2014

Not without Political Power: Gays and Lesbians, Equal Protection and the Suspect Class Doctrine

Darren L. Hutchinson
Emory University School of Law, darren.lenard.hutchinson@emory.edu

"NOT WITHOUT POLITICAL POWER": GAYS AND LESBIANS, EQUAL PROTECTION AND THE SUSPECT CLASS DOCTRINE

Darren Lenard Hutchinson[*]

ABSTRACT

The Supreme Court purportedly utilizes the suspect class doctrine in order to balance institutional concerns with the protection of important constitutional rights. The Court, however, inconsistently applies this doctrine, and it has not precisely defined its contours. The political powerlessness factor is especially undertheorized and contradictorily applied. Nevertheless, this factor has become salient in recent equal protection cases brought by gay and lesbian plaintiffs.

A growing body of and federal and state-court precedent addresses the flaws of the Court's suspect class doctrine. This Article discusses the inadequacies of the suspect class doctrine and highlights problems within the emerging scholarship and precedent that criticizes the Supreme Court's errors. This Article offers two alternatives approaches that could inform a new theory of equal protection for all subordinate classes.

---

* Visiting Professor, University of Florida Levin College of Law; Professor, American University; J.D., Yale Law School; B.A., University of Pennsylvania. Ryan Weir and Leah Wissow provided excellent research assistance.

I. INTRODUCTION

During its 2013 term, the Supreme Court issued opinions in two important sexual orientation discrimination cases. In *United States v. Windsor*, the Court considered whether the Defense of Marriage Act (DOMA) violated the Equal Protection Clause by denying to legally married same-sex couples federal benefits that attach to marriage.[1] In *Hollingsworth v. Perry*, the Court considered whether Proposition 8, a California constitutional amendment that prohibits same-sex marriage, denies equal protection to same-sex couples who wish to marry.[2] These cases gave the Court an opportunity to resolve many lingering questions regarding the status of sexual orientation as an equal protection category. The Court, however, declined to announce a new equal protection doctrine and treaded very carefully to established practice. For instance, in *Windsor*, rather than considering whether gays and lesbians constitute a suspect class, the Court held simply that DOMA violates the Equal Protection Clause because it is a product of animus directed towards same-sex couples.[3] The Court has invalidated several statutes on the grounds of animus rather than considering whether the affected classes warrant heightened or strict scrutiny. In *Hollingworth*, the Court did not even reach the merits of the case and instead held that the plaintiffs—private individuals who supported Proposition 8—lacked standing to defend the amendment.[4]

Because the Court issued minimalist rulings in *Hollingsworth* and *Windsor*, the doctrinal status of sexual orientation in equal protection case law remains unsettled and undertheorized. As this Article will demonstrate, the Court's equal protection doctrine suffers generally from many logical inconsistencies. A survey of that doctrine, however, reveals that when the Court reviews equal protection claims it seeks to balance democratic governance against constitutional protection of important personal interests. In order to weigh these vital concerns, the Court applies shifting levels of scrutiny to evaluate the constitutionality of state action. When a challenged action impairs the enjoyment of a fundamental right or discriminates against a suspect class, the Court applies strict scrutiny—its most exacting review. Most other cases, however, trigger rational basis review—the most deferential judicial scrutiny. The Court has also

1. United States v. Windsor, 133 S. Ct. 2675 (2013).
2. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).
3. *Windsor*, 133 S. Ct. at 2695–96.
4. *Hollingsworth*, 133 S. Ct. at 2668.

developed a middle-tier analysis, intermediate scrutiny, which it applies to state action that discriminates against quasi-suspect classes.[5]

With respect to equal protection cases, the tiered analysis is traditionally known as the suspect class doctrine.[6] This doctrine determines the appropriate level of scrutiny by evaluating a set of factors related to the political vulnerability of plaintiffs' social class. Theoretically, the doctrine treats discrimination against historically disadvantaged groups as suspicious and presumptively unconstitutional.[7]

The suspect class doctrine suffers from several weaknesses. It is extraordinarily undertheorized, inconsistently applied, and it operates primarily as a gatekeeper that limits the recognition of new suspect classes rather than extending judicial solicitude to additional vulnerable groups.[8] Despite the vagueness and contradictions of the suspect class doctrine, courts have frequently analyzed four factors to determine what level of scrutiny to apply in equal protection cases. Specifically, courts have considered whether: (1) the class has endured a history of discrimination; (2) the class lacks political power; (3) members of the class share an obvious and immutable characteristic that renders them susceptible to discrimination; and (4) the trait that stigmatizes the class bears no relationship to its members' ability to contribute to or perform in society.[9] Justice Brennan's plurality opinion in *Frontiero v. Richardson* examined these factors and concluded that they justify applying strict judicial scrutiny to state action that discriminates against women.[10] Later, however, the Court settled upon intermediate scrutiny as the standard for analyzing claims of sex-based discrimination.[11]

Although each of the *Frontiero* factors raises questions worthy of critical exploration, this Article analyzes the political powerlessness prong

---

5. *See infra* text accompanying notes 83–91.

6. Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209, 1220 ("The *Plyler* Court described equal protection doctrine as organized into two strands of analysis (suspect class and fundamental right) and three tiers of scrutiny (rational, intermediate, and strict). The equal protection doctrine thus had settled into this now familiar pattern . . . .") (citing Plyler v. Doe, 457 U.S. 202, 216–17 & n.15 (1982); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 9.1, at 530 (Walter Kluwer Law & Business, 1997)).

7. *See infra* text accompanying notes 92–98.

8. *See infra* text accompanying notes 104–05.

9. *See* Noreen Farrell & Genevieve Guertin, *Old Problem, New Tactic: Making the Case for Legislation to Combat Employment Discrimination Based on Family Caregiver Status*, 59 HASTINGS L.J. 1463, 1481–82 (2008) ("[The heightened scrutiny] factors include (1) the possession of an immutable characteristic by members of the protected class, (2) the existence of a history of discrimination against members of the class, (3) the relevance of the characteristic to legitimate decision making, and (4) the political power of the class.").

10. 411 U.S. 677, 684–88 (1973) (plurality opinion) (discussing reasons why women constitute a suspect class).

11. Craig v. Boren, 429 U.S. 190 (1976).

exclusively. For several reasons, the political powerlessness factor presents compelling issues for contemporary legal analysis. First, the political powerlessness factor is perhaps the most undertheorized element of the suspect class doctrine. The Court has not devoted much attention to elaborating a comprehensive definition of political powerlessness. Adding to the problems with this doctrine, the Court inconsistently applies its already inadequate definition of political powerlessness. Furthermore, the Court has described political powerlessness in extremely narrow terms. Consistent application of the Court's constricted view of political powerlessness would make it impossible for most groups, including existing suspect and quasi-suspect classes, to qualify for judicial solicitude.[12] These shortcomings make the political powerlessness prong a compelling site for legal inquiry.

Second, while the Court's doctrine regarding political powerlessness suffers in numerous respects, this factor has become salient in contemporary equal protection litigation, particularly cases challenging discrimination against gays and lesbians.[13] In some of these cases, courts have applied rational basis review after holding that gays and lesbians do not lack political power.[14]

Recent rulings by the Second Circuit in *Windsor* and by the Iowa and Connecticut supreme courts depart from this trend. These courts have held

---

12. As Jane Schacter argues:

> In the course of making political powerlessness an element of equal protection doctrine, the justices have had very little to say about what the idea of political powerlessness means and requires, and even less to say about the underlying idea of democracy informing the Court's assessment of the political process. Supreme Court opinions simply contain very little by way of exposition.

Jane S. Schacter, *Ely at the Alter: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1376 (2011); *see also* 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, 565 (1998) (identifying "two major problems with the current political powerlessness analysis"—that "the standards are applied inconsistently across contexts" and "are coarse in the extreme").

13. William Eskridge, Jr., *Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?*, 50 WASHBURN L.J. 1, 7 (2010) ("The gay rights cases of the last generation have sparked a debate about the role of political powerlessness in equal protection scrutiny."); Schacter, *supra* note 12, at 1366 ("The question whether members of the lesbian, gay, bisexual, and transgender . . . community are candidates for heightened scrutiny under equal protection principles has been framed as a central question in many lawsuits on the issue, and the 'political powerlessness' idea has drawn sustained analysis.")

14. *See, e.g.*, Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989) ("In these times homosexuals are proving that they are not without growing political power. It cannot be said 'they have no ability to attract the attention of the lawmakers.' A political approach is open to them to seek a congressional determination about the rejection of homosexuals by the Army.") (citing Cleburne v. Cleburne Living Center, 473 U.S. 432, 445 (1985)); Dean v. Dist. of Columbia, Civ. A. No. 90-13892, 1992 WL 685364, at *4 (D.C. Super. June 2, 1992) ("Gays and lesbians are, in the 1990's, a political force that any elective officeholder may ignore only at his or her peril."), *aff'd*, 653 A.2d 307 (D.C. 1995); Conaway v. Deane, 932 A.2d 571, 614 (Md. 2007) (finding that "gay and lesbian persons are not powerless but, instead, exercise increasing political power"); Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (finding the same).

that political powerlessness is not a prerequisite to the application of heightened scrutiny.[15] Despite discounting the significance of political powerlessness, the courts still find that gays and lesbians remain vulnerable to majoritarian mistreatment.[16] The Supreme Court upheld the Second Circuit's judgment in *Windsor*, but it decided the case using the animus principle rather than the suspect class doctrine. Nonetheless, as these federal and state cases indicate, the relationship of sexual orientation to the suspect class doctrine has become a central issue in contemporary equal protection litigation.

In addition to impacting civil rights litigation, the subject of gay and lesbian political powerlessness has affected legal analysis in the political branches. In 2011, the Department of Justice decided that it would no longer defend the constitutionality of DOMA.[17] Attorney General Eric Holder released a memorandum (Holder Memorandum) that explains the government's position.[18] The Holder Memorandum analyzes Court precedent and concludes that gays and lesbians qualify for heightened judicial scrutiny due, in part, to their political powerlessness.[19]

The importance of the political powerlessness in recent equal protection litigation has inspired several legal scholars to publish articles on the subject.[20] These articles, along with developments in federal and

15. Windsor v. United States, 699 F.3d 169, 181 (2d Cir. 2012) ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class."); Varnum v. Brien, 763 N.W. 2d 862, 889 (Iowa 2009) ("[W]e consider the last two factors—immutability of the characteristic and political powerlessness of the group—to supplement the analysis as a means to discern whether a need for heightened scrutiny exists."); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 427 (Conn. 2008) ("It is evident, moreover, that immutability and minority status or political powerlessness are subsidiary to the first two primary factors because . . . ."). This Article criticizes the argument that political powerlessness is irrelevant to a heightened scrutiny analysis. *See infra* text accompanying notes 170–94.

16. *See Windsor*, 699 F.3d at 185 ("In sum, homosexuals are not in a position to adequately protect themselves from the discriminatory wishes of the majoritarian public."); *Kerrigan*, 957 A.2d at 461 ("In sum, the relatively modest political influence that gay persons possess is insufficient to rectify the invidious discrimination to which they have been subjected for so long."); *Varnum*, 763 N.W.2d at 895 ("We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation.").

17. *See* Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/us/24marriage.html?pagewanted=all.

18. Letter from Eric H. Holder, Jr., Attorney General, on Litigation Involving the Defense of Marriage Act to Congress (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

19. *See id.*

20. *See* Eskridge, *supra* note 13; Lawrence Friedman, *Not the Usual Suspects: Suspect Classification Determinations and Same-Sex Marriage Prohibitions*, 50 WASHBURN L.J. 61 (2010); Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court's Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33 (2010); Schacter, *supra* note 12; David Schraub, Comment, *The Price of Victory: Political Triumphs and Judicial Protection in the Gay Rights Movement*, 77 U. CHI. L. REV. 1437 (2010); Yoshino, *supra* note 12; Kenji Yoshino, *The Paradox of*

state courts and within the political branches, constitute an important, yet emergent, conversation regarding the extension of equal protection to gays and lesbians. Although this evolving discussion has made provocative insights, the existing scholarship and case law do not resolve many of the extant problems related to the Court's analysis of political powerlessness. In addition, this emerging discourse sometimes rests on problematic or incomplete legal analysis.

For example, several scholars have criticized the Court's vague and narrow conception of political powerlessness. Most of these scholars, however, have not offered a more complicated alternative.[21]

Other scholars and some courts have sought to avoid the complications related to the Court's elaboration of political powerlessness by treating this factor as wholly irrelevant to the application of heightened scrutiny.[22] This argument, however, ignores a fundamental justification for the suspect class doctrine: to correct political process failures.[23]

Moreover, when scholars discount the significance of political powerlessness in equal protection doctrine, they forego the opportunity to examine the multiple factors that make gays and lesbians politically vulnerable. Analyzing gay and lesbian political vulnerability, however, could respond to a prevalent stereotype that depicts gays and lesbians as wealthy, well educated, and politically dominant.[24] Opponents of gay and lesbian equality employ this stereotype to contest the enactment of protective civil rights measures.[25]

The prevalent assumption that gays and lesbians possess substantial economic and political advantages could also inform court rulings that find that recent political and legal victories by gays and lesbians indicate that they possess substantial political power.[26] This thinking, however, obscures

---

Political Power: Same-Sex Marriage and the Supreme Court, 2012 UTAH L. REV. 527 ; Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010).

21. *See infra* text accompanying notes 170–87. Kenji Yoshino's work is an exception to this general observation. Yoshino has offered an expanded list of factors that could inform the Court's analysis of political powerlessness. *See* Yoshino, *supra* note 12, at 563–67.

22. *See* Eskridge, *supra* note 13; *see also infra* note 249 (citing judicial opinions that discount the relevance of political powerlessness to the application of heightened scrutiny). *See generally infra* text accompanying notes 244–251.

23. *See infra* text accompanying notes 49–53.

24. On the stereotyping of gays and lesbians as wealthy, well educated, and politically dominant, see Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1072 (1994); Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1372–83 (2000); 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, 291–94 (1994).

25. *See supra* note 24.

26. *See* Dean v. Dist. of Columbia, Civ. A. No. 90-13892, 1992 WL 685364, at *4 (D.C. Super. June 2, 1992); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Andersen v. King Cnty., 138 P.3d 963, 975 (Wash. 2006).

the diversity among gays and lesbians. Gays and lesbians who are poor, persons of color, disabled, rural dwellers, and members of other disadvantaged groups, however, do not influence the priorities of social movement organizations that sponsor much of the legal and political advocacy that seeks equal rights for gays and lesbians.[27] As a result, the agendas pursued by these organizations have greater appeal and impact among relatively privileged individuals, such as white men and upper-class persons.[28] Therefore, the attainment of political victories by gay and lesbian social movement organizations does not necessarily indicate that gays and lesbians as a class possess political power.[29] Instead, it suggests that some persons within the class possess a meaningful degree of political power. If true, this fact should not disqualify gays and lesbians from suspect or quasi-suspect status. Privilege undoubtedly exists within all of the current suspect and quasi-suspect classes. Yet, they still receive judicial solicitude.

If courts were to treat political powerlessness as irrelevant to equal protection, this could impact doctrine outside of the gay and lesbian context. For example, this change could greatly expand the judicial invalidation of state action and lead to claims of judicial excess. Furthermore, discarding political powerlessness in equal protection cases could validate the troubling application of rigid scrutiny to remedial state action designed to ameliorate the effects of historical and present-day discrimination against vulnerable classes, such as persons of color.[30] The emergent discourse regarding political powerlessness and equal protection does not analyze these potential collateral consequences.

This Article offers alternatives to the Court's flawed equal protection doctrine. Part II discusses the development of process theory as a justification for special judicial protection of politically vulnerable classes. Part II also analyzes the vague and inconsistent nature of the Court's equal

27. Depictions of gays and lesbians in popular culture overwhelmingly centralize whiteness, youth, maleness, able-bodied status, wealth, and urban settings. *See* MICHAEL SHELTON, FAMILY PRIDE: WHAT LGBT FAMILIES SHOULD KNOW ABOUT NAVIGATING HOME, SCHOOL, AND SAFETY IN THEIR NEIGHBORHOODS (2013) (debunking the myth that gays and lesbians are white, wealthy, and urban); *see also infra* text accompanying notes 136–69 (discussing factors that disempower gays and lesbians).

