate substantive or material theories of equality that could improve more meaningfully the lives of poor persons of color.

Lawrence, *Grutter*, and *Gratz* demonstrate the precarious nature of legal mobilization as a social movement tactic. Although the law shapes and responds to racial and sexual domination, thus making it an appropriate venue to contest racism and heterosexism, the responsiveness of courts to dominant social interests diminishes and complicates the utility of law as an instrument of progressive social change.[449] This observation does not mean that social movement organizations for gender, racial, sexual, and class justice should abandon litigation and legislative strategies. Instead, the reality that law is a shifting, limited, and an often oppressive venue means that legal theorists and activists must confront law with a vivid understanding of its limitations, devise strategies to subvert law's replication of social hierarchy, weigh the costs and benefits of expensive litigation and lobbying that might only generate marginal social change, and constantly consider alternative or parallel paths to equality and liberation that exist outside of traditional legal institutions.[450] The final section of this Article considers possible directions that legal theorists and social movement organizations might take that recognize the precarious and majoritarian nature of judicial decision making.

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447. Brief for the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union as Amici Curiae in support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (No. 02-241) at 4-6, http://www.naacpldf.org/content/pdf/gratz/grutter.pdf (last visited Oct. 4, 2004).

448. *See supra* note 349 and accompanying text.

449. *See* Harris, *supra* note 128, at 745-54 (discussing postmodern and modernist approaches to law among critical race theorists).

450. *See* Brenda Cossman, *Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories*, 48 CLEV. ST. L. REV. 49, 59 (2000) (discussing the complexity and limited nature of legal victories but arguing that "I do not in any way mean to suggest that gay men and lesbians, and other marginalized group [sic], should not be fighting these cases. . . . Rather, my point is that we must equip ourselves with an understanding of what we can and should reasonably expect from the law.").

B. Law and Equality: Contesting Repressive Majoritarianism

The social, political, and legal constraints upon progressive social movements require strategic engagement. If legal victories for oppressed groups occur rarely, and usually when dominant interests can benefit from such advances, then legal theorists should consider how best to press legal and nonlegal actors for more progressive change. The remainder of this Article suggests critical points of inquiry for legal theorists and civil rights organizations as they confront legal institutions as a social movement tactic.

1. Beyond Countermajoritarian Discourse: Toward Normative Theories of Justice

This Article began by discussing the prevalence of countermajoritarian discourse in constitutional theory.[451] The purpose of this discussion, however, is not to defend the Court against claims of countermajoritarianism or to determine whether public opinion *should* influence the Court. Instead, the aim is to demonstrate that the law, more often than not, reflects dominant and majoritarian interests and that antimajoritarian discourse rests on a false or complicated premise. An enhanced theory of democracy, one that resists totalizing and reductionist approaches, permits a more complicated view of federal courts and the so-called democratic branches. All branches of our central government contain both majoritarian and countermajoritarian elements; the Constitution structures government in such a fashion; historical practice has entrenched these customs as norms.[452]

If legal theorists accept the reality that American constitutional structures operate in a dynamic manner, they can free themselves from efforts to legitimize judicial review in a "democracy" and make their claims about the law more normative.[453] Legal theorists seem perfectly suited for making normative claims *about the law*, and critical theorists would argue that normativity always lurks beneath claims of objective legal

451. *See supra* Part I.

452. *See supra* Part I.B.1.

453. *See* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 941 (2001) ("And if one believes that judicial review is perfectly consistent with democracy, the answer is equally easy: spend time developing normative theories of when or how it should be exercised.").

analysis and application of formal rules.[454] Legal theorists and social movement organizations that negotiate legal institutions need to create a vocabulary and a discourse to describe rights in a society that formally subscribes to equality, but which fails to live up to its cultural norms of equal opportunity and justice. They also need to navigate political opportunity structures that might engender substantive equality.[455] Several legal theorists have constructed progressive theories of justice that, if implemented, could advance the needs of the most marginalized members of society. Antisubordination and antisubjugation approaches to equal protection and liberty, for example, provide rich opportunities for judicial recognition of substantive theories of equality.[456] By bridging the work of critical theorists, social scientists, and traditional constitutional scholars, this Article seeks to join an important conversation on justice unrestrained by totalizing assumptions regarding the propriety of judicial review.