28. *See* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CAL. L. REV. 1309, 1330 n.117 (2011) (discussing a study conducted by Human Rights Commission that finds that "when LGBT people of color were asked to rank their most important political priorities, many of the 'gay' issues privileged by the mainstream gay rights movement, such as same-sex marriage, ranked below guaranteeing racial equality and HIV prevention/treatment, among other race- and class-inflected issues"); *see also* Hutchinson, *supra* note 24, at 1368–72 (discussing how race, class, and gender impact desirability of LGBT rights initiatives).

29. Furthermore, due to varying levels of wealth and power, gays and lesbians might not share the same goals related to social change. If this is the case, then it is difficult to argue that political victories achieved by gay and lesbian social movement organizations represent victories for or the political power of the entire class.

30. *See infra* text accompanying notes 307–69.

protection doctrine, particularly as it pertains to the protection of classes that suffer from political powerlessness. Part III analyzes case law in which plaintiffs have argued that gays and lesbians constitute a suspect or quasi-suspect class. Part III demonstrates that several courts have rejected this contention after finding that gays and lesbians are politically powerful. Part IV analyzes recent legal scholarship and judicial opinions that elaborate new theories regarding political powerlessness and the suspect class doctrine. After discussing the shortcomings of these alternative approaches, Part IV advances two possible alternative theories of equal protection that could replace the heavily criticized doctrine the Court currently utilizes.

II. EQUAL PROTECTION, SUSPECT CLASSES, AND GAYS AND LESBIANS

A. Process Theory and Its Origin

Although several theoretical approaches could inform the judicial elaboration on equal protection, Court doctrine remains amorphous and confusing. Most commentators agree that, at a minimum, equal protection prohibits certain forms of discrimination or disparate treatment by state actors. Beyond this point, reasonable minds diverge with respect to a coherent approach.[31]

One of the most formidable barriers to cohering equal protection is the need to isolate the kinds of discrimination the Constitution prohibits. The historical context of the Reconstruction Amendments demonstrates that the Framers intended to bar certain forms of state action that discriminate on the basis of race. The historical record, however, does not support the idea, favored by many contemporary conservatives, that the Framers intended to ban every form of race-conscious state action.[32] The Framers' openness to certain types of racial discrimination has generated substantial debate among scholars and jurists concerning the appropriateness of race-

31. 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, 616 n.2 ("describing 'text and history' of the Equal Protection Clause as 'vague and ambiguous'" (quoting Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5 (1976))); 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, 1174 (1988) ("The scope of the [Equal Protection] Clause and the precise content of the equality norm are of course deeply disputed.").

32. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 413–14 (2011) (arguing that "colorblindness is foreign to both the text and the original understanding of the Fourteenth Amendment"); *see also* Stephen Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998) (making similar observation with respect to the power of Congress).

conscious state action and neutral state action that disproportionately harms persons of color.[33]

After the demise of Reconstruction, the Supreme Court determined that the Equal Protection Clause only guaranteed civil and political equality, but not social equality. As the Court infamously held in *Plessy v. Ferguson*:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.[34]

The Court reasoned that racial segregation was not a product of white supremacy. To the extent that blacks believed racial segregation had racist roots, the Court concluded that they were unnecessarily "choosing" to view these policies negatively.[35]

In *Brown v. Board of Education*, however, the Court held that "separate but equal" public schools violated the Equal Protection Clause.[36] The Court explicitly rejected the argument in *Plessy* that dismissed the tangible and intangible injuries that blacks suffered due to mandatory racial segregation.[37]

Brown received support from a majority of the American public, national political actors, and national and global press.[38] After an initial period of calm, however, *Brown* eventually radicalized southern states. Successful southern politicians became much more conservative and defiant on questions of racial justice. Local authorities enacted many facially neutral measures blatantly designed to subvert the implementation of *Brown*. Also, some whites engaged in acts of racial terrorism and

---

33. David Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 940–42 (1989) (discussing various possible theories of equal protection including that it prohibits "impartiality" and "subordination").

34. 163 U.S. 537, 544 (1896).

35. *Id.* at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

36. 347 U.S. 483, 495 (1954).

37. *Id.* at 494–95 ("Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.") (internal citation omitted).

38. MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

violence in order to defend Jim Crow against the protests of a nation that was becoming more racially tolerant.[39]

Within the legal academy, some scholars praised the holding in *Brown*, even as they asserted that the ruling lacked an adequate theoretical foundation. Herbert Wechsler, one of the most noted critics of *Brown*, argued that the Court failed to base its desegregation rulings upon neutral principles.[40] Also, Alexander Bickel challenged the Court's holding that the intent of the Framers regarding state-mandated racial segregation in public schools was inconclusive. According to Bickel, it was clear that the Framers did not believe that the Fourteenth Amendment would invalidate social inequality. Bickel therefore chastises the Court for not explaining its decision to ignore this uncomplicated history.[41] Given their prestigious backgrounds, the critics of *Brown* commanded the attention of their peers.

The academic critiques of *Brown* generated scholarly responses that defended the decision. Charles Black, for example, contested the reasoning of both Wechsler and Bickel. Black argued that the Equal Protection Clause prohibits states from "significantly disadvantag[ing]" blacks and that "segregation is a massive intentional disadvantaging of the Negro race."[42]

Louis Pollack comprehensively addressed Wechsler's argument that the Court's desegregation decisions lack a theoretical basis. Pollack argued that the division of political, civil, and social equality is inconsistent with the Equal Protection Clause.[43] The separate-but-equal doctrine announced in *Plessy*, however, rests firmly upon this now-outdated distinction.[44]

Additionally, Pollack, like Black, argued that official racial segregation harms blacks and that southern states enacted such measures in order to perpetuate racial hierarchy.[45] Finally, Pollack asserted that the *Slaughter-House Cases* justifies the Court's treatment of racial discrimination against

---

39. *Id.* at 385–420.

40. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

41. Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 65 (1955). *But see Brown*, 347 U.S. at 492–93 (explaining why the Framers' intent is insufficient to determine the constitutionality of racial discrimination in contemporary public education).

42. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 421 (1960).

43. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 26 (1959) ("Nothing in the equal protection clause suggests a dichotomy between laws affecting civil and political rights and those affecting social relationships. That clause proscribes *all* laws which impose special disabilities on particular persons or groups without any reasoned basis for the differential treatment.").

44. Plessy v. Ferguson, 163 U.S. at 537, 544 (1896).

45. Pollak, *supra* note 43, at 31 ("The 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 . . . .").

nonwhites as constitutionally suspicious.[46] By design or effect, Jim Crow perpetuated the oppression that blacks endured as slaves. Because racial segregation was rooted in white supremacy and because it denied blacks equality in a host of social and political settings, it was inconsistent with the text of the Equal Protection Clause and with the Court's earliest interpretation of the Reconstruction Amendments.[47]

Over two decades after these initial debates regarding *Brown*, John Hart Ely would provide substantial academic justification for the ruling and, more broadly, for the Court's invasive scrutiny of state action that discriminates on the basis of race and, potentially, other factors. In *Democracy and Distrust*, Ely responds to Bickel's concern that *Brown* and other Warren-era cases were countermajoritarian because they overturned laws implemented by democratic branches of government.[48]

Today, many legal and political science scholars have rebutted general claims that judicial review is countermajoritarian, relying upon qualitative and quantitative research which finds that Court rulings typically correlate with known public opinion. This research also challenges the assumption that the political branches are majoritarian, drawing from scholarship that discusses the structural dimensions of Congress and the Executive that diminish majoritarian influence.[49] Ely, however, accepts the empirical claims of countermajoritarian criticism.[50] He then turns to constitutional text and Court precedent in order to validate judicial countermajoritarianism. Ely draws heavily from footnote four of *United States v. Carolene Products*.[51] Ely argues that courts should rigorously evaluate state action that represents a failure of the political process. According to Ely, a process failure exists when laws place substantial restraints upon the exercise of First Amendment activities and voting, which are essential to political representation.[52] Ely also argues that a

46. *Id.* ("[A]nd on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71–72 (1873))).

47. *See generally* Black, *supra* note 42; Pollak, *supra* note 43. *See also* 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.").

48. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

49. Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics* 23 LAW & INEQ. 1, 12–32 (2005) (citing numerous sources).

50. ELY, *supra* note 48, at 101–04.

51. United States v. Carolene Prods., Co., 304 U.S. 144, 152–53 n.4 (1938); *see also* ELY, *supra* note 48, at 73–100 (discussing countermajoritarianism).

52. *Id.* at 103.

political process tainted by prejudice against "political outsiders" constitutes a process failure, thus warranting a more stringent judicial analysis.[53]

B. The Supreme Court and Process Theory

Ely's research has greatly influenced legal scholarship and, to some extent, the Supreme Court's equal protection doctrine. The Court applies a tiered analysis to equal protection claims. In cases involving discrimination on the basis of a quasi-suspect or suspect class, the Court applies intermediate or strict scrutiny, respectively. For all other equal protection claims, the Court applies rational basis review—the most deferential standard of review.[54] The Supreme Court has relied upon several tests to determine whether certain classes deserve heightened or strict scrutiny. Some of these formulations either implicitly or explicitly draw from Ely's representation-reinforcement approach. At times, however, the Court has clearly not relied upon process theory.

The most detailed discussion of representation-reinforcement among the Justices appears in *Frontiero v. Richardson*.[55] In *Frontiero*, the Court invalidated a federal law that provided an automatic dependency benefit to wives, but not to husbands, of military servicemembers. To qualify for the benefit, husbands had to prove dependency upon their wives' income.[56] Justice Brennan's plurality opinion would have applied strict scrutiny to sex discrimination, but Burger, Powell, and Blackmun concurred only in the judgment.[57] Nevertheless, Brennan's justification for applying strict scrutiny to sex discrimination has influenced legal scholarship and doctrine related to equal protection.

Brennan listed several factors that make discrimination against women suspicious. Brennan observed that women have suffered a long history of discrimination.[58] He also emphasized that sex discrimination is perhaps most pronounced in the political branches of government.[59] The acutely

53. *Id.* at 43–72.

54. Anthony Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 398 n.12 (1994) ("It is fairly well settled that under the 'suspect classification' branch of Equal Protection analysis there are three standards of review that may be applied: strict scrutiny (applicable to discrimination on the basis of 'suspect' classifications), intermediate scrutiny (applicable to discrimination on the basis of 'quasi-suspect' classifications), and rational basis review (applicable to all other cases).") (internal citation omitted).

55. 411 U.S. 677 (1973).

56. *Id.* at 691.

57. *Id.*

58. *Id.* at 684.

59. *Id.* at 686 n.17 ("It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils.").

low number of women holding positions of power in federal and state governments demonstrated women's political disempowerment.[60] Furthermore, Brennan argued that sex typically bears no relationship to a person's "ability to perform or contribute to society."[61] Finally, he observed that sex, "like race," is an immutable characteristic beyond the control of the individual.[62] Discrimination on the basis of this fixed biological trait violated firmly established fairness principles contained in Court precedent.[63]

Twelve years after *Frontiero*, Brennan reiterated these four factors in *Rowland v. Mad River Local School District*.[64] *Rowland* involved a challenge to a decision by an Ohio school district to discharge a teacher "solely because she was bisexual and had told her secretary and some fellow teachers that she was bisexual."[65] Although the Court denied the teacher's petition for certiorari, Brennan, joined by Justice Marshall, dissented. Brennan argued that the Court should have granted the petition because it raised unresolved questions of "individual constitutional rights."[66]

Brennan argued that the school district potentially violated the Equal Protection Clause, and he framed the equal protection issue as a question of process theory.[67] Drawing from footnote four of *Carolene Products*, he maintained that "homosexuals constitute a significant and insular minority of this country's population."[68] He also observed that because of "immediate and severe opprobrium . . . [homosexuals] are particularly powerless to pursue their rights openly in the political arena."[69] Finally,

60. *Id.*

61. *Id.* at 686.

62. *Id.*

63. *Id.* Today, scholars tend to reject biologicalization of identity categories, like race and sex. Instead, these categories are socially constructed. Susan Carle, *Theorizing Agency*, 55 AM. U. L. REV. 307, 381 (2005) ("We do not choose our identity categories; socially constructed meanings about race, gender, class, and other salient characteristics precede us in our social milieus and are operationalized at every moment by those we encounter in ways that we are often unable to renounce."). The term gender is used to identify the socially constructed aspects of sex. Janet Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 273 n.47 (1993) ("[U]sage of the term 'gender' to refer to the socially constructed aspects of sexual difference, while reserving the term 'sex' for the biologically determined attributes of sexual difference, is consistent with contemporary usage in the social sciences."). Feminists, however, caution that many so-called sex-related differences actually rest on social construction as well. *See, e.g.*, Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995) (arguing that "under close examination, almost every claim with regard to sexual identity or sex discrimination can be shown to be grounded in normative gender rules and roles.").

64. 470 U.S. 1009 (1985) (Mem).

65. *Id.* at 1010.

66. *Id.* at 1011.

67. *Id.* at 1014.

68. *Id.*

69. *Id.*

Brennan asserted that "homosexuals" have been the victims "of pernicious and sustained hostility" and that due to this history, discrimination against them likely rests on "deep-seated prejudice rather than . . . rationality."[70]

Process theory also influenced the Court's analysis in *San Antonio Independent School District v. Rodriguez*.[71] In *Rodriguez*, the Court upheld a Texas policy that used local property taxes, along with state and federal subsidies, to finance public school districts. The plaintiffs argued that the policy discriminated against pupils in poor districts.[72]

The Court, however, held that students in poor districts do not constitute a suspect or quasi-suspect class. The Court reasoned that "the class 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."[73] Thus, the use of judicial review to protect plaintiffs from the political process was unwarranted.

In *Plyler v. Doe*, the Court invalidated a Texas law that denied a free public education to undocumented children.[74] Although the Court found that undocumented persons do not constitute a suspect class, it, nevertheless, applied intermediate scrutiny due to the special vulnerability of undocumented children.[75] The Court held that denying these children an education would severely stigmatize them, deprive them of self-esteem and the ability to engage in participatory democracy, and render them a permanent underclass.[76] The Court also found that while undocumented adults enter the country voluntarily, their children do not.[77] Thus, Texas punished the children for having a status they could not control.[78]

In *Plyler*, the Court relied upon *Rodriguez* to explain when a group qualifies for more rigorous equal protection scrutiny. The reason comes from process theory, namely, that the class suffers from political vulnerability and thus requires "extraordinary protection from the majoritarian political process."[79]

---

70. *Id.*

71. 411 U.S. 1, 55 (1973).

72. *Id.* at 4–5.

73. *Id.* at 28.

74. 457 U.S. 202, 230 (1982); *see also supra* note 6.

75. *Id.* at 219 n.19 ("We reject the claim that 'illegal aliens' are a 'suspect class.'"); *id.* at 219–20 (distinguishing undocumented children from adults).

76. *Id.* at 221–24.

77. *Id.* at 220.

78. *Id.*

79. *Id.* at 216 n.14 ("Finally, certain groups, indeed largely the same groups, have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))).

The Court utilized a similar approach in *Graham v. Richardson* when it held that "aliens" constitute a suspect class.[80] Although the Court discusses the scrutiny question somewhat summarily, it turns to footnote four of *Carolene Products* to justify the application of strict scrutiny. The Court simply held that "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."[81] The Court's reliance upon *Carolene Products* indicates that it viewed prejudice against aliens as "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."[82] In other words, the Court utilized process theory.

In *City of Cleburne, Texas v. Cleburne Living Center*, the Court invalidated a municipal law that required a proposed group home for the "mentally retarded" to secure a "special use" permit before it could open.[83] Other group living facilities, like fraternities and convalescent centers, did not have to obtain the special use permit, which has more rigorous procedural hurdles than the typical land-use permit.[84] The Fifth Circuit held that the mentally disabled constitute a quasi-suspect class and, applying intermediate scrutiny, invalidated the requirement.[85] The Supreme Court upheld the judgment but reversed the finding that the mentally disabled constitute a quasi-suspect class.[86]

In order to reach its decision, the Court explicitly considered the political powerlessness of the class of mentally disabled individuals. After finding that Congress had passed numerous remedial statutes related to mentally disabled persons, the Court held that the class could not qualify for heightened scrutiny.[87] The Court reasoned that the enactment of the remedial measures by Congress "negates any claim that the mentally retarded are politically powerless in the sense that they have no ability to attract the attention of the lawmakers."[88]

Although the Court found that mental disability is an immutable characteristic, the Court nonetheless finds that it is a relevant trait, which

80. 403 U.S. 365, 372 (1971).
81. *Id.* (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)).
82. *See Carolene Prods.*, 304 U.S. at 152–53 n.4.
83. 473 U.S. 432, 450 (1985).
84. *Id.* at 447.
85. *Id.* at 437–38.
86. *Id.* at 442, 450.
87. *Id.* at 443–45.
88. *Id.* at 445.

diminishes the significance of its immutability.[89] The Court cites to a passage in *Democracy and Distrust* that makes a similar argument:

> "Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?"[90]

The Court's discussion of political powerlessness and *Democracy and Distrust* demonstrates the relevance of process theory to equal protection doctrine.[91]

C. Departure from Process Theory

In numerous rulings the Court has conceived of judicial review in equal protection cases as a means of policing the political process. State action that mistreats historically vulnerable groups often reflects blunt prejudice, which in turn evinces a malfunctioning political process.[92] Despite the Court's consideration of political process theory in some cases, many important exceptions exist.

1. Race and Sex

First, the Court did not explicitly turn to process theory when it began applying strict scrutiny in racial and sexual discrimination cases. In the context of race, for example, the Court has held that the Fourteenth Amendment prohibits all racial distinctions and that strict scrutiny ensures that state actors limit their consideration of race to the pursuit of compelling objectives.[93] Because current Court doctrine views racial discrimination as universally suspicious, it has applied strict scrutiny

89. *Id.* at 442.

90. *Id.* at 442 n.10 (quoting ELY, *supra* note 48, at 150 (emphasis omitted)).

91. *See supra* text accompanying notes 12 and 48.

92. Ely tries to hide behind the veil of "process," but he is really making a substantive claim. *See supra* note 48.

93. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218–23 (1995).

symmetrically in racial discrimination cases.[94] Despite the fact that whites have not endured a history of racial discrimination and political vulnerability due to their racial status, the Court nevertheless applies strict scrutiny to whites' claims of discrimination.[95] The Court's doctrine has shifted from one that protects suspect *classes* to a mechanism to root out suspect *classifications*.

Moreover, while men have not generally faced subjugation and political marginalization on account of sex, the Court applies intermediate scrutiny in all sexual discrimination cases.[96] In fact, the first case of sex discrimination to receive intermediate scrutiny involved male plaintiffs.[97] The symmetrical application of strict and intermediate scrutiny in equal protection cases is inconsistent with the theory that judicial review protects politically powerless classes from majoritarian mistreatment.[98]

2. *Other Categories*

The Court has also failed to consider political powerlessness in other cases involving vulnerable groups. For example, the Court has applied a sometimes amorphous version of intermediate scrutiny in cases involving discrimination against non-marital children.[99] The Court has justified this approach due to the history of discrimination related to this status—not political powerlessness.[100]

3. *Politically Powerless, but No Judicial Solicitude*

The Court has also declined to apply heightened scrutiny to cases that involve classes with strong claims of political isolation and historical mistreatment. For example, the Court has rejected arguments that poor people, the elderly, mentally disabled, and undocumented persons qualify as suspect or quasi-suspect classes.[101] Also, narrowly adhering to Court doctrine, numerous lower federal courts have held that gays and lesbians do

94. *See* Hutchinson, *supra* note 31, at 638–40.

95. *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 465 (1997) (discussing application of strict scrutiny to whites' claims of racial discrimination).

96. *See* Craig v. Boren, 429 U.S. 190 (1976).

97. *Id.*

98. Hutchinson, *supra* note 31, at 638–54.

99. *See* Pickett v. Brown, 462 U.S. 1, 7–8 (1983) (discussing precedent regarding non-marital children).

100. *Id.* Non-marital children, however, probably lack political power due to their age.

101. *See* James v. Valtierra, 402 U.S. 137 (1971) (poor); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (elderly); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (mentally disabled); Plyler v. Doe, 457 U.S. 202 (1982).

not constitute a suspect or quasi-suspect class.[102] Furthermore, while the Court has never considered whether gays and lesbians constitute a suspect class, in his dissenting opinion in *Romer v. Evans*, Justice Scalia made it absolutely clear that he would disagree with such a finding due to his own belief that gays and lesbians possess disproportionate wealth, education, and political power.[103]

4. Gatekeeping

The Court has not recognized a new suspect class or classification since 1976, when it started applying intermediate scrutiny in sex discrimination cases.[104] Because the Court has usually invoked political process theory to deny judicial solicitude, some scholars have argued that the suspect class doctrine operates merely as a gatekeeping mechanism, rather than as an honest effort to protect politically powerless classes.[105] The gatekeeping assessment of the suspect class doctrine has substantial merit. For several reasons, however, this argument, even if true, does not make a discussion of political process theory irrelevant.

First, the Court has never explicitly overruled the suspect class doctrine. It is still good law.[106] Because this precedent remains valid, it could potentially shape future cases brought before the Court. This is especially true of sexual orientation discrimination cases because the Court has never considered whether gays and lesbians constitute a suspect or quasi-suspect class. While the Supreme Court has not applied political process theory in sexual orientation discrimination cases, this issue has generated substantial analysis in state and lower federal court opinions.[107]

Furthermore, in 2011, Attorney General Eric Holder analyzed the suspect class doctrine in a memorandum that explains the government's refusal to defend DOMA.[108] The Holder Memorandum concludes that gays and lesbians constitute a quasi-suspect class and that DOMA would not survive judicial application of intermediate scrutiny.[109]

Moreover, constitutional law scholars have renewed their concern with political process theory after many theorists had written off the suspect

102. *See infra* text accompanying notes 137, 146, 148, 151, and 153.

103. Romer v. Evans, 517 U.S. 620, 645–46 (1996) (Scalia, J. dissenting).

104. *See* Craig v. Boren, 429 U.S. 190 (1976).

105. *See* Yoshino, *supra* note 12, at 558 (arguing that the Court uses the suspect class doctrine in order to "limit[] the number of groups deemed to deserve the courts' solicitude").

106. Lower courts continue to apply the doctrine even though the Supreme Court has generally declined to do so. *See infra* text accompanying notes 138, 152, and 212.

107. *See infra* text accompanying notes 137, 146, 148, 151, and 153.

108. *See supra* note 18.

109. *See supra* note 18.

class doctrine as a relic from a bygone era.[110] Today, a growing number of legal scholars believe the Court should construct a normative theory of equal protection that does not rest on the proposition—real or imagined—that the Court protects vulnerable groups from majoritarian influences.[111] Process theory, however, is not necessarily irrelevant to the formulation of that normative theory. Political vulnerability could serve as just one factor, among many others, that informs a new theory of equal protection that treats certain categories of discrimination as invalid, not because they result from a malfunctioning political process, but instead because the types of injuries they cause are inconsistent with equal protection itself.[112]

The next Part of this Article analyzes the use of political process theory in sexual orientation discrimination claims. Because the political powerlessness factor has the most explicit connection to a finding of political vulnerability and because it has become somewhat controversial in sexual orientation discrimination cases, this factor will receive substantial engagement in the next Part. Finally, the next Part considers the strengths and weaknesses of alternatives to political process theory advanced in recent legal scholarship and judicial opinions concerning sexual orientation and the Equal Protection Clause.

III. GAY AND LESBIAN POWER

A. "Gay Power" as a Civil Rights Slogan

Gay men and lesbians began to organize and build their own institutions after World War II.[113] Although the organizations they formed focused largely on social activities, gays and lesbians also engaged in political and legal work as well. Activism among LGBT individuals changed rapidly during the next decade. Inspired by the successes of the Civil Rights Movement, the Women's Movement, and the Stonewall Rebellion, LGBT rights activists became radicalized.[114] They criticized heteronormativity and gender normativity and urged other LGBT persons to express their identities publicly.[115] Some activists employed methods advanced by the Black Power movement.[116] Also, during this liberationist

110. *See* sources cited *supra* note 27.

111. *See, e.g.*, Schacter, *supra* note 12, at 1376.

112. *See infra* text accompanying notes 129 and 143.

113. Patricia Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1581 (1993).

114. *Id.* at 1580–81.

115. *Id.* at 1581.

116. Kevin Mumford, *The Trouble with Gay Rights: Race and the Politics of Sexual Orientation in Philadelphia, 1969–1982*, 98 J. AM. HIST. 49, 54 (2011) (discussing the influence of "Black Power" movement on gay male organizers).

era, some black nationalists and gay liberationists tried to form coalitions, but these efforts were unsustainable due to homophobia and racism among the two groups.[117]

More radical gay and lesbian rights groups, however, emulated black nationalists who encouraged blacks to become self-sufficient and who believed that blacks and whites were innately distinct.[118] "Black Power" became a leading expression of the nationalists. Similarly, Gay Liberationists embraced "Gay Power" as emancipatory rhetoric.[119]

Historically, an embryonic gay liberation movement used the phrase "Gay Power" in order to contest inequality when civil rights protections for gay and lesbian people were virtually nonexistent and when discrimination and stigmatization were rampant. Today, however, the belief that gays and lesbians possess political power has justified denying them the very civil rights protection that they have endeavored so long to achieve.

B. Gay and Lesbian Power and the Denial of Equal Protection

1. Political Powerlessness and the Suspect Class Doctrine

In equal protection cases, federal and state courts consider whether a group is politically powerless in order to determine whether it constitutes a suspect or quasi-suspect class. The Supreme Court's elaboration of political powerlessness suffers from many weaknesses. In particular, the Court has defined political powerlessness in extremely narrow terms.[120] In *Cleburne*, the Court held that mentally disabled individuals do not qualify for heightened scrutiny, in part, because they did not demonstrate that they had "no ability to attract the attention of the lawmakers."[121] The existence of federal statutes that benefit the class proves it possesses some political power.[122] If the Court utilized this same standard consistently, it would disqualify all of the existing suspect and quasi-suspect classes as candidates for judicial solicitude.[123] Many state, federal, and municipal policies prohibit discrimination on the basis of race, national origin, alienage, and sex. These categories, however, all receive strict or intermediate scrutiny. The Court has never sufficiently addressed this glaring inconsistency.[124]

---

117. *Id.*
118. *See id.*
119. *Id.*
120. *See supra* text accompanying note 12.
121. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985).
122. *Id.* at 443.
123. *See supra* text accompanying note 20.
124. Eskridge, *supra* note 13, at 8.

Furthermore, in some cases, the Court has shifted from discussing suspect classes to analyzing suspect classifications. Thus, while Latinos constitute a suspect *class*, warranting strict scrutiny for any discriminatory state action they experience, the Court applies strict scrutiny to any racial *classification*—including those that burden whites. Whites, however, do not face hostility and disadvantage in the political process on account of race.[125]

The class-to-classification shift means that groups that are historically advantaged receive strict or intermediate scrutiny for their discrimination claims once the Court concludes that it should depart from rational basis in equal protection cases brought by historically marginalized groups. Today, the Court accepts the argument Justice Powell made in *Regents of the University of California v. Bakke*: "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[126] Powell's observation, however, is inconsistent with many cases in which the Court has considered the group's political powerlessness (and history of discrimination) in order to determine the appropriate level of scrutiny to apply.[127] Powell, however, validated this blatant inconsistency when he opined that political powerlessness and other factors should determine what new groups constitute a suspect class, but race should always receive scrutiny.[128] In other words, Powell concedes that his arguments mean that some future litigants would still have to prove their political vulnerability to receive judicial solicitude, but whites would not face this requirement.[129]

Although the Court has justified this contradiction by contending that the Fourteenth Amendment prohibits all racial distinctions, this justification is problematic. First, legal historians have demonstrated that the Framers of the Fourteenth Amendment could not have believed that all racial distinctions were inconsistent with equal protection because they enacted legislation that provided race-based remedies for the former slaves and that maintained segregation in District of Columbia public schools.[130]

Furthermore, aside from finding that all racial classifications require strict scrutiny, which is a strained conclusion, the Court has never announced a general rule that would determine when a classification, rather than a class, qualifies as suspect or quasi-suspect. Instead, it has relied

125. *See supra* note 95 and accompanying text.

126. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289–90 (1978).

127. *See supra* notes 12, 15, 79 and accompanying text.

128. *Bakke*, 438 U.S. at 290.

129. *See* Hutchinson, *supra* note 31, at 648.

130. *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (discussing support for race-conscious legislation among Framers of the Fourteenth Amendment).

primarily upon the class-to-classification shift or the inherent unconstitutionality of racial classifications to justify the application of heightened and strict scrutiny to certain classifications.

Moreover, the Court has justified the denial of heightened scrutiny to vulnerable classes on the grounds that symmetrical scrutiny would make it more difficult for governmental actors to remedy discrimination they face. In *Cleburne*, the Court observed that if it applied intermediate scrutiny to laws that discriminated on the basis of mental disability, then it would have to apply the same level of scrutiny to laws that benefited the class—and thus discriminate against people without mental disabilities.[131] The application of intermediate scrutiny to remedial policies for the mentally disabled would make those laws more susceptible of judicial invalidation.[132] This risk, however, only exists because the Court applies heightened scrutiny symmetrically. That the Court applies intermediate scrutiny to equal protection claims brought by mentally disabled persons should not compel identical treatment of claims challenging policies that favor them. Nevertheless, had the Court found that the *Cleburne* plaintiffs were members of a quasi-suspect class, persons without mental disabilities would automatically receive heightened scrutiny of their equal protection claims despite their inability to meet the political powerlessness and history of discrimination factors. The Court's symmetrical equal protection doctrine ignores the difference between invidious and remedial policies.[133]

Although the Court contends that the class-to-classification shift treats everyone evenly, it actually fails to do so.[134] Politically dominant classes undoubtedly would fail to secure judicial solicitude if the Court required them to satisfy the elements of the suspect class doctrine.[135] These classes, however, would immediately accomplish this same goal if the Court found that a politically vulnerable class who shares a trait with the dominant class (e.g., the wealthy and poor have an economic status) constitutes a suspect or quasi-suspect class.[136] The class-to-classification shift does not function as a coherent and uniform approach to equal protection.

---

131. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985).

132. *See id.*

133. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1996) (Stevens, J. dissenting) (arguing that the Court's affirmative action doctrine would "disregard the difference between a 'No Trespassing' sign and a welcome mat").

134. Regents of the Univ. of California v. Bakke, 438 U.S. 265, 289–90 (stating that equal protection must mean the same thing for all races).

135. *See* Rubenfeld, *supra* note 95, at 451.

136. Hutchinson, *supra* note 31, at 646–47.

2. Gays and Lesbians and Political Powerlessness

The Court's narrow and inconsistent analysis of political powerlessness has made it difficult for gays and lesbians to convince courts that they constitute a suspect or quasi-suspect class. Although the Supreme Court has never considered whether gays and lesbians qualify for heightened or strict scrutiny, several state and lower federal courts have confronted this question. Until recently, most of these courts followed the Court's narrow construction of political powerlessness and denied suspect class status to gay and lesbian plaintiffs. In many of these cases, the courts' rulings turn on very little evidence—some of which actually suggests that gays and lesbians lack political power.

In *Ben-Shalom v. Marsh*, for example, the Seventh Circuit upheld the military's exclusion of gays and lesbians.[137] Applying the suspect class doctrine, the court found that the political power of gays and lesbians precluded a finding that they constitute a quasi-suspect class.[138] To reach this conclusion, however, the court relied exclusively on two news articles:

> Homosexuals are *not without political power. Time* magazine reports that one congressman is an *avowed* homosexual, and that there is a *charge* that five other top officials are *known* to be homosexual. Support for homosexuals is, of course, not limited to other homosexuals. The *Chicago Tribune* . . . reported that the Mayor of Chicago participated in a gay rights parade . . . .[139]

The court's evidence of political power is dubious at best. Applying *Cleburne*, the court sought only to consider whether gays and lesbians were "without political power."[140] Complete deprivation of political power, however, is a difficult, if not impossible, standard to meet, and it certainly is not the only way to prove that a group suffers abuse in the political process.

Furthermore, the court's own evidence of gay and lesbian power suggests that the group suffers from political powerlessness. The court could only point to one openly gay member of Congress.[141] This would constitute underrepresentation even by conservative standards.