2. Reconstructing Majoritarian Interests

Lawrence and *Grutter* demonstrate that antiracist and gay rights movements can influence majoritarian politics. Gay and lesbian rights organizations mobilized state courts and legislatures to decriminalize sodomy despite *Bowers*, which had severely constrained gay and lesbian equality and liberty in a host of contexts unrelated to sodomy.[457] Similarly, civil rights organizations have pressed for affirmative action as a means of remedying discrimination and ensuring that the nation's leadership and professional population represents the pluralistic nature of American society. A large cross-section of businesses, educational institutions, and governmental actors subscribed to the diversity rationale advanced by antiracism movements and embraced by the Court in *Grutter*.[458]

These cases demonstrate that the construction and altering

454. *See id.* (arguing that "constitutional scholars are as nervous today as they were sixty years ago about simply taking a normative stance, because they apparently still have trouble with the notion that the Constitution is indeterminate").

455. *See* PATRICIA J. WILLIAMS, *The Pain of Word Bondage, in* THE ALCHEMY OF RACE AND RIGHTS 146, 152 (1991) ("For blacks, then, the battle is not deconstructing rights, in a world of no rights; nor of constructing statements of need, in a world of abundantly apparent need. Rather the goal is to find a political mechanism that can confront the *denial* of need.").

456. *See supra* note 160 and accompanying text.

457. *See supra* note 430 and accompanying text.

458. *See supra* notes 375-377 and accompanying text.

of doctrinal and theoretical norms in constitutional law result from a dynamic interplay of factors external and internal to the Court. Social movements have played an important role in this discursive elaboration of constitutional text. As Reva Siegel argues in her research on the relationship between feminist social movements and legal change:

> Throughout American history, groups of Americans have mobilized to make interpretive and amendatory claims on the Constitution's text, yet constitutional theory rarely recognizes the role that social movements play in the construction of constitutional meaning. This omission is consequential, for if judges have played the central role in articulating constitutional norms in the American tradition, their understanding of the Constitution has been deeply shaped by mobilized citizenry, acting through electoral processes, and outside of them.[459]

The Court's responsiveness to external constitutional discourse, either from the democratic branches, mobilized social movements, law professors and other academics, or important social institutions, suggests that in order to maximize opportunities for progressive social change, social movement organizations need to capitalize on positive political opportunity structures that permit them to influence majoritarian thought. *Lawrence* and *Grutter* might provide such opportunities. While the decisions themselves do not undo entrenched social hierarchy, they could allow for enhanced progressive activism by antiracist and gay and lesbian social movement organizations. These organizations could generate bolder interpretations of the Constitution and statutory enactments prohibiting discriminatory state action.

a. Beyond Lawrence

The reaction to *Lawrence* by antigay movements demonstrates the *potential* importance of the decision. Subsequent to the Court's decision in *Lawrence*, antigay organizations have mobilized in support of heterosexist initiatives, particularly proposals to prohibit same-sex marriage, because they believe that *Lawrence* shifts the opportunity structure in favor of progay legal organizations.[460] Legal theorists and advocates for gay, lesbian, bisexual, and transgender equality should creatively

459. *See* Siegel, *supra* note 420, at 300 (citations omitted).