Also, the court's statement that some governmental officials are "charged" with being "homosexuals"[142] suggests that gay and lesbian status

137. Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989).
138. *Id.* at 465–66. The court considered other factors, such as history of discrimination.
139. *Id.* at 466 n.9 (emphasis added) (citation omitted).
140. *Id.*
141. *Id.* at 466 n.9.
142. *Id.*

is criminal or otherwise sinister. The use of such language by the court confirms the general marginalization of gays and lesbians. Furthermore, that these alleged homosexuals have concealed their sexual orientation helps to prove the political vulnerability of gays and lesbians.[143] An abundance of psychological data shows that the closet is not necessarily a healthy place, but that gays and lesbians are driven to hide their identities in order to escape harassment, discrimination, violence, and other forms of mistreatment.[144] If gay and lesbian status were not politically disempowering, then these closeted officials might have chosen to disclose their sexuality.

Furthermore, that the Mayor of Chicago marched in a gay rights parade does not mean discrimination against gays and lesbians does not exist—particularly within the military. Instead, it could simply indicate that in the liberal urban community of Chicago, marching in the parade was not politically risky. This reality, however, does not change the fact that gays and lesbians suffer discrimination nationwide. Finally, regardless of the power that gays and lesbians might have exercised in Chicago in 1989, the statutory prohibition of gays and lesbians from the United States military remained in effect until 2011.[145]

A similarly narrow analysis of political power appears in *Dean v. District of Columbia*.[146] In *Dean*, two gay men argued that a District of Columbia law that prohibited same-sex marriage infringed numerous statutory and constitutional rights, including the equality component of the Fifth Amendment Due Process Clause.[147]

Ultimately, the District of Columbia Superior Court summarily agreed with several federal courts of appeals cases that upheld governmental discrimination against gays and lesbians.[148] The court, however, specifically addressed the issue of political powerlessness and found that gays and lesbians were too powerful to qualify for judicial solicitude:

> Of perhaps equal significance to this Court in reaching a similar finding of no "suspect class" or quasi-suspect class" [sic] is the reality that homosexuals today are not so lacking in political power as to warrant enhanced constitutional protection. Witness, for

143. Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 931 (1989); *see also* Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724–28 (1985).

144. Robinson, *supra* note 28, at 1369–78.

145. Elisabeth Bumiller, *Out and Proud to Serve*, N.Y. TIMES, (Sept. 20, 2011), http://www.nytimes.com/2011/09/20/us/after-toiling-in-shadows-to-end-dont-ask-dont-tell-1st-lt-josh-seefried-greets-a-new-era.html?pagewanted=all.

146. Dean v. Dist. Of Colombia., 653 A.2d 307 (D.C. 1995).

147. *Id.*

148. *Id.* at 309.

> instance, the recent passage by the City Council and signing by the Mayor of the Domestic Partnership Bill. Gays and lesbians are, in the 1990's, a political force that any elective officeholder may ignore only at his or her peril.[149]

The court finds that the mere passage of a municipal domestic partnership bill makes gays and lesbians of formidable interest group that has the power to punish discriminatory lawmakers. The court reaches this conclusion despite the legislative denial of marital rights to gays and lesbians. Although the court finds that gays and lesbians have a dominate voice in local politics, they were unable to secure the passage of marriage equality legislation in the District of Columbia until 2009, more than seventeen years after the trial court's decision in *Dean*.[150]

In *High Tech Gays v. Defense Industrial Security Clearance Office*, the Ninth Circuit upheld a discriminatory policy that subjected gay and lesbian applicants for certain federal jobs to more invasive background and security checks.[151] The Court applied the suspect class doctrine and, borrowing from *Cleburne*, found that gays and lesbians do not meet the standards for quasi-suspect status:

> [L]egislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus, homosexuals are not without political power; they have the ability to and do "attract the attention of the lawmakers," as evidenced by such legislation.[152]

State courts have also decided equal protection claims brought by gay and lesbian litigants. Although these cases raise questions of state constitutional law, state courts often follow Supreme Court precedent regarding federal constitutional law in order to interpret the meaning of analogous state constitutional provisions. Some of these state courts have also employed narrow conceptions of political power in order to deny judicial solicitude to gays and lesbians.

Opinions by the supreme courts of Maryland and Washington demonstrate how constrained conceptions of political power operate to

149. *Id.* at 350.

150. Ian Urbina, *D.C. Council Approves Gay Marriage*, N.Y. TIMES, (Dec. 15, 2009), http://www.nytimes.com/2009/12/16/us/16marriage.html.

151. 895 F.2d 563, 578 (1990).

152. *Id.* at 574 (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985)).

deny heightened scrutiny to gay and lesbian litigants.[153] Both of these courts held that state prohibitions of same-sex marriage do not violate state constitutional law.[154] Both courts followed *Cleburne* and, after discussing numerous state policies that prohibit discrimination on the basis of sexual orientation, found that gays and lesbians do not require judicial solicitude.[155]

In addition, the Colorado trial court that presided over *Romer v. Evans* concluded that gays and lesbians do not constitute a suspect class because they possess sufficient power to protect themselves in the political process.[156] The court reached this conclusion despite the fact that voters in the state enacted a constitutional amendment that repealed and banned the future implementation of state policies that protect gays, lesbians, and bisexuals from discrimination.[157] In one way, this court requires even less to demonstrate political power than the *Cleburne* decision. In *Cleburne*, the Court determined that mentally disabled individuals did not constitute a quasi-suspect class because legislatures had enacted laws that benefited them in several contexts.[158] By contrast, the Colorado trial court held that a statewide *political loss* demonstrated gay and lesbian political power.[159] The court reasoned that because 46% of voters opposed the amendment, gays and lesbians failed to present evidence that they were politically vulnerable.[160]

The court also concluded that President Bill Clinton's support of various gay and lesbian initiatives and the passage of the then-repealed Colorado antidiscrimination laws provided additional evidence of gay and lesbian power.[161] The court, however, does not discuss Clinton's retreat from his campaign promise to lift the military policy of excluding gays and lesbians due to widespread and virulent opposition among members of Congress and military leadership.[162] Also, Clinton supported and signed

153. Conaway v. Deane, 932 A.2d 571, 624 (Md. 2007) (holding that state equal protection provision does not require state to recognize same-sex marriage); Andersen v. King Cnty., 138 P.3d 963, 986 (Wash. 2006) (same).

154. *See Deane*, 932 A.2d at 635; *Andersen*, 138 P.3d at 990.

155. *Deane*, 932 A.2d at 613 ("[R]ecent legislative and judicial trends toward reversing various forms of discrimination based on sexual orientation underscore an increasing political coming of age."); *Anderson*, 138 P.3d at 974–75 ("The enactment of provisions providing increased protections to gay and lesbian individuals in Washington shows that as a class gay and lesbian persons are not powerless but, instead, exercise increasing political power.").

156. Evans v. Romer, 1993 WL 518586, at *12 (Colo. Dist. Ct. Dec. 14, 1993), *aff'd*, 882 P.2d 1335 (Colo. 1994), *aff'd on other grounds*, 517 U.S. 620 (1996).

157. *Evans*, 1993 WL 518586, at *1.

158. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 443 (1985).

159. *Evans*, 1993 WL 518586, at *12.

160. *Id.*

161. *Id.*

162. John Cushman, *The Transition: Gay Rights; Top Military Officers Object to Lifting Homosexual Ban*, N.Y. TIMES (Nov. 14, 1992), http://www.nytimes.com/1992/11/14/us/the-transition-

DOMA into law.[163] Finally, although gay and lesbian activists successfully lobbied for the passage of civil rights policies in a few Colorado cities, state voters were so angered by the existence of these laws that they mobilized to repeal them and to make it impossible to enact similar laws without a constitutional amendment.[164] Thus, any gay and lesbian political power that might have led to the creation of these laws was fleeting and tenuous.

Although the Supreme Court has never considered whether gays and lesbians constitute a suspect class, Justice Scalia's dissent in *Romer* broached the issue. Scalia would have applied rational basis review and found Amendment 2 constitutional.[165] While the majority never discusses the suspect class doctrine, Scalia considers elements of this doctrine in his dissent.[166] Scalia, joined by Chief Justice Rehnquist and Justice Thomas, describes gays and lesbians as disproportionately wealthy and politically powerful:

> [B]ecause those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course, care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.[167]

Scalia's reasoning makes it abundantly clear that he would deny heightened scrutiny to gays and lesbians. Scalia's argument rests on the false assumption that gays and lesbians are wealthy and powerful. Numerous empirical studies, however, debunk this perception.[168]

---

gay-rights-top-military-officers-object-to-lifting-homosexual-ban.html. ("This is a judgment that will have to be made by political leaders . . . . The military leaders in the armed forces of the United States—the Joint Chiefs of Staff and the senior commanders—continue to believe strongly that the presence of homosexuals within the armed forces would be prejudicial to good order and discipline. And we continue to hold that view." (quoting Colin Powell)); Maria Puente, *Nunn Ready to Do Battle to Keep Gays Out of Military,* USA TODAY, Jan. 26, 1993, at 5A (describing objection to gays and lesbians in the military among members of Congress); Editorial, *A Retreat on Gay Soldiers*, N.Y. TIMES (Sept. 19, 1993), http://www.nytimes.com/1993/09/19/opinion/a-retreat-on-gay-soldiers.html (arguing that Clinton retreated from plan to allow gays and lesbians to serve in military due to "prejudice and politics").

163. *See* Melissa Healy, *Clinton Signals He'd Sign Anti-Gay Marriage Bill*, L.A. TIMES, May 23, 1996; *Clinton Draws Criticism from Gay Activists*, CHI. TRIB., Sept. 23, 1996.

164. *See* Romer v. Evans, 517 U.S. 620, 625 (1996).

165. *Id.* at 639 (Scalia, J., dissenting).

166. *Id.* at 645–46.

167. *Id.* (internal citations omitted).

168. *See infra* text accompanying notes 294–304.

Scalia's argument resembles the logic of the Colorado trial court. Because gays and lesbians are politically powerful, Amendment 2 does not represent an irrational majoritarian disadvantaging of a political minority. Instead, the law is merely "a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[169]

C. *General Problems with the Court's Analysis of Political Powerlessness*

1. *Undertheorized*

A review of the Court's equal protection case law reveals numerous weaknesses in the elaboration of political powerlessness. First, the standard is ambiguously defined. In *Rodriguez*, for example, the Court considered whether people who live in poor neighborhoods were "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."[170] Although this language indicates that the Court considers judicial review as a representation-reinforcement mechanism, this standard lacks a clear meaning.

2. *Narrow*

Court doctrine also employs an extremely narrow definition of political power. In *Cleburne*, for example, the Court found that scattered legislative prohibitions of discrimination against the mentally disabled prove that the class has sufficient power to "attract the attention of the lawmakers."[171] This standard is exceedingly narrow for two reasons. First, the existence of beneficial legislation is just one measure, among many others, of a group's political power. Political scientists have discussed the many factors that contribute to political power. These factors include: the group's wealth;[172]

169. *Romer*, 517 U.S. at 636.

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

171. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985).

172. Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 TEX. L. REV. 1673, 1676 & n.11 (1999) ("[T]heorists of political power treat personal resources, especially wealth, as potential power. Studies of community power in the 1920s and 1950s found that the wealthiest people in a city seemed to have the greatest political influence or reputation for influence.") (citing FLOYD HUNTER, COMMUNITY POWER STRUCTURE 81 (1953); ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN 413–34 (1929); ROBERT S. LYND & HELEN MERRELL LYND, MIDDLETOWN IN TRANSITION, 74–101 (1937)).

the extent to which public opinion supports the objectives of the group;[173] whether the group can eliminate disadvantaging practices with relative ease or whether political gains would require a sluggish and very expensive process;[174] whether the group can influence mass media, which in turn helps to shape public opinion and political decisions;[175] whether the group's primary reform issues are so outside what dominant groups would accept that it never even advances or advocates these concerns;[176] whether pernicious stereotypes or prejudice deter others from supporting the group and its needs;[177] and whether any favorable legislation for the group passed, not due to its own power, but because political elites wanted to satisfy their own interests.[178]

Kenji Yoshino, influenced by Cass Sunstein, has also proposed a list of factors that include: "(1) the group's income and wealth; (2) its health and longevity; (3) its freedom from public and private violence; (4) its ability to exercise its political rights; (5) its education level; (6) its social position; and (7) the acceptability of prejudice against the group."[179] Because the Court has narrowly construed the meaning of political power, its doctrine has denied heightened or strict scrutiny to several vulnerable classes, including the poor and the mentally disabled.[180]

---

173. Kevin Arceneaux, Paul Brace, Martin Johnson & Kellie Sims-Butler, *Public Opinion in the American States: New Perspectives Using National Survey Data*, 46 AM. J. POL. SCI. 173 (2002) (discussing the influence of public opinion and ideology upon policy outcomes).

174. John Garrard, *Social History, Political History and Political Science: The Study of Power*, J. OF SOC. HIST. 105, 108 (1983) ("[W]e also need to take into account the 'distance travelled' by the person or group subject to any exercise of power, and the costs involved in compliance.").

175. Kevin M. Carragee & Wim Roefs, *The Neglect of Power in Recent Framing Research*, J. OF COMM. 214 (2004) (discussing media processes and political outcomes); Robert M. Entman, *Framing Bias: Media in the Distribution of Power*, J. OF COMM. 163 (2007) (same).

176. JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980) (discussing political science concept of "quiescence"); *see also* Helen Ingram & Anne Schneider, *Social Construction of the Target Populations: Implications for Politics and Policy*, 87 AM. POL. SCI. REV. 334, 341 (1993) (arguing the "advantaged groups" utilize the political process because it typically benefits them); *id.* at 342 (arguing that disadvantaged groups fear the political process because they have learned "that it is not in the public's interest to solve their problems").

177. Ingram & Schneider, *supra* note 176, at 334–37 (discussing the impact of social construction upon social groups).

178. Garrard, *supra* note 174, at 108 (discussing possibility that disadvantaged classes could only achieve victories "from a willing political elite" or if the elite acquiesced to their demands in order to gain bargaining power for future disputes).

179. Yoshino, *supra* note 12, at 565 (citing Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2430 (1994)).

180. Dandridge v. Williams, 397 U.S. 471 (1970); Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.") (citing James v. Valtierra, 402 U.S. 137 (1971)); Maher v. Roe, 432 U.S. 464, 471 (1977) ("But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973))).

Second, the *Cleburne* standard is too narrow because it requires a complete deprivation of political power in order for a group to constitute a suspect or quasi-suspect class.[181] This standard would disqualify many groups—including current suspect classes—from receiving judicial solicitude.[182] The Court's reasoning implies that previously disempowered groups that achieve some legislative success have reached a "tipping point" with respect to political power and no longer deserve judicial solicitude.[183] This conclusion, however, does not place the attainment of these legislative benefits within a historical context. The formal movement for gay and lesbian rights in the United States began in the 1950s.[184] The first case asserting a right to same-sex marriage was decided against the plaintiffs in 1971.[185] It was not until 2003, however, that Massachusetts became the first state to recognize same-sex marriage.[186] Under prevailing Supreme Court precedent, if after decades of litigating, lobbying, enduring mistreatment, and conducting public educational campaigns, a despised class finally secures some legislative victories, this class suddenly loses its politically powerless status. This standard, however, obscures the historical timeline in which these victories occurred. Court doctrine focuses only on the increasingly egalitarian present-day situation, rather than considering the "distance travelled" by the group in order to achieve basic civil rights.[187]

---

181. Levy, *supra* note 20, at 42 ("It is hard to see how complete political powerlessness could be a requirement in light of *Frontiero* and *Craig v. Boren*, insofar as women make up at least half of the voting population. Yet in *Cleburne*, the Court pointed to the existence of some political power (for example, the lack of complete political powerlessness) as one reason to reject heightened scrutiny for classifications based on developmental disabilities.") (internal footnote omitted).

182. *Id.* (noting contradiction between *Cleburne* and sex discrimination cases); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 467 (1985) (Marshall, J., concurring in the judgment) ("Moreover, even when judicial action *has* catalyzed legislative change, that change certainly does not eviscerate the underlying constitutional principle. The Court, for example, has never suggested that race-based classifications became any less suspect once extensive legislation had been enacted on the subject.").

183. Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010) ("The gay tipping point raises the question of whether gay individuals are still a politically powerless minority deserving of judicial protection in this country.").

184. *See* Cain, *supra* note 113, at 1580.

185. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2176 (2002) (citing Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971)) (discussing the first same-sex marriage litigation), *appeal dismissed*, 409 U.S. 810 (1972).

186. Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003). In 1993, the Hawaii Supreme Court held that the state's prohibition of same-sex marriage required a strict scrutiny analysis. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993). On remand, the trial court held that the prohibition violated the state constitution. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Ct. App. Dec. 3, 1996). Voters, however, passed a constitutional amendment allowing the legislature to define marriage in opposite-sex terms, which abrogated the court ruling. HAW. CONST. art. I, § 23 ("The Legislature shall have the power to reserve marriage to opposite-sex couples.").

187. *See* Garrard, *supra* note 174, at 108.

3. Inconsistent Application

The Court inconsistently applies the political powerlessness factor. For example, the Court requires some groups to prove that they lack political power before they can receive judicial solicitude, but other classes do not have to meet this standard. Because the Court has shifted from a suspect class to a suspect classification standard, politically powerful groups receive the same level of scrutiny for their equal protection claims as politically vulnerable groups.[188] Thus, race does not politically marginalize whites, but when whites allege equal protection violations, the Court applies strict scrutiny.[189]

This shifting use of process theory has led to unprincipled outcomes in equal protection litigation. The Court has extended its highest level of protection to historically advantaged classes, but it has concluded that several historically disadvantaged groups should wage their battles for equality in the political process.[190] The Court, for example, consistently applies strict scrutiny to racial discrimination claims asserted by whites.[191] The Court, however, has held that equal protection claims by the poor, elderly, and mentally disabled trigger only rational basis review.[192] And while the Court has not applied the suspect class doctrine to gay and lesbian equal protection claims, several state and lower federal courts have found that gays and lesbians do not constitute a suspect class.[193] Many of these rulings have turned on courts finding that gays and lesbians possess political power.[194]

The next Part of this Article considers alternatives to the current situation. First, it examines legal scholarship and recent precedent that responds to the Court's vague and inconsistent equal protection doctrine. It then discusses some of the limitations and problems with these emerging theories. Finally, the next Part will contribute to the emerging political power discussion by suggesting two alternative approaches that could inform a new equal protection doctrine.

188. *See supra* text accompanying notes 94–98.
189. *See supra* text accompanying notes 94–95.
190. *See supra* text accompanying notes 73 and 88.
191. *See supra* text accompanying notes 94–95.
192. *See* sources cited *supra* note 101.
193. *See supra* text accompanying notes 137–164.
194. *See supra* text accompanying notes 149–169.

IV. A NEW EQUAL PROTECTION DOCTRINE

A. Emerging Scholarly and Juridical Alternatives to the Court's Discussion of Equal Protection

The Supreme Court has never decided whether gays and lesbians constitute a quasi-suspect or suspect class. Nevertheless, several state and lower federal courts have examined this question.[195] These cases have involved challenges to many state and federal policies, including prohibitions of same-sex marriage and the Defense of Marriage Act.[196]

The growing importance of the issue of political powerlessness in contemporary equal protection cases—especially those adjudicating claims of antigay discrimination—has recently led many scholars to produce works on the subject. The works of these scholars and the rulings of federal and state courts offer new ways of thinking about gay and lesbian equal protection claims and generally about reforming Court doctrine interpreting the Equal Protection Clause.

This Part analyzes the emerging judicial and scholarly analysis of political powerlessness and equal protection. Although this body of precedent and scholarship offers potential doctrinal improvements, some of the positions that scholars and courts advance suffer from weaknesses as well. After summarizing these developments and analyzing how they fall short of providing a workable substitute for the Court's problematic suspect class doctrine, this Part will discuss additional matters that could inform the development of a new theory of equal protection.

1. Discounting the Relevance of Political Powerlessness

The supreme courts of Connecticut and Iowa have held that denying same-sex marriage to gay and lesbian individuals violates those states' constitutions.[197] Although the cases turned on the meaning of state law, both courts followed Supreme Court precedent to decide the case.[198] These courts, however, addressed and sought to overcome many of the weaknesses associated with the Court's suspect class doctrine, including its ambiguous and narrow definition of political powerlessness.

The Connecticut and Iowa courts attempted to overcome the limitations of Supreme Court precedent by deemphasizing the relevance of political

195. *See supra* text accompanying notes 137–184.

196. *See supra* text accompanying notes 137–164.

197. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

198. *See* sources cited *supra* note 15.

powerlessness to the suspect class doctrine. If political powerlessness is not a prerequisite for heightened scrutiny, then the purported political power of gays and lesbians would not preclude courts from giving the class judicial solicitude. This logic guided both courts.

In *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court held that "immutability and minority status or political powerlessness were subsidiary to the first two primary factors" of relevance and history of discrimination.[199] To justify this conclusion, the court found that the Supreme Court extended "quasi-suspect" status to women, even though they are not a "minority or truly politically powerless."[200] *Kerrigan* also observed that the Court has applied strict scrutiny in racial discrimination cases and in cases involving discrimination against non-marital children without examining whether the affected classes lack political power.[201]

Kerrigan found that Supreme Court doctrine "invariably has placed dispositive weight" on a group's history of discrimination and the relevance of the trait that disadvantages the class.[202] Thus, in *Lyng v. Castillo*, the Supreme Court found that close relatives were not a quasi-suspect class because they have not experienced a history of discrimination.[203] *Kerrigan* also found that in *Cleburne*, the Court's decision against treating mentally disabled individuals as a quasi-suspect class turned on the relevance of mental disability for social policy.[204] Furthermore, *Kerrigan* found that the elderly did not qualify as a suspect class in Court precedent due to the relevance of age.[205]

The Iowa Supreme Court reached a similar conclusion in *Varnum v. Brien*.[206] Although the court included political powerlessness on a list of factors that are relevant to a suspect class analysis, it determined that this factor, along with immutability, merely "supplement[s] the analysis as a means to discern whether a need for heightened scrutiny exists."[207] *Varnum*, like *Kerrigan*, described a history of discrimination and relevance as "critical" and as "prerequisites" for finding that a group constitutes a suspect or quasi-suspect class.[208]

---

199. *Kerrigan*, 957 A.2d at 427.

200. *Id.* at 428.

201. *Id.* at 428 & n.21.

202. *Id.* at 427.

203. Lyng v. Castillo, 477 U.S. 635 (1986); *see also Kerrigan*, 957 A.2d at 428 n.21 (citing *Lyng*, among other cases). *Kerrigan* misinterprets *Lyng*. *See infra* text accompanying notes 265–69.

204. *Kerrigan*, 957 A.2d at 426.

205. *Id.* at 427.

206. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

207. *Id.* at 889.

208. *Id.*

Varnum borrowed substantially from *Kerrigan*. *Varnum*, like *Kerrigan*, interpreted Brennan's opinion in *Frontiero* as advocating suspect class status to women, even though they were not politically powerless.[209] *Varnum* also held that if political powerlessness were relevant to the suspect class doctrine, blacks would not qualify for strict scrutiny:

> By one measure—occupation of public office—the political power of racial minorities is unbounded in this country today. This fact was on display January 20, 2009, when Barack H. Obama, the African-American son of a native Kenyan, was inaugurated as the forty-fourth President of the United States of America.[210]

The Second Circuit also downplayed the relevance of political powerlessness in *Windsor v. United States,* which held that the Defense of Marriage Act violates the Equal Protection Clause.[211] Although the court considered political powerlessness a factor when applying the suspect class doctrine, it held that this element was "not strictly necessary."[212]

Within legal scholarship, William Eskridge provides the most extended argument that plaintiffs need not demonstrate political powerlessness in order to qualify for quasi-suspect status.[213] Eskridge's arguments closely mirror the analyses in *Kerrigan* and *Varnum*. Eskridge argues that the Court has only treated three factors as essential to the suspect class doctrine: whether the class is "a coherent social group," whether the group has endured a "history of state discrimination," and whether the trait that makes the class vulnerable to discrimination "generally does not contribute to legitimate public policies."[214] Eskridge, like the Connecticut and Iowa supreme courts, relegates immutability and political powerlessness to secondary status.[215]

Eskridge offers several justifications for his position. First, Eskridge argues that in 1984, the Court did not mention political powerlessness as a reason for applying strict scrutiny in *Palmore v. Sidotti*, a case that invalidated a family court custody decision that catered to societal racial stereotypes.[216] Eskridge contends that it would have been "out of line" to suggest that blacks lacked political power in 1984: "Not only had racial minorities persuaded Congress, a generation earlier, to adopt the Civil

---

209. *Id.* at 894.

210. *Id.* at 894 n.21.

211. 699 F.3d 169 (2d Circuit 2012).

212. *Id.* at 181, 188.

213. *See generally* Eskridge, *supra* note 13.

214. *Id.* at 10.

215. *Id.* ("As far as I can tell, immutability and political powerlessness never have made a difference in the Court's ultimate determinations.").

216. 466 U.S. 429 (1984); *see* Eskridge, *supra* note 13 at 11 (discussing *Palmore*).

Rights Act of 1964 and the Voting Rights Act of 1965, but by 1984, racial minorities were benefitting from race-based preferences in federal legislation."[217]

Eskridge also argues that Court doctrine regarding affirmative action demonstrates the irrelevance of political powerlessness to the suspect class doctrine.[218] Because the Court applies strict scrutiny to whites' claims of racial discrimination, then political powerlessness cannot operate as a prerequisite to heightened or strict scrutiny.[219]

Sex discrimination and the status of women also influence Eskridge's analysis. He argues that the application of intermediate scrutiny in sex discrimination cases proves the irrelevance of political powerlessness.[220] Following the analysis in *Kerrigan* and *Varnum*, Eskridge contends that women do not lack political power and that Brennan's opinion in *Frontiero* demonstrates the irrelevance of political vulnerability to the suspect class doctrine.[221] Furthermore, Eskridge contends that because the Court first applied intermediate scrutiny to a sex discrimination claim in *Craig v. Boren*, a case with male plaintiffs, political powerlessness must have no bearing on the application of heightened scrutiny.[222]

Echoing the analysis in *Kerrigan* and *Varnum*, Eskridge also asserts that history of discrimination and relevance of the stigmatized trait are the only essential factors in a determination to apply heightened scrutiny.[223] Eskridge observes that in *Lyng*, the Court concluded that "close relatives" do not constitute a suspect class because the trait has not been a longstanding source of discrimination.[224] Furthermore, he contends that in *Massachusetts Board of Retirement v. Murgia*, the Court found that the elderly do not qualify for heightened scrutiny solely on the grounds that age is socially relevant and because the class has not suffered from sustained historical discrimination.[225] These arguments perfectly track the reasoning in *Kerrigan* and *Varnum*.[226]

Eskridge has a more difficult time fitting *Cleburne* into his analysis. The Court applied rational basis review after finding that mental disability was a relevant trait and that the class failed to demonstrate political

217. *See* Eskridge, *supra* note 13, at 11.

218. *Id.* at 12 ("If political powerlessness was a requirement for strict scrutiny, almost all of these affirmative action cases were wrongly decided.").

219. *See id.*

220. *Id.*

221. *Id.*

222. *Id.* at 12–13 ("At almost half of the population, and by far the wealthier half, men are far from politically powerless.").

223. *Id.* at 13.

224. *Id.*

225. *Id.*

226. *See supra* text accompanying notes 199–205 (*Kerrigan*) and 206–210 (*Varnum*).

powerlessness.[227] Eskridge consciously struggles with the reasoning in *Cleburne* and concedes that he is not sure "how to characterize" the decision.[228] Despite these reservations, Eskridge argues that *Cleburne* cannot mean that groups must demonstrate political powerlessness to qualify for heightened scrutiny. Although the Court explicitly considers political powerlessness in *Cleburne*, Eskridge contends that this aspect of the ruling has probably been overruled by subsequent affirmative action precedent that applies strict scrutiny to whites' equal protection claims.[229]

Finally, Eskridge departs from his doctrinal analysis and makes an argument grounded in legal realism. Eskridge observes that political powerlessness is irrelevant to the suspect class doctrine because the Court has never applied intermediate or strict scrutiny when state action discriminates against classes that completely lack political power.[230] Instead, classes can only persuade the Court to provide them solicitude after they have amassed enough power to convince politicians and the public that the type of discrimination they face is improper. Groups that lack political power altogether would not obtain favorable results with the Court. Because judicial decision-making often rests on majoritarian beliefs, classes that do not have the resources to influence the political process are the very parties who will fail to receive judicial solicitude.

2. *Rational Basis with a Bite*

In *Romer v. Evans*, the Court held that Colorado Amendment 2 violated the Equal Protection Clause.[231] The Court, however, never considered whether gays and lesbians constitute a suspect or quasi-suspect class. Instead, the Court held that Amendment 2 could not survive rational basis review.[232]

Romer applied a more rigid version of rational basis review.[233] The Court placed its decision within a line of cases which hold that a "bare . . . desire to harm a politically unpopular group" is patently

227. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 443 (1985).

228. Eskridge, *supra* note 13, at 14.

229. *Id.*

230. *Id.* at 17–19.

231. Romer v. Evans, 517 U.S. 620, 635–36 (1995).

232. *Id.* at 632.

233. *Id.* at 632–33; Michael Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1343–44 (2011) (citing Lawrence v. Texas, 539 U.S. 558, 577–78 (2003)) (observing that "the Supreme Court . . . has applied a kind of rational basis scrutiny 'with bite' in cases involving gay rights"); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005); Steven P. Wieland, Note, *Gambling, Greyhounds, and Gay Marriage: How the Iowa Supreme Court Can Use the Rational-Basis Test to Address* Varnum v. Brien, 94 IOWA L. REV. 413, 436–37 (2008).

irrational.[234] Similarly, in *Romer*, the Court ruled that Amendment 2 violated the Constitution because it expressed "animus" against gays and lesbians.[235]

Although rational basis review is traditionally the Court's most deferential analysis, several legal scholars have attempted to justify a more stringent version. Daniel Farber and Suzanna Sherry, for example, persuasively argue that when state action relegates a class of people to the status of "pariahs," it cannot withstand rational basis review.[236]

Romer has influenced other decisions as well. Justice O'Connor, for example, utilized the animus doctrine in her concurring opinion in *Lawrence v. Texas*.[237] *Lawrence* invalidated a Texas statute that criminalized same-sex sodomy.[238] The Court held that the law deprived gays and lesbians of due process.[239] Justice O'Connor agreed that the law violated the Constitution, but she argued that it denied equal protection to gays and lesbians.[240] Applying the animus doctrine recognized in *Romer*, O'Connor argued that the statute was irrational because it criminalized gay and lesbian status.[241]

Furthermore, in *United States v. Windsor* the Court held that DOMA violates the Equal Protection Clause.[242] Although the Second Circuit held that gays and lesbians constitute a quasi-suspect class, the Court abandoned that analysis. Instead, the Court held that the "avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[243] In other words, Congress enacted DOMA in order to express animus against gays and lesbians. This purpose fails rational basis review.

---

234. *See Romer*, 517 U.S. at 634 ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973))).

235. *Id.* at 632.

236. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT 257, 266 (1996) ("To be a pariah is to be shunned and isolated, to be treated as if one had a loathsome and contagious disease. The message is that outcasts are not merely inferior; they are not fully human, and contact with them is dangerous and degrading."); *see also* Akhil Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203 (1996).

237. 539 U.S. 558 (2003) (O'Connor, J., concurring in the judgment).

238. *Id.* at 578.

239. *See generally id.*

240. *Id.* at 579.

241. *Id.* at 584 (citing *Romer* as authority); *id.* at 585 ("A law branding one class of persons as criminal based solely on the State's moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.").

242. 133 S. Ct. 2675, 2695–96 (2013).

243. *Id.* at 2693.

B. Critiquing Emerging Discourse

The emergent equal protection discourse has rightfully criticized Court doctrine for its inconsistency and vagueness. Nonetheless, these new theories also fall short in several ways. In particular, discounting the relevance of political powerlessness ignores how scholars and courts have traditionally interpreted the Equal Protection Clause. Discarding political powerlessness could also negatively impact other protected classes. In addition, while current doctrine legitimizes the animus rationale, use of this precedent does not lead to fairly predictable results. Furthermore, these new approaches often employ narrow definitions of political powerlessness—a flaw that also weakens the Court's suspect class doctrine.