460. *See* Lewis, *supra* note 251, at A19 (discussing conservative reaction to *Lawrence* and fears that the decision legitimates a number of unpopular activities, including the performance of same-sex marriages).

respond to *Lawrence* and to the activity of antigay organizations that the decision has generated. To date, gay and lesbian rights organizations have allowed conservatives to dictate the content of their political activism. Since *Lawrence*, most predominant gay and lesbian politics today centers around same-sex marriage, a reaction to conservative efforts to repudiate same-sex marriage which conservatives fear *Lawrence* could potentially legitimize.[461] The wisdom of such a reactive approach remains unknown, although it has led to some interesting acts of civil disobedience and to litigation over the constitutionality of same-sex marriage proscriptions.[462]

Legal theorists and social movement organizations should carefully consider the role of majoritarian politics in judicial decision making before re-embarking upon a course of litigation seeking to invalidate prohibitions of same-sex marriage.[463] Polling data demonstrate that a large majority of the public disfavors same-sex marriage, although it might support an alternative "civil unions" or domestic partnership structure, which some scholars have rightfully described as "separate but equal" institutions.[464] While recent attention to same-sex marriage politics in gay and lesbian rights organizations responds largely to countermovement mobilization, the marriage movement predated *Lawrence* and

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461. Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, § 1, at 8 ("Spurred on by the Supreme Court's landmark ruling decriminalizing gay sexual conduct, both sides in the debate over gay rights are vowing an intense state-by-state fight over deeply polarizing questions, foremost among them whether gays should be allowed to marry."); *see, e.g.*, Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (declaring civil marriage ban to same sex couples as unconstitutional under the Massachusetts state constitution).

462. *See* Pam Belluck, *Gay Marriage, State by State*, N.Y. TIMES, Mar. 7, 2004, § 4, at 2 (discussing performance of same-sex marriage by government actors in several states).

463. The Hawaii Supreme Court once held that the prohibition of same-sex marriage constituted gender discrimination which was impermissible under the state constitution. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). After a trial on the merits, a circuit court rejected the state's asserted interests and enjoined the state from enforcing the prohibition of same-sex marriage. *See* Baehr v. Miike, 23 Fam. L. Rep. (BNA) 2001, 2011 (Haw. Cir. Ct. Dec. 3, 1996) (rejecting state's asserted interests in denying same-sex marriage), *aff'd mem.*, 950 P.2d 1234 (Haw. 1997). Citizens of the state, however, amended the constitution permitting the state to define marriage in heterosexual terms. *See* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

464. *See* David Cruz, *The New "Marital Property": Civil Marriage and the Right to Exclude?*, 30 CAP. U. L. REV. 279, 279-80 (2002) ("But many people have also questioned whether the creation of a regime of parallel marriage and civil unions, or the creation of domestic partnership legislation elsewhere, is an improper variation of 'separate but equal,' only now in the symbolic service of heterosexuality supremacy, not white supremacy.").

reflects the middle-, upper-class, and white normative nature of gay and lesbian civil rights organizations. Although marriage debates often center around access to pubic benefits, at the heart of the same-sex marriage movement is the desire for public recognition; or a need to "fit in" a society that privileges whiteness, maleness, heterosexuality, and wealth. The poor, persons of color, women, and nonmonogamous and unpartnered individuals stand to gain less symbolically and materially from the legalization of same-sex marriage.[465] Furthermore, given public hostility to the issue and the Court's explicit distancing of *Lawrence* from formal marriage, a litigation strategy could generate doctrinal setbacks, apart from renewed legislative attacks on gay and lesbian relationships.

Instead of allowing antigay discourse to shape their activism, pro-gay and lesbian theorists and social movement organizations should consider overlooked agendas that might present more positive political opportunities than same-sex marriage. One such agenda is the movement to include sexual orientation as a protected category in federal employment discrimination law, a project that implicates material concerns and benefits more pointedly than does marriage politics. While the vast majority of Congress and a democratic, "gay-friendly" President endorsed the Defense of Marriage Act,[466] the proposed Employment Nondiscrimination Act (ENDA), which would amend federal law to prohibit employment discrimination on the basis of sexual orientation, failed by only one vote the last time it was considered in the Senate.[467]

Gay and lesbian social movements might be able to capitalize on any remaining momentum from *Lawrence* and seek this progressive legislative advancement rather than stumbling blindly

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465. *See supra* notes 275-281 and accompanying text.