1. Problems Associated with Discarding of Political Powerlessness

a. Strained or Incorrect Interpretation of Doctrine

Arguments that discount or deemphasize the relevance of political powerlessness in a suspect class analysis suffer from several flaws. First, these arguments rest on strained and contradictory interpretations of the Court's doctrine. For example, Eskridge argues that application of strict scrutiny in race-based affirmative action cases and intermediate scrutiny to sex discrimination claims brought by men proves that political powerlessness is not an essential part of the suspect class doctrine.[244] On the other hand, Eskridge argues that a history of discrimination and relevance is critical to such a discussion.[245] These conclusions, however, contradict one another. If the application of strict scrutiny to whites' equal protection claims proves the irrelevance of political powerlessness to the suspect doctrine, then it also demonstrates that a history of discrimination is insignificant as well. Whites do not have a history of racial discrimination, but they still receive strict scrutiny of their racial discrimination claims.[246] Eskridge's logic compels the conclusion that political powerlessness *and* a history of discrimination are immaterial to the suspect class doctrine.

Also, opinions and scholarship that dismiss the doctrinal significance of political powerlessness misread *Frontiero*. Brennan argued that the Court should apply strict scrutiny to claims brought by women.[247] Eskridge, following *Varnum* and *Kerrigan*, argues the Brennan's conclusion

244. Eskridge, *supra* note 13, at 12–13.
245. *Id.* at 11.
246. *See supra* note 95 and accompanying text.
247. Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

demonstrates the insignificance of political vulnerability to the suspect class doctrine.[248] In support of this conclusion, *Kerrigan*, *Varnum*, and Eskridge contend that Brennan conceded that women do not lack political power.[249] This reading of *Frontiero* is misleading.

Frontiero indeed states that "women do not constitute a small and powerless minority."[250] But *Varnum*, *Kerrigan*, and Eskridge take this language out of its full context in order to suggest the insignificance of political powerlessness. The complete passage in *Frontiero* states that:

> It is true, of course, that *when viewed in the abstract*, women do not constitute a small and powerless minority. *Nevertheless*, in part because of past discrimination, women are vastly underrepresented in this Nation's decisionmaking councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government.[251]

Contrary to recent assertions in scholarship and case law, Brennan does not contend that women are politically powerful. While it might appear that women are powerful in the abstract, this view is disproved by the reality of sexist discrimination. Due to past discrimination and other factors, women lack political power, as their vast underrepresentation in state and federal leadership positions demonstrates.

While Brennan does not say that women are completely devoid of political power, he rejects a superficial examination of women's political strength that only considers their demographic majority or the recent enactment of legislation that prohibits sex discrimination. The absence of women in positions of power within the state and federal government also determines the amount of power they possess.

Brennan also treated political powerlessness as a part of the suspect class doctrine in two additional cases. He authored the opinion for the Court in *Plyler v. Doe*, which invalidated a Texas law that denied free

248. Eskridge, *supra* note 13, at 12.

249. *Id.* ("Although Justice Brennan mentioned that women still were discriminated against and underrepresented in the political arena, his opinion suggested that however 'underrepresented' women were in the halls of Congress, they were far from 'politically powerless' in the 1970s."); Varnum v. Brien, 763 N.W.2d 862, 894 (Iowa 2009) (citing *Frontiero*, 411 U.S. at 685–88 & n.17) (arguing that "females enjoyed at least some measure of political power when the Supreme Court first heightened its scrutiny of gender classifications"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 428 (Conn. 2008) (citing *Frontiero*, 411 U.S. at 686 n.17) (arguing that the Court "has accorded quasi-suspect status to a group that had not been a minority or truly politically powerless").

250. *Frontiero*, 411 U.S. at 686 n.17.

251. *Id.* (emphasis added).

public education to undocumented children.[252] *Plyler* listed the factors that determine whether a class deserves heightened or strict scrutiny. This list includes: the enactment of legislation that reflects "deep-seated prejudice"; whether the law is "irrelevant to any proper legislative goal"; and "[f]inally," whether the group has "historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[253] Rather than discounting political powerlessness as a factor, Brennan placed it at the center of analysis, just like history of discrimination and relevance.

In *Plyler*, Brennan also found that undocumented status *is relevant* for legislators to consider.[254] *Kerrigan*, *Varnum*, and Eskridge, however, contend that a trait's social irrelevance constitutes a strict prerequisite for heightened scrutiny. Yet, in *Plyler*, the Court applies intermediate scrutiny to the equal protection claim of undocumented children. Rather than treating the class as a suspect or quasi-suspect class, however, the Court applies a more demanding level of scrutiny due to the importance of education to the economic and psychological well-being of these children and their inability to control their undocumented status.[255]

Brennan also considered political powerlessness in *Rowland v. Mad River Local School District*.[256] In *Rowland*, Brennan, along with Justice Marshall, dissented from the denial of certiorari in a case that challenged the constitutionality of firing a public school teacher solely on the basis of her bisexual status.[257] Brennan argued that the case raised important "constitutional questions," including whether the discharge violated the Equal Protection Clause.[258] Brennan argued, in part, that gays and lesbians constitute a "significant and insular minority."[259] This formulation comes from footnote four of *Carolene Products*, which is one of the most cited cases for political process theory.[260] *Frontiero*, *Plyler*, and *Rowland* all lead to the conclusion that Brennan (and the Court) has considered political powerlessness relevant to the suspect class doctrine and to the application of heightened scrutiny.

---

252. Plyler v. Doe, 457 U.S. 202 (1982).

253. *Id.* at 216–17 n.14 (quoting San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

254. *Id.* at 219 n.19 ("In addition, it could hardly be suggested that undocumented status is a 'constitutional irrelevancy.'"); *id.* at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal.").

255. *Id.* at 223–24 (demanding "substantial" justification for a law that "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status").

256. 470 U.S. 1009 (1985).

257. *Id.*

258. *Id.* at 1014.

259. *Id.*

260. *See supra* notes 51–53 and accompanying text.

Arguments that dismiss the relevance of political powerlessness in Court doctrine also rest on questionable interpretations of *Murgia*. The Court clearly denied heightened scrutiny to the elderly after finding that they have not suffered from a "history of purposeful unequal treatment or been subjected to unique disabilities on the basis of [an irrelevant trait]."[261] But this holding alone does not negate the importance of political powerlessness. First, *Murgia* listed political powerlessness as a factor that impacts a suspect class analysis.[262] Furthermore, the Court also found that the elderly did not constitute a suspect class because the class was not a "'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.'"[263] The Court instead found that "[old age] marks a stage that each of us will reach if we live out our normal span."[264]

Other cases cited to support the irrelevance of political powerlessness do not substantiate this contention. *Kerrigan*, for example, observed that the Supreme Court's ruling in *Lyng v. Castillo*[265] supported the conclusion that if a class cannot demonstrate a history of discrimination or relevance, then "its claim to suspect or quasi-suspect class status invariably has been rejected without regard to the extent of its political power."[266] Eskridge cites *Lyng* for a similar proposition.[267] *Lyng*, however, does not stand for this proposition. Instead, the Court refused to apply heightened scrutiny in *Lyng* for multiple reasons, namely, that close relatives "have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority *or politically powerless*."[268]

In addition to the foregoing precedent, legal scholars and courts have overwhelmingly treated political powerlessness as a significant factor in the suspect class doctrine.[269] Recent judicial opinions and legal scholarship that

---

261. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (internal quotation marks omitted).

262. *Id.* at 313 ("[A] suspect class is one '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.'" (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))).

263. *Id.* (internal citation omitted) (quoting United States v. Carolene Products, 304 U.S. 144, 152–53 n.4 (1938)).

264. *Id.* at 313–14.

265. 477 U.S. 635 (1986).

266. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 428 n.21 (Conn. 2008).

267. Eskridge, *supra* note 13, at 13 ("Thus, in *Lyng v. Castillo*, the Court ruled that the food stamp program's exclusion of 'close relatives' from households was not subject to strict scrutiny, primarily because that classification has not been applied in an oppressive way in the past.").

268. *Lyng*, 477 U.S. at 638 (emphasis added).

269. *See, e.g.*, Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1686–87 (2000); Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 942 (2010); Levy, *supra* note 20, at 38–39; Osagie K. Obasogie, *Can the Blind Lead the Blind? Rethinking Equal Protection Jurisprudence Through an Empirical Examination of Blind People's Understanding of Race*, 15 U. PA. J. CONST. L. 705, 718

discount the relevance of political powerlessness fail to engage this literature and precedent. Calling into doubt this voluminous scholarship and precedent requires more than a strained and incomplete reading of Court doctrine.

Eskridge makes a final point about the relationship between political powerlessness and the suspect class doctrine that is somewhat persuasive. He contends that groups that lack political power in the "deepest" meaning of the word will never qualify for heightened scrutiny.[270] Eskridge observes that racial and sex discrimination did not become suspect categories until blacks and women had enough power to convince the Court and society that racism and sexism were inconsistent with equality.[271] Thus, cultural judgments, rather than legal abstraction alone, determine whether state action derives from prejudice or rational processes.[272]

Although he does not consider the following explanation, Eskridge's argument that the Court makes cultural judgments about the appropriateness of certain forms of discrimination is quite plausible. Numerous social scientists have produced empirical studies that demonstrate that Court rulings tend to mirror known public opinion. This finding holds true even in civil rights cases, although many people tend to view the Court as a guardian of minority interests.[273] Accordingly, unless disadvantaged classes can convince the larger culture, and thus the Court, that the discrimination they face offends broader notions of equality, these groups will not receive judicial solicitude. Undoubtedly, a group's ability to affect cultural norms and popular opinion is a function of its political power.

That the Court follows cultural norms when it decides equal protection cases, however, does not remove political powerlessness from the list of *formal factors* that courts apply in a suspect class analysis. Instead, equal protection precedent and legal scholarship make it abundantly clear that judges have often considered a group's political vulnerability in order to decide whether the group constitutes a suspect class. That women and people of color successfully labored to modify public and judicial opinion regarding sexism and racism does not mean that these groups are politically powerful in the sense that they no longer suffer abuses in the political process. Instead, it means that the power they have, though sufficient to

---

(2013); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 34; Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1408 (2010); Yoshino, *supra* note 12, at 565; *see also supra* text accompanying notes 55–91 (discussing case law considering political powerlessness).

270. Eskridge, *supra* note 13, at 17.

271. *Id.* at 18–19.

272. *Id.* at 19.

273. *See* Hutchinson, *supra* note 31.

bring about some remedial measures, does not immunize them from mistreatment.

Finally, the application of strict scrutiny in equal protection cases brought by whites or intermediate scrutiny in cases filed by men does not prove the insignificance of political powerlessness. First, numerous scholars and judges have criticized the Court's affirmative action jurisprudence precisely because it treats race-based remedies as presumptively unconstitutional.[274]

Furthermore, in sex discrimination cases, a majority of the Court first applied intermediate scrutiny in *Craig v. Boren*—a case that sustained an equal protection challenge brought by male plaintiffs.[275] *Craig*, however, does not negate the significance of political powerlessness in the suspect class doctrine. It is important to consider the complete history surrounding *Craig* and the elevation of sex to a quasi-suspect classification. For over a century, women had lobbied state legislatures and Congress for civil rights measures. Women had also challenged commonly-held cultural beliefs about the role of the sexes in society.[276] Yet, the Court did not invalidate a law that discriminated against women until it decided *Reed v. Reed* in 1971.[277] Although the Court did not elevate sex to a protected category, it applied a rather strong version of rational basis.[278]

When the Court decided *Reed*, the Civil Rights Movement had already successfully lobbied for the enactment of laws that required formal racial equality in numerous policy settings. Furthermore, the Women's Rights Movement was becoming far more influential and important among lawmakers, judges, and the public.[279] By the time the Court decided *Frontiero* in 1976, the Equal Rights Amendment was pending in the states, and Congress had passed several laws that prohibited discrimination on the basis of sex.[280] And while a majority of the Court could not agree on a

274. *See, e.g.*, Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 22 (1995) (questioning the application of strict scrutiny to affirmative action policies); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 387–402 (1978) (Marshall, J., concurring in part) (criticizing the Court for applying strict scrutiny in affirmative action case).

275. 429 U.S. 190 (1976).

276. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1358–1414 (2006) (discussing long history of social movement advocacy contesting subordination of women).

277. 404 U.S. 71 (1971).

278. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1024 (1986) ("In *Reed v. Reed*, the Court purported to use rational basis scrutiny in striking down an Idaho statute that provided a mandatory preference for males over females in the selection of the administrators of estates, but the Court actually applied a heightened level of scrutiny.") (internal footnote omitted).

279. Siegel, *supra* note 276, at 1376–77 (discussing accomplishments of Women's Rights Movement during 1960s).

280. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 311 (2001).

reason to invalidate the sexist law in *Frontiero*, the plurality would have applied strict scrutiny, and the concurring judges would have applied the stronger version of rational basis that the Court used in *Reed*.[281]

Thus, *Reed* and *Frontiero* demonstrate that the Court had already begun shifting its views on the permissibility of sex discrimination when it decided *Craig*. Because the Women's Rights Movement greatly influenced the country's political culture and its elite institutions, the decisions in these cases did not stray dramatically from mainstream public opinion.[282] It is true that when the Court finally settled on intermediate scrutiny in *Craig*, men were the plaintiffs. But this fact does not necessarily mean the suspect class doctrine had become judicially irrelevant in *Craig*. Instead, a more plausible reading of *Craig* suggests that the Court had already moved towards a heightened standard for sex discrimination in *Reed* and *Frontiero*. Indeed, the Court's decision to apply intermediate scrutiny in *Craig* rests primarily upon the history of sex discrimination that women have endured.[283] The Oklahoma statute invalidated in *Craig*, however, invidiously discriminated in favor of women, rather than remedying past discrimination against them.[284] If the law served a benign purpose, the Court might have applied ordinary rational basis review. Subsequent to *Craig*, however, the Court has utilized the same problematic suspect *classification* doctrine that it applies in racial discrimination cases.

b. Acquiescing in the Assumption of Gay and Lesbian Power

Finally, retreating from the political powerlessness requirement suggests that courts and scholars have acquiesced in the assumption that gays and lesbians are a powerful class. One of the most persistent and harmful stereotypes portrays gays and lesbians as a wealthy, powerful, and well-educated class. Gays and lesbians use their power to dominate the political process. Gays and lesbians, therefore, do not deserve judicial solicitude. On the contrary, they have the full attention of lawmakers.[285] Furthermore, when political majorities enact or support measures that

281. *See* Frontiero v. Richardson, 411 U.S. 677, 689 (1973) (applying strict scrutiny); *id.* at 691 (Stewart, J., concurring in the judgment) (applying the *Reed* standard); *id.* at 692 (Powell, J., concurring in the judgment) (applying the *Reed* standard).

282. *See* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 32–36 (2005) (discussing social movement strategy of influencing public and elite opinion).

283. Craig v. Boren, 429 U.S. 190, 198–99 (1976) (discussing precedent invalidating policies that rest on archaic stereotypes of women).

284. *Id.* at 198 n.6 (distinguishing Oklahoma statute from laws upheld in previous cases that remedied discrimination against women).

285. Schacter, *supra* note 24, at 291–94.

disadvantage gays and lesbians, this is simply the product of representative democracy rather than animosity or prejudice.[286]

Countermovements to gay and lesbian rights have frequently disparaged as special rights any policy that prohibits discrimination on the basis of sexual orientation. For example, during the political mobilization to pass Colorado Amendment 2, a conservative organization created and distributed a video called *Gay Rights/Special Rights*, which described gays and lesbians as a powerful class that does not suffer from subordination.[287] Justice Scalia used this stereotype to describe gays and lesbians in his dissent in *Romer v. Evans*:

> The problem (a problem, that is, for those who wish to retain social disapprobation of homosexuality) is that, because those who engage in homosexual conduct tend to reside in disproportionate numbers in certain communities, have high disposable income, and, of course care, about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide. Quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.[288]

Justice Scalia argued that the passage of Amendment 2 did not evince hatred of gays and lesbians. Instead, voters who favored the amendment simply wanted to restore the moral status quo in the state against the efforts of a powerful interest group to reshape the laws to its own advantage through the enactment of special rights.[289]

Justice Scalia's comments closely follow the political rhetoric used to contest civil rights measures for gays and lesbians. Compare, for example, Justice Scalia's dissenting opinion in *Romer* with a 1993 statement delivered by the Christian Coalition of Hawaii to the state senate during debates over same-sex marriage:

---

286. *See* Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) ("[H]omosexuals are as entitled to use the legal system for reinforcement of their moral sentiments as is the rest of society. But they are subject to being countered by lawful, democratic countermeasures as well."). The trial court in the *Romer* case made a similar argument. *See* Evans v. Romer, Civ. A. No. 92 CV 7223, 1993 WL 518586, at *12 (Colo. Dist. Ct. Dec. 14, 1993) ("Because the gay position has been defeated in certain elections, such as Amendment 2, does not mean gays are particularly politically vulnerable or powerless. It merely shows that they lost that election.").

287. Schacter, *supra* note 24, at 292; Hutchinson, *supra* note 24, at 1375.

288. *Romer*, 517 U.S. at 645–46 (Scalia, J., dissenting) (internal citations omitted).

289. *Id.* at 647 ("[Amendment 2] put directly, to all the citizens of the State, the question: Should homosexuality be given special protection? They answered no. The Court today asserts that this most democratic of procedures is unconstitutional.").

> "While comprising less than 2% of the population, homosexuals do not constitute a discriminated minority but in reality are better educated with a higher level of income and are more politically sophisticated than the average population. In fact, they are a radical liberal special interest group using their political and economic clout to force their radical agenda on the majority of the population. Their agenda is not about civil rights, but an agenda for special prividges [sic] based upon sexual preference."[290]

Scalia's dissent sounds exactly like a political document against gay and lesbian rights.

As applied in the gay and lesbian context, the special rights rhetoric is fallacious because it assumes that gays and lesbians possess greater wealth than the general public. Several empirical studies, however, debunk the myth of gay and lesbian wealth. These studies show that gay or lesbian sexual identity negatively impacts employment opportunities and income.[291] Other studies show acute economic deprivation for many gays and lesbians.[292] For example, many studies find that well over 30 percent of homeless teenagers in large urban centers are gay or lesbian.[293] Family conflict over sexual orientation is a leading cause of homelessness among gay and lesbian youth.[294] These teens often turn to sex work and criminal behavior in order to survive.[295] Predictably, many of them also suffer from

---

290. Jonathan Goldberg-Hiller & Neal Milner, *Rights as Excess: Understanding the Politics of Special Rights*, 28 LAW & SOC. INQUIRY 1075, 1083 (2003) (quoting *Haw. House Judiciary Comm. Hearing on Same-Sex Marriage* (Haw. 1993) (statement of Rosemary Garciduenas, State Director of the Christian Coalition of Hawaii) (transcript available at Speech Collections, University of Hawaii Library, Honolulu)).

291. M.V. Lee Badgett, *The Wage Effects of Sexual Orientation Discrimination*, 48 INDUS. & LAB. REL. REV. 726 (1995) (finding gay and bisexual men earn less than heterosexual men, but results for lesbians not statistically consistent); Nathan Berg & Donald Lien, *Measuring the Effect of Sexual Orientation on Income: Evidence of Discrimination?*, 20 CONTEMP. ECON. POL'Y 394 (2002) (finding gay and bisexual men earn less than heterosexual men, but results for lesbians not statistically consistent); Dan A. Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449 (2003) (finding gay and bisexual men earn less than heterosexual men, but lesbians earn more than heterosexual women); Christopher S. Carpenter, *Revisiting the Income Penalty for Behaviorally Gay Men: Evidence from NHANES III*, 14 LABOUR ECON. 25 (2007) (finding lower income for gay men than heterosexual men).

292. Laura F. Redman, *Outing the Invisible Poor: Why Economic Justice and Access to Health Care Is an LGBT Issue*, 17 GEO. J. ON POVERTY L. & POL'Y 451 (2010) (discussing economic deprivation and LGBT individuals); *see also* RANDY ALBELDA ET AL., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2009), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

293. Ernst Hunter, *What's Good for the Gays Is Good for the Gander: Making Homeless Youth Housing Safer for Lesbian, Gay, Bisexual, and Transgender Youth*, 46 FAM. CT. REV. 543, 545 (2008).

294. *Id.*; *see also* Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 773, 774 (2002).

295. Hunter, *supra* note 293, at 545.

untreated mental illnesses, which can lead to substance abuse, alcoholism, and suicide.[296] They also suffer from physical abuse and are very susceptible to contracting HIV and other infections.[297] Many existing homeless shelters that offer services for youth are ill-prepared to address the special needs of this population.[298]

Other empirical studies have examined the impact of poverty, homophobia, and racism upon low-income gays and lesbians of color. For example, the rate of HIV and AIDS among black gay and bisexual men is the highest of any gay and bisexual demographic group.[299] The rate among Latino gay and bisexual men is also disproportionately high.[300] Some researchers attribute this higher rate of infection to emotional distress that results from exposure to multiple sources of disempowerment, such as racism, xenophobia, homophobia, and poverty.[301]

Although some gays and lesbians undoubtedly have wealth and power, the class as a whole suffers economic detriment due to societal discrimination. Many persons in the class, moreover, live in conditions of extreme deprivation. They are not politically powerful. Instead, they are a prime example of a powerless minority that needs protection from an abusive political process.

Rather than examining poverty and political powerlessness among gays and lesbians, many legal commentators and judges seek to discount the relevance of this factor in equal protection doctrine. Although this strategy might lead to temporary litigation success, it wastes the opportunity to document the suffering among the most marginalized gays and lesbians.

This strategy also risks ignoring the needs of poor gays and lesbians. Indeed, many scholars have questioned whether some of the interests that are most heavily pursued by gay and lesbian social movement

296. *Id.* at 545–46; *see also* Cochran, *supra* note 294, at 774–75.

297. Hunter, *supra* note 293, at 545.

298. *Id.* at 546–52.

299. *See HIV Among Gay and Bisexual Men*, CENT. FOR DISEASE CONTROL FACT SHEET, May 2012, at 1, *available at* http://www.cdc.gov/hiv/pdf/library_factsheet_HIV_among_GayBisexualMen.pdf ("Among all gay and bisexual men, blacks/African Americans bear the greatest disproportionate burden of HIV.").

300. *See HIV Among Latinos*, CENT. FOR DISEASE CONTROL FACT SHEET, Nov. 2011, at 1, *available at* http://www.cdc.gov/hiv/resources/factsheets/pdf/latino.pdf ("In 2009, Latino men who have sex with men . . . accounted for 81% . . . of new HIV infections among all Latino men and 20% among all MSM.").

301. Rafael M. Diaz, George Ayala & Edward Bein, *Sexual Risk as an Outcome of Social Oppression: Data from a Probability Sample of Latino Gay Men in Three U.S. Cities*, 10 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 255 (2004). Geography could also determine the extent to which gays and lesbians possess power. Although many gays and lesbians live in small cities and rural areas, they are not the subject of much academic research. More studies are necessary to document their experiences with subordination. *See* Emily Kazyak, *Disrupting Cultural Selves: Constructing Gay and Lesbian Identities in Rural Locales*, 34 QUALITATIVE SOC. 561 (2011).

organizations will actually benefit poor persons.[302] It is unclear, for example, how marriage or the lifting of the ban on gays and lesbians in the military will alleviate the plight of homeless youth or reduce the violence and sexual exploitation they endure. Furthermore, the connection between popular gay and lesbian social movement initiatives, on the one hand, and the needs of poor persons of color (who suffer from a lack of adequate healthcare and from the negative mental health consequences of racism, sexism, heterosexism, and poverty) on the other hand, is not readily discernible.[303]

c. *Validating Court's Hostility to Race-Based Remedies*

Treating political powerlessness as irrelevant to an equal protection analysis would also validate the Court precedent that treats race-based remedies with extreme suspicion. Presently, the Court shifts between two contradictory doctrines in equal protection cases. Although the Court has historically considered whether state action impermissibly burdens certain classes that lack power in the political process, today it polices the use of suspect classifications.[304]

The class-to-classification shift has led to the judicial invalidation of race-based remedial state action such as affirmative action, reverse racial gerrymandering, and primary school reassignments that seek to alleviate the racial isolation of students of color. Political powerlessness and process theory are irrelevant in these cases. When legal scholars argue that courts should formally discard consideration of political powerlessness in equal protection cases, they risk legitimizing Court doctrine that treats racially remedial policies as materially indistinct from Jim Crow laws and other forms of state-imposed racial hierarchy.

2. *Criticizing Rational Basis with Bite*

a. *Adds Another Tier to Equal Protection*

For several reasons, the application of a rigid rational basis review creates a very problematic equal protection doctrine. First, rational basis

---

302. *See, e.g.*, Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811 (1999) (discussing complexity of Latino/a identity by analyzing sexuality); Hutchinson, *supra* note 24, at 1368–72 (analyzing race and sexuality); Robinson, *supra* note 28 (arguing that dominant racial and class assumptions regarding gay men lead to inadequate and harmful policies for poor persons of color).

303. *See* Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, TUL. J.L. & SEXUALITY 31, 51 n.75 (1991); Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* LESBIANS, GAY MEN, AND THE LAW 401, 404 (William B. Rubenstein ed., 1993).

304. *See supra* text accompanying notes 125–136.

with a bite implicitly adds an additional tier to equal protection scrutiny.[305] While many commentators and jurists believe that the Court should abandon the tiered analysis altogether, the Court has made it even more complicated by creating stronger rational basis review, weaker and stronger versions of intermediate scrutiny, and, recently, flexible application of strict scrutiny.[306]

b. Unpredictable Results

Furthermore, the Court has not articulated a clear test for determining whether a policy reflects animus. In *Romer*, the Court concluded that Colorado voters supported Amendment 2 as a result of hostility to gays and lesbians.[307] To reach this conclusion, the Court considered the sweeping disability that the amendment imposed upon a small minority within the state.[308] This analysis, however, should not provide the only basis for determining whether a law stems from animus. For example, if Amendment 2 imposed narrower harms, but the law contained an antigay slur, certainly such language would constitute evidence of animus. Laws, however, rarely contain such explicit statements of hostility.[309] This fact makes the animus approach an incoherent and unpredictable alternative to strict and intermediate scrutiny.[310]

Rational basis with a bite diminishes the predictability of the doctrine because it widens the discretion that judges have with respect to equal protection cases. If the legitimacy of laws that discriminate on the basis of sexual orientation depends solely upon a finding that the law rests on animus towards gays and lesbians, then judges will have more

305. Smith, *supra* note 233, at 2774.

306. Grutter v. Bollinger, 539 U.S. 306, 328 (2003) (applying strict scrutiny, but holding that Court must "defer" to defendant's assessment of its educational mission); Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) ("While the Court invokes heightened scrutiny, the manner in which it explains and applies this standard is a stranger to our precedents."); Jill Elaine Hasday, *The Principle and Practice of Women's "Full Citizenship": A Case Study of Sex-Segregated Public Education*, 101 MICH. L. REV. 755, 771 n.75 (2002) (observing that numerous scholars contend the Court has elevated the standard in sex discrimination cases to strict scrutiny (citing many sources)); *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (advocating single standard for all equal protection cases); Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397 (1998) (criticizing proliferation of tiers in equal protection doctrine beyond the three formal standards).

307. Romer v. Evans, 517 U.S. 620, 632 (1996).

308. *Id.*

309. In *Windsor*, the Court held that DOMA expressed animus towards same-sex married couples because it deviated from Congress's traditional deference to states regarding the definition of marriage, deprives these couples of over 1,000 federal benefits, and because the legislative history and title of the statute demonstrate hatred toward these couples. *See* Windsor v. United States, 133 S. Ct. 2675, 2690–96 (2013).

310. Dorf, *supra* note 233, at 1344 (describing rational basis with a bite as an "unstable" alternative to intermediate scrutiny).

opportunities to uphold heterosexist state action. At the same time, judges could also use this wide discretion to strike down such measures. Consider, for example, the issue of adoption by same-sex couples. In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit upheld a Florida law that prohibited adoptions by "homosexuals."[311] Applying a very deferential version of rational basis review, the Court found that plaintiffs failed to demonstrate that Florida enacted the law due to animus against gays and lesbians.[312] The Court reasoned that the law was not a sweeping burden on gays and lesbians, like Amendment 2, and that the state's belief that children need opposite-sex parents was rational.[313]

By contrast, a Florida trial court subsequently found that the adoption ban violated the Equal Protection Clause.[314] The court applied rational basis review and rejected the same arguments that the Eleventh Circuit held constituted a legitimate basis for the law.[315] The Florida court found that the law was "illogical to the point of irrationality."[316]

c. *Avoiding a Critique of Heteronormativity*

In addition to making equal protection doctrine less predictable, the application of one of two versions of rational basis review in sexual orientation equal protection cases allows the Court to evade addressing the general question of whether heterosexism is consistent with the Constitution. Under the current approach, a law rooted in heterosexism and animus is unconstitutional. State action rooted in heterosexism without animus, however, is permissible. Some scholars might praise this flexible approach because it allows the political process to shape constitutional discourse related to sexual orientation.[317] In this setting, however, rational basis review ultimately means that the Court retains the power to validate most majoritarian policies that disadvantage gays and lesbians without examining whether heterosexism generally offends the Equal Protection Clause. When the impermissibility of heterosexist state action requires a finding of governmental animus, equal protection for gays and lesbians is theoretically and practically incomplete.

---

311. 358 F.3d 804, 827 (2004).

312. *Id.* at 826–27.

313. *Id.*

314. *In re* Adoption of Doe, 2008 WL 5006172, at *29 (Fla. Cir. Ct. Nov. 25, 2008).

315. *See generally id.*

316. *Id.* at *28 (Barkett, J., dissenting) (quoting Lofton v. Sec'y of the Dep't of Children and Family Servs., 377 F.3d 1275, 1293 (11th Cir. 2004)) (disagreeing with denial of en banc review).

317. *See* William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TUL. L. REV. 519, 537–39 (2005) (discussing the understanding of rational basis review as recognition of the Court's limited role in a democracy).

3. *Replicating Problematic Understanding of Political Power*

Some of the recent precedent and legal scholarship related to the suspect class doctrine also replicate the Court's narrow understanding of political powerlessness. *Kerrigan*, *Varnum*, and Eskridge describe women as politically powerful solely due to their numerical majority and the existence of laws that protect them from discrimination.[318] This conclusion, however, ignores the economic inequality associated with sex and the underrepresentation of women in offices of political power.

Eskridge argues that the Civil Rights Act of 1964 and the Voting Rights Act of 1965 demonstrate the political power of blacks.[319] But this view ignores the fact that the Fifteenth Amendment was ratified in 1870 and that large numbers of blacks in the South could not vote until nearly a century later.[320] Also, Congress only enacted these measures after decades of protests and very public and violent subjugation of blacks during and before the Civil Rights Movement. The 1960s civil rights legislation was not the product of the routine exertion of political power. Instead, a culmination of demonstrations, litigation, international affairs, violence, and grave personal sacrifices created these changes. Furthermore, the Court has recently weakened the Voting Rights Act on the grounds that fifty years of protection has obviated the need for federal monitoring of states and counties with the most egregious records of racism with respect to election laws.[321] Today, these remedies are "racial entitlements."[322] Similarly, the Iowa Supreme Court suggested that blacks no longer suffer political powerlessness because Barack Obama is President.[323] Obama's election does not alter the substantive inequality that blacks and other persons of color experience.[324] This type of reasoning does not provide a helpful solution for the problems associated with the Court's equal protection doctrine. Instead, this view of political power legitimizes the denial of civil rights and remedies for vulnerable populations.

---

318. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 428 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 894 (Iowa 2009); Eskridge, *supra* note 13, at 22.

319. Eskridge, *supra* note 13, at 11.

320. *See* U.S. CONST. amend. XV.

321. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

322. Scalia made this comment during oral arguments in *Shelby*. *See* Adam Liptak, *Voting Rights Law Draws Skepticism from Justices*, N.Y. TIMES, Feb. 28, 2013; *see also* Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV 917 (2008) (discussing characterization of race-based remedies as special handouts to blacks).

323. *Varnum*, 763 N.W.2d at 894 n.21.

324. Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1025 (2010) (dismissing the assumption that Obama's election demonstrates the end of racial subordination).

C. Repairing Equal Protection Doctrine

This Subpart of the Article suggests two possible alternatives that could help improve equal protection doctrine. The Court could create a more sophisticated definition of political powerlessness that reflects the multiple factors that cause political vulnerability. On the other hand, the Court could scrap the suspect class doctrine altogether and create a normative theory of equal protection. Political powerlessness, however, could remain an important factor in either of the two alternatives.