466. *See* 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."); 28 U.S.C. § 1738C (2000) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

467. Elaine S. Povich, *Gays Lose on 2 Fronts*, NEWSDAY, Sept. 11, 1996, at A4, LEXIS, Newsday (New York, NY) file (discussing defeat of ENDA in Senate by one vote).

into the marriage trap: same-sex marriage faces a treacherous journey with so much opposition from the public, and from legal and political actors. Many Americans, however, embrace the promise of formal equality that underlies ENDA and generally disfavor employment discrimination on the basis of sexual orientation.[468] Volatile same-sex marriage debates are also emerging in a presidential election year, where, like the year 2000, the country seems highly divided. The President has already staked out a position supporting a constitutional amendment banning same-sex marriage, a stance that many commentators believe seeks to rally a conservative base.[469] Yet, the President must also appeal to moderates, so his interest in embracing antigay agendas is probably limited to a few issues with vast public support. These political factors could enhance the opportunity for passage of ENDA. That social movements for gay, lesbian, bisexual, and transgender equality have narrowly focused on same-sex marriage after *Lawrence* suggests the dominance of assimilationist politics within these organizations and their failure to appreciate the complexity of judicial decision making.[470]

b. Beyond Grutter *and* Gratz

Antiracist legal theorists and organizations need to create opportunities to advance substantive equality. While an intricate array of federal and state laws and constitutional doctrines prohibit formal racial and sex discrimination, federal constitutional doctrine and some antidiscrimination laws treat as permissible "neutral" practices that disparately affect persons of color and women. In the constitutional law setting, the discriminatory intent rule rests on a narrow view of the Equal Protection Clause as exclusively guaranteeing formal, rather than

468. *See* Farabee, *supra* note 253, at 270 n.174 (1996) (discussing polling data indicating very broad support for laws prohibiting employment discrimination against gays and lesbians); William A. Henry III, *Pride and Prejudice*, TIME, June 27, 1994, at 58 (indicating broad public support for antidiscrimination laws protecting gays and lesbians against job discrimination but wide public opposition to efforts to legalize same-sex marriage).

469. *See* Dana Milbank, *A Move to Satisfy Conservative Base*, WASH. POST, Feb. 25, 2004, at A1 (reporting common belief that Bush's support of constitutional amendment prohibiting same-sex marriage seeks to shore up support from conservatives).

470. Laura Secor, *The Gay-Rights Movement Has Seized the Nation's Attention and Agenda*, BOST. GLOBE, Aug. 3, 2003, at E1 (reporting that some pro-gay and lesbian activists do not believe that they should push the same-sex marriage issue at this time and that employment discrimination and others issues should have priority).

substantive, equality. *Grutter*, despite its liberal strands, does not disturb this jurisprudence. Instead, the ruling tacitly affirms the discriminatory intent rule by legitimizing the Law School's ambiguous usage of race, while *Gratz* invalidates the quantified employment of race by the undergraduate admissions policy. The two decisions also do not address the permissibility of remedial usages of race. The applicability of the Court's "deferential" and "contextual" analysis of race-conscious state action to policies aimed at remedying discrimination thus remains unknown.

As progressive theorists contemplate what positive opportunities *Grutter* and *Gratz* might engender, they need to resist proposals that entrench intent as the sole basis for challenging racially disparate state action. Intent-based theories of equality present substantial hurdles to racial justice in a society that embraces formal equality. The intent rule also discounts progressive theories that would treat impact as actionable on its own terms,[471] a move that could make state actors take greater responsibility to ensure that their policies do not exacerbate the vulnerability of historically marginalized classes.