1. Rework Political Powerlessness

The Court's equal protection doctrine employs a vague and narrow definition of political powerlessness. The Court also inconsistently applies this doctrine. *Cleburne* epitomizes the narrowness of the Court's definition of political power. The existence of scattered legislation that benefits a class evinces its ability to defeat majoritarian mistreatment.[325] This is a terribly "coarse" view of political powerlessness.[326] In fact, if existing suspect and quasi-suspect classes had to satisfy this constrained formulation, they would all fail.[327] Although scholars have criticized the narrowness of *Cleburne*, only a few have offered a broader definition of political powerlessness.[328]

Although the size of a group could influence its political success, size alone does not offer a comprehensive accounting of political power. Large groups, like women, can suffer from political vulnerability; small groups, like wealthy white men, can possess power which greatly exceeds their numbers. And as Bruce Ackerman argued over two decades ago, a group that lacks a discrete or visible trait, such as gays and lesbians, might endure burdens in the political process because its members can opt out and deprive the class of a cohesive political voice.[329] Nevertheless, discreteness and insularity do not necessarily translate into political advantages. The social construction of race and ongoing racism, both conscious and unconscious, hinder the ability of persons of color to achieve many of their political goals.[330]

Political science scholarship related to power could help overcome the limitations of the current doctrine. Political scientists, as opposed to most

---

325. City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 445 (1985).

326. Yoshino, *supra* note 12, at 565.

327. *See Cleburne*, 473 U.S. at 467.

328. *But see* Yoshino, *supra* note 12, at 565–66.

329. *See* Ackerman, *supra* note 143.

330. Farber & Sherry, *supra* note 236; Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J 734, 773–88 (2008).

lawyers, have extensively studied how to define and measure power. Their scholarship provides many additional factors to consider when discussing a group's ability to create change in the political process. Contrary to the narrow understanding of power in legal scholarship and judicial opinions, political scientists consider wealth, public opinion, time and cost impediments, influence upon the media, prejudice, whether the group fails to mobilize because it has been conditioned for political losses, and if prior changes have actually resulted in the advancement of the interests of elites—rather than the betterment of the class.[331] This expanded list of factors should inform equal protection analysis.

2. *Beyond the Suspect Class Doctrine: Normative Theory*

A more difficult path could lead to the elaboration of a normative theory of equal protection. Although the Equal Protection Clause is expressed in general terms, the Court's judicial review power includes the authority to "say what the law is."[332] Since the demise of *Lochner* and the settling of the New Deal standoff between President Roosevelt and the judiciary, the Court has attempted to allay the concerns of critics who believe judicial review is inconsistent with democracy.[333]

Political process theory, however, does not successfully avoid the antidemocracy critiques of judicial review. Although process theory facially polices only the political process, it offers subjective judgments about which forms of prejudice warrant Supreme Court protection.[334] Because the Court already makes subjective judgments about discrimination, it could discard the veil of neutrality associated with process theory and strengthen its equal protection doctrine by crafting a normative theory that is logically consistent and that does not exacerbate the disadvantages of oppressed classes. Political powerlessness could operate as an element or factor in a new equal protection theory, but the focus of equal protection doctrine would be the *protection* of persons or groups, not the illusory policing of the political process.

Of the various alternative theories of equal protection that scholars have discussed, the antisubordination approach offers the most promise.[335]

---

331. *See supra* text accompanying notes 172–178 (discussing political science literature analyzing power).

332. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

333. Richard H. Fallon, Jr., *Strict Judicial Scrutiny,* 54 UCLA L. REV 1267, 1293 (2007).

334. Eskridge, *supra* note 13 (arguing that the Court makes cultural judgments about the relevance of certain personal characteristics); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

335. Several legal scholars, including Lawrence Tribe, Dorothy Roberts, Cass Sunstein, Reva Siegel, and Ruth Colker have advocated antisubordination theory. *See* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW §16–21, at 1515 (2d ed. 1988); Colker, *supra* note 278; Dorothy E. Roberts,

Antisubordination theorists believe that equal protection doctrine should analyze "the concrete effects of government policy on the substantive condition of . . . disadvantaged [classes]."[336] Antisubordination theory also conceives of the Equal Protection Clause as a legal bar against subjugation or the formation of a caste structure. Caste results when state action imposes or reinforces the social and economic vulnerability of classes of persons.[337] For example, laws that mandate racial segregation in public schools do not offend the Constitution simply because they classify on the basis of race or because they were enacted in a process tainted by prejudice. Instead, these laws violate equal protection because they compel persons of color to live perpetually in social and economic deprivation.

Antisubordination theory is more consistent with the original intent of the framers of the Fourteenth Amendment. The Fourteenth Amendment was ratified to outlaw Black Codes—laws passed by the former Confederate States to re-enslave blacks.[338] The Civil Rights Act of 1866 was the first congressional response to the Black Codes.[339] The Fourteenth Amendment made the statute a constitutional principle.

Early interpretations of the Reconstruction Amendments by the Supreme Court also validate antisubordination theory. The *Slaughter-House Cases*, for example, found that the "pervading purpose" of the Reconstruction Amendments was the emancipation of blacks and the end of their oppression.[340] Other cases support this theory.[341] Furthermore,

---

Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1453–54 (1991); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004); Sunstein, *supra* note 179; *see also* Hutchinson, *supra* note 31, at 682–98.

336. Roberts, *supra* note 335, at 1454.

337. Cass Sunstein makes this point in his groundbreaking article on the subject of caste and equal protection:

> [T]he anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so. On this view, a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant from a moral point of view. This form of inequality is likely to be unusually persistent and to extend into multiple social spheres, indeed into the interstices of everyday life.

Sunstein, *supra* note 179, at 2411–12.

338. Jack M. Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459, 1461 (2012).

339. Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 273 (2005).

340. Slaughter-House Cases, 83 U.S. 36, 71–72 (1872).

341. Strauder v. West Virginia, 100 U.S. 303, 308 (1879) (Reconstruction Amendments give blacks rights against discriminatory and "unfriendly" laws and from state action "implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (finding that antimiscegenation law promotes "white supremacy," which violates Fourteenth Amendment).

nothing in the history of the United States since Reconstruction makes the antisubordination principle outdated or inappropriate. Race remains a critical determinant of maltreatment and deprivation.

Because antisubordination does not turn on any particular type of classification being presumptively unconstitutional, this theory risks broad judicial invalidation of state action. This outcome, however, is mitigated because courts would only concern themselves with state action that subjugates classes. Antisubordination theory could also operate in the opposite direction, by validating state action that would violate the Constitution under the current doctrine. The current doctrine, however, probably operates too harshly with respect to remedial uses of prohibited classifications. Also, courts need not apply minimal scrutiny of laws that classify on the basis of race or sex—even when the intent of the law is remedial. Instead, a court could apply intermediate scrutiny, which unlike strict scrutiny, gives the government more flexibility to make distinctions among social classes.[342]

D. Gays and Lesbians and a Reformed Equal Protection Doctrine

This Subpart concludes by applying both a refined political powerlessness doctrine and antisubordination theory to discrimination against gays and lesbians. Both approaches would invalidate most or all antigay state action.

1. Gays and Lesbians and Political Powerlessness

Gays and lesbians face hurdles in equal protection cases because Court doctrine is vague, narrow, and applied inconsistently. The refined analysis outlined in this Article could prove successful for gay and lesbian plaintiffs in ideologically receptive courts.

Although gays and lesbians have achieved recent political success, they have traveled a great distance to get to this point. The first organizations for gays and lesbians emerged in the United States after World War II.[343] Although these groups were primarily social, their members also pressed for civil rights.[344] Lesbians who were discharged from the military during the 1950s also sought assistance from existing civil rights organizations,

342. Brennan and Marshall advocated intermediate scrutiny of race-based affirmative action. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 535–36 (1989) (Marshall, J., dissenting); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 358–59 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (advocating intermediate scrutiny).

343. *See supra* text accompanying notes 113–114.

344. *See supra* text accompanying notes 113–114.

like the American Civil Liberties Union, but were unsuccessful.[345] The ACLU advised one of the women to seek medical treatment in order to discard her "homosexual relations."[346]

Gays and lesbians became more politicized in the 1960s, following the lead of the Civil Rights Movement and feminism.[347] But it would take decades for them to achieve measurable success. Today, most states still permit discrimination on the basis of sexual orientation by private and governmental actors.[348] Federal civil rights legislation does not protect gays and lesbians from discrimination in employment, places of public accommodation, or in programs financed by federal subsidies.[349]

Furthermore, many of the gains made by gays and lesbians have faced stiff resistance. Gay and lesbian civil rights legislation and judicial rulings have been negated by the initiative process in many states.[350] Also, voters have removed judges from office for ruling that state constitutional law prohibits sexual orientation discrimination, including with respect to marriage equality.[351]

Gays and lesbians lack significant representation in Congress and state legislatures.[352] They are not a majority demographic of the national population or within any state. Several studies show that sexual orientation negatively impacts the economic status of gays, lesbians, and (especially)

345. Allan Bérubé & John D'Emilio, *The Military and Lesbians During the McCarthy Years*, 9 SIGNS 759 (1984).

346. *Id.* at 774–75. At the time, "homosexuality" was considered a mental illness. This classification lasted until the early 1970s. *See* Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 485 (2008) (observing that the American Psychiatric Association and American Psychological Association withdrew this classification in 1973 and 1975, respectively).

347. *See supra* text accompanying notes 114–119.

348. *See State Nondiscrimination Laws in the U.S.*, NAT'L GAY AND LESBIAN TASK FORCE, June 21, 2013, *available at* www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf.

349. The Employment Nondiscrimination Act would prevent employers from discriminating on the basis of a person's "actual or perceived sexual orientation or gender identity." H.R.1397, 112th Congress (1st Sess. 2011). This bill has been proposed many times; Congress has never passed it. *See Employment Non-Discrimination Act (ENDA)*, NAT'L GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/nondiscrimination/ENDA_main_page (last visited Feb. 21, 2014).

350. Schacter, *supra* note 12, at 1395 ("[T]he use of ballot measures to reverse or preempt gay rights legislation has been a mainstay not only in the same-sex marriage debate, but in the larger debate about gay rights over the last several decades.").

351. A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, (Nov. 3, 2010), http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0.

352. Jeremy W. Peters, *Openly Gay, and Openly Welcomed in Congress*, N.Y. TIMES, (Jan. 25, 2013), http://www.nytimes.com/2013/01/26/us/politics/gay-lawmakers-growing-presence-suggests-shift-in-attitudes.html, (reporting that the 113th Congress has six openly gay, lesbian or bisexual members); Denis Dison, *Victory Fund Celebrates Huge Night for Gay Candidates*, VICTORY FUND AND INST.: GAY POL. BLOG (Nov. 7, 2012), http://www.gaypolitics.com/2012/11/07/victory-fund-celebrates-huge-night-for-gay-candidates/ (reporting 123 gay and lesbian candidates elected to state and federal offices, which translates to about 2 per state).

transgender persons.[353] Furthermore, LGBT teenagers are disproportionately represented among homeless youth and in cases of suicide.[354]

Gays and lesbians who live in rural locations often lack the services and political representation of gays and lesbians in urban settings.[355] And the needs of the poor and persons of color usually receive only scant or purely symbolic attention in the most influential gay and lesbian social movement organizations.[356]

Gays and lesbians remain susceptible to private and governmental violence and discrimination by private and state actors. Overturning antigay legislation still requires tremendous financial resources and time. To the extent that gays and lesbians have political power, they can only use this power to persuade courts and legislatures to recognize basic rights that others take for granted. Legislative and judicial success for gays and lesbians are not spoils of war won by a politically powerful class. Instead, they are merely kernels of dignity accomplished by decades of political struggle. These accomplishments remain subject to repeal by a majoritarian political process that remains heteronormative. Viewed in this complex fashion, gays and lesbians can make a strong case that they meet the requirement of political powerlessness in the suspect class doctrine.

2. *Gays and Lesbians and Antisubordination Theory*

Gay and lesbian plaintiffs could also advance successful equal protection claims using antisubordination theory. Some of the factors that make gays and lesbians politically powerless also make them susceptible to subjugation by state actors.

The denial of economic benefits to gays and lesbians helps to perpetuate their economic inequality. Judicial practices that favor biological parents instead of constructive parents stigmatize and disrupt gay and lesbian families.[357] Discriminatory prison policies cause severe violence against gay and lesbian inmates.[358] School officials who fail to address homophobic bullying cause many gay and lesbian children to drop out of school or to suffer from emotional distress.[359] Their exclusion from

353. *See supra* text accompanying notes 291–295.

354. *See supra* text accompanying notes 294–298.

355. *See supra* text accompanying note 27.

356. *See supra* text accompanying notes 299–303.

357. *See* Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 688–90 (2005).

358. Robinson, *supra* note 28.

359. Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education* 7 U. PA. J. CONST. L. 183, 184–85 & n.8 (2004) ("For instance, evidence suggests that because of their sexual orientation, some LGBT students currently are

education also renders them susceptible to poverty and related conditions, such as homelessness. When schools prohibit gay and lesbian students and their allies from forming support groups in public schools they exacerbate the isolation and marginalization of gay and lesbian youth.[360]

Under certain circumstances, the antisubordination approach could also require the government to act to prevent subjugation. For example, if a state constitution guarantees every child a free public education, that education should take place in a safe environment, which could compel states to protect gay and lesbian students from bullies.[361] Prison officials might have an affirmative obligation to place transgender inmates in a prison population that matches the person's lived gender identity.[362]

3. *Remedial Policies*

Neither the refined definition of political powerlessness nor antisubordination theory would treat remedial policies for gays and lesbians as impermissible discrimination against heterosexuals. States and Congress could address the acute homelessness problem among gay and lesbian youth. State money could help fund scholarships to poor gay and lesbian youth as a remedial measure. Congress could require recipients of federal subsidies to make sure they do not discriminate on the basis of sexual orientation or gender identity. These policies are valid under antisubordination theory because they ameliorate, rather than deepen, the conditions of disadvantaged classes. These policies would be permissible under a refined definition of political powerlessness because heterosexuality alone does not lead to political vulnerability.

4. *Which Theory?*

Both approaches outlined in this Article—redefining political powerlessness or replacing the suspect class doctrine with antisubordination theory—could improve the Court's equal protection doctrine. Thus, this Article does not aim to announce a new totalizing theory of equal protection.

Redefining political powerlessness, however, is closer to the current doctrine, so it might lead to greater immediate success in litigation. The

---

already not receiving an educational experience comparable to heterosexual students in our nation's public schools.").

360. Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 878–79 (2000).

361. *See* Harris & Dyson, *supra* note 359, at 204–05.

362. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 758 (2008) (discussing violence against incarcerated transgender women assigned by biological sex).

antisubordination approach, however, offers a richer theory of equal protection. It is more comprehensive than the suspect class doctrine because it improves the analysis utilized to identify classes that warrant judicial solicitude, but it also addresses other substantial problems associated with the Court's doctrine, such as the intolerance of remedial uses of racial classifications.

Furthermore, antisubordination does not rest on the misperception that the Court can avoid making subjective judgments when it interprets the Equal Protection Clause. Accordingly, antisubordination theories could provide a more sustainable and honest alternative to the current doctrine than simply reworking political powerlessness.

V. CONCLUSION

2013 was an unprecedented moment in the history of the Supreme Court. The Court issued opinions in two important sexual orientation discrimination cases. Although the cases gave the Court the opportunity to cover new ground, it elected to pursue a more conservative path by avoiding a substantive ruling on one case (opting instead to reach a holding on procedural grounds) and applying animus review in the other. Thus, the Court left its suspect class doctrine untouched.

As this Article has demonstrated, the suspect class doctrine suffers from many weaknesses. And while an emerging discourse among legal scholars and a body of case law among the courts seek to improve the suspect class doctrine, these jurisprudential developments sometimes rest on incorrect and strained reading of precedent. This scholarship and case law also fail adequately to discuss the multiple factors that cause political vulnerability among gays and lesbians. While some gays and lesbians possess power, most of them do not. Poverty, gender, race, geography, and disability influence the ability of gays and lesbians to exercise political power. Accordingly, while gay and lesbian social movements might praise the successful employment of theories posited in recent scholarship and opinions regarding the irrelevance of political powerlessness, these theories do not prove a comprehensive alternative to the existing doctrine.

Political science scholarship offers more sophisticated definitions of political power that could inform legal scholarship and judicial opinions. Furthermore, legal scholarship elaborating antisubordination theory could ultimately replace the suspect class doctrine altogether. If legal scholars and advocates consider these alternative approaches, they could help fashion a new equal protection doctrine that promotes substantive justice rather than inequality and subjugation.