Unfortunately, many progressive race theorists have acquiesced in the intent/impact dichotomy. Several critical race theorists, for example, have embraced ostensibly "race neutral" admissions programs, including percentage plans (policies favoring students from racially segregated schools) or preferences for students who have overcome hardships, as substitutes for race-conscious affirmative action.[472] The support of these plans by critical theorists, though understandable as a reaction to majoritarian discomfort with race consciousness, could have dangerous implications for racial justice efforts. The promotion of

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471. *See, e.g.*, Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001) (advocating a realist approach to equality which would treat state action that harms persons of color as impermissible, regardless of conscious or unconscious intent); Hutchinson, *supra* note 70, at 683 (embracing an antisubordination theory that treats patterns of discrimination as "actionable under an equal protection analysis when they likely reflect impermissible prejudice against historically disparaged groups *or* when they reinforce the subordinate status of these groups" (emphasis added)).

472. *See* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 217 (2002) (describing Texas's percentage plan as "a useful example of experimental and democratic decisionmaking that changed admissions practices to expand opportunities for structural mobility"); Gerald Torres, Grutter v. Bollinger/Gratz v. Bollinger: *View from a Limestone Ledge*, 103 COLUM. L. REV. 1596 (2003) (advocating "race-neutral" admissions programs, such as percentage plans which guarantee college admissions for top performers in each high school).

these plans as "race neutral" alternatives to affirmative action affirms the legitimacy of the intent standard that has seriously hindered antiracist social justice efforts. The historical context of these alternative measures clearly indicates that race factored in their enactment by state actors.[473] When critical theorists describe these plans as "race neutral," they acquiesce in the doctrinal permissibility of facially neutral state action that ultimately injures disadvantaged groups more than it privileges them. The Court *should* treat these plans as constitutional, not because they are "race neutral," but because they seek to remedy discrimination and promote racial diversity.

Rather than lending legitimacy to intent standards, critical theorists should challenge state action that, though neutral on its face, hinders racial equality. For example, antiracist scholars and social movements might respond to majoritarian discomfort with race consciousness by continuing to advocate for contextualized discussions of race-based state action and by challenging the structures of subordination that limit educational opportunity for poor persons of color. In response to the dismantling of affirmative action in California, for example, commentators have demonstrated how admissions policies that favor schools in wealthy districts and that emphasize standardized testing and advanced placement courses disadvantage the poor, persons of color, and women.[474] By discussing the unfairness of "race-neutral" policies, antiracist advocates might be able to form coalitions among the poor, persons of color, and women to challenge the very way in which American society structures educational opportunity.

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473. Brief of Amici Curiae on Behalf of a Committee of Concerned Black Graduates of ABA Accredited Law Schools: Vicky L. Beasley, Devon W. Carbado, Tasha L. Cooper, Kimberlé Crenshaw, Luke Charles Harris, Shavar Jeffries, Sidney Majalya, Wanda R. Stansbury, Jory Steele, et al., in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), *reprinted in* 9 MICH. J. RACE & L. 5, 23 (2003) [hereinafter Brief of Concerned Black Graduates] (observing that percentage plans are not race-neutral given the social context in which they have emerged). Other scholars have argued that percentage plans that successfully diversify public universities only work where high schools in the states are largely segregated, because in integrated settings, white (and wealthy) students will tend to outperform poor students of color. *See, e.g.*, Michelle Adams, *Isn't it Ironic? The Central Paradox at the Heart of "Percentage Plans"*, 62 OHIO ST. L.J. 1729 (2001);*see also* Brief of Concerned Black Graduates, *supra*, at 23.

474. *See* Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 943-47 (2001) (discussing the racial and class impact of the reliance upon advanced placement courses and standardized testing by University of California at Berkeley admissions policy).

3. Constructing New Majorities through Coalitions of the Oppressed

If majoritarian views influence Court doctrine, then progressive social movements should consider enhancing their political voice by engaging in coalition politics. Many scholars have commented on the need for oppressed classes to engage in coalition politics and on the barriers to their collective activism.[475] Homophobia and racism among leaders of antiracist and gay and lesbian social movements hinder their engagement in collective action.[476] Furthermore, the persistence of racism, despite a prolonged movement combating it, makes persons of color suspicious of "new" groups seeking civil rights protection, viewing civil rights as a "zero-sum game"—as if any particular group has a monopoly on justice claims.[477]

Critical theorists have demonstrated the pitfalls of fragmented and isolated progressive movements. Their research examines the synergistic nature of systems of subordination in order to advocate more multidimensional and coalitional social movement activity.[478] The historical relationship between sexualized domination and racism, for example, counsels against the embrace of sexual hierarchies in antiracist politics.[479] The importance of racism in structuring the domination of women of color requires a holistic account of sex and race within feminist politics.[480] Furthermore, the cynical exploitation of race by conservative, antigay activists who construct gay and lesbian communities as white, upper-class, and privileged, and therefore undeserving of civil rights, suggests that pro-gay movements should work to uncover the material consequences of heterosexism

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475. *See, e.g.*, MANNING MARABLE, *Beyond Racial Identity Politics: Toward a Liberation Theory for Multicultural Democracy*, *in* BEYOND BLACK AND WHITE 185 (1995) (advocating mulitracial justice and collective politics); ERIC K. YAMAMOTO, INTERRACIAL JUSTICE (1999) (advocating conflict resolution and collaborative activism among oppressed racial communities).

476. *See generally* Hutchinson, *supra* note 126.

477. *See* MARABLE, *supra* note 475, at 190-91; *id* at 202 ("By dismantling the narrow politics of racial identity and selective self-interest, by going beyond 'black' and 'white,' we may construct new values, new institutions and new visions of an America beyond traditional racial categories and racial oppression.").

478. *See generally* Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multidimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285 (2001) (discussing intersectional and multidimensional theories of subordination and identity).

479. *See id.* (discussing the linkages between racial and sexual domination).

480. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing the "intersection" of racism and sexism among women of color).

and to examine the way in which race, sexuality, and class intersect to construct the subject position of gay, lesbian, bisexual, and transgendered individuals.[481] These theoretical currents suggest a congruence of interests among oppressed classes.

Beyond these theoretical inquiries, the decisions in *Lawrence*, *Grutter*, and *Gratz* provide concrete examples of the need for coalition politics among subordinate groups. These decisions resulted from a dynamic process in which marginalized groups assembled support from majoritarian structures, including receptive state courts and legislatures that decriminalized sodomy, and from governmental, corporate, and institutional actors who believed that supporting racial diversity advanced their own interests. Despite the enormous effort to amass a coalition of actors in both cases, the ultimate rulings of the Court, though positive in many respects, fail to deliver substantive equality. Instead, the decisions provide an opportunity structure for the attainment of more progressive activism and a strengthening of the Court's equality doctrine.

Progressive transformation of the Court's equality doctrine will undoubtedly benefit the constituents of both antiracist and gay and lesbian rights movements. While the law formally embraces racial equality, the Court has construed equal protection as generally permitting facially neutral state action that harms historically disadvantaged classes and as barring, except in the most extreme cases, governmental efforts to undo material racial inequality.[482] Gay and lesbian litigants have yet to persuade the Court, Congress, and most states that statutory and constitutional law should formally prohibit antigay state action. In the context of equal protection litigation, the Court has applied rational basis scrutiny to heterosexist laws and policies, implying their ordinary permissibility.[483] Moreover, the Court has yet to protect public expressions of gay, lesbian, bisexual, or transgender status against discriminatory action, suggesting a bifurcation of speech and identity that parallels rulings in litigation upholding discriminatory practices that punish behaviors closely identifiable with race and gender.[484] These doctrinal realities contain the

481. *See* Hutchinson, *supra* note 176, at 1383-85; Hutchinson, *supra* note 478, at 314-15.

482. *See supra* Part I.B.2.

483. *See supra* note 141 and accompanying text.

484. *See* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769, 839 (1987) (criticizing the dismissal of behavior as a protected category in antidiscrimination law because acts are related to sexual, racial, and ethnic identity); Paulette M. Caldwell, *A Hair*

seeds of coalition politics. Because these doctrines impede equality for all oppressed groups, each group would benefit from a more enlivened and substantive equal protection jurisprudence, thus countering the distorted view of justice as a fixed quantity.

If oppressed groups must rely upon majoritarian support and legal reasoning to influence the direction of Court doctrine, legal theorists concerned with social justice should examine the work of political scientists and social movement theorists to consider how the law might incentivize and effectuate progressive coalitions that trigger the dynamic processes of legal analysis, political opportunity, and activism that can help fashion a more comprehensive theory of equality.[485]

Conclusion

Civil rights litigation takes place in a political, economic, social, and historical context, where factors external and internal to the Court influence judicial opinion. *Lawrence*, *Grutter*, and *Gratz* illustrate the relevance of social movements for equality *and* dominant perspectives to the judicial process. These decisions prove that constitutional interpretation often involves a discourse among the democratic branches, the judiciary, and social actors. These cases also demonstrate the constraints of legal mobilization as a social movement strategy. Although the law remains an important institution for oppressed people, legal actors respond to majoritarian concerns, which are often, but not always, incongruent with the needs of disadvantaged classes.

Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365, 366-67, 371-81, 385-88 (discussing hairstyles of black women and black identity); Christopher David Ruiz Cameron, *How the García Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1367-72 (1997) (discussing Spanish language and Latino/Latina identity); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 2008 (2000) (discussing compartmentalization of race and culture in antidiscrimination law).

485. The politics of same-sex marriage that *Lawrence* generated has provided the basis for coalition politics *and* for conflicts between antiracist and gay and lesbian rights organizations and activists. *See* Phuong Ly & Hamil R. Harris, *Blacks, Gays in Struggle of Values*, WASH. POST, Mar. 15, 2004, at B1 ("In Georgia, black Democrats—many of them deacons or ministers who had previously supported a ban on same-sex marriage—balked at voting for a state constitutional amendment. Black Democrats were also the only legislators in the Mississippi House of Representatives to vote against such a ban."). *But see id.* ("For most black Americans who know our history, we do not want any further confusion about what a marriage and a family happen to be. . . . We have not yet recovered from the cruelties of slavery, which were based on the destruction of the family." (quoting black antiracist activist)).

Legal scholars need to consider the Court's majoritarianism as they proffer theories designed to ameliorate social inequality. While this Article joins a small group of scholars whose work integrates political science, sociology, constitutional law, and critical theory, legal theorists have neglected to utilize the rich analysis of public institutions that social scientists have produced. This omission limits the relevance of legal theory. While the actualization of doctrinal reform inevitably depends upon the theoretical strength and practicality of the suggested innovation, legal transformation ultimately rests upon a combination of social, historic, economic, and political factors that influence popular opinion and judicial perspectives. Because the Court does not render its decisions in a social vacuum, interdisciplinary research can supply important context for understanding judicial decision making and its relationship to social and political actors.

This Article utilizes legal and social science research to contextualize the Court's decision in *Lawrence*, *Grutter*, and *Gratz*. Though these cases are pivotal moments in civil rights litigation, their doctrinal content tends to reflect majoritarian views concerning race and sexuality. The opinions moderately advance civil rights agendas, but they are severely constrained in their reach because the justices considered both their own and the public's guarded perspectives on the propriety of gay and lesbian equality and racial justice. Yet the cases might embolden legal theorists and progressive social movement organizations by providing a political opportunity for the advancement of more energetic reform agendas.

In order to effectuate the attainment of a more substantive and comprehensive equality jurisprudence, legal theorists and civil rights advocates must engage in a sober reading of *Lawrence*, *Gratz*, and *Grutter*. This is not in order to become overwhelmed and paralyzed by cynicism, but to consider what strategic choices led to the positive outcomes in these decisions, and to discover what important political and theoretical work the cases have left unperformed. Only then can legal theorists and social movement organizations begin a serious dialogue with the Court, other legal actors, and the public concerning how these important cases fit within a broader, more substantive, social justice agenda.