

Is Political Powerlessness a Requirement for Heightened Equal Protection Scrutiny?

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I. INTRODUCTION

Gay rights advocates have spent a generation seeking political advances for sexual minorities—yet now find themselves arguing that gay men, lesbians, and bisexuals are “politically powerless.” During the same time period, traditionalists have sought to block gay power—yet now say that “homosexuals” are political powerhouses. How did this paradoxical debate come about? It all derives from the politics of constitutional litigation, especially the same-sex marriage cases.

An emerging issue in the same-sex marriage litigation is whether sexual orientation is a “suspect classification” requiring strict scrutiny under the federal Equal Protection Clause or equivalent provisions in state constitutions. The constitutional fate of state and federal laws excluding gay couples from civil marriage, and the rights and responsibilities attached to it, may hinge on the answer to that question.

The Massachusetts Supreme Judicial Court memorably held that there was not a rational basis for state exclusion of gay couples from civil marriage; however, most judges do not believe that opposition to marriage equality is completely irrational.¹ Hence, advocates for marriage equality almost invariably seek a reason for judges to apply heightened scrutiny. The California Supreme Court recently applied strict scrutiny because exclusion of gay couples from the institution of marriage violated those couples’ fundamental “right to marry,” but this, too, remains the minority position.²

Another avenue to heightened scrutiny is when the state exclusion relies on a suspect classification, namely, sexual orientation. Under federal and most state constitutional law, the government cannot rely on suspect classifications, like race, unless it can show a compelling public interest that requires

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1. *Goodridge v. Dep’t Pub. Health*, 798 N.E.2d 941, 941, 1004 (Mass. 2003) (Cordy, J., dissenting).
2. *In re Marriage Cases*, 183 P.3d 384, 426 (Cal. 2008) (relying on the fundamental right to marry to invalidate legislation that prohibited the recognition of same-sex marriages). I believe this is a good argument for same-sex marriage. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

such classification.³

Defenders of “traditional marriage,” between one man and one woman, sometimes maintain that the exclusion of gay couples from civil marriage is not a “sexual orientation” classification.⁴ Their better argument is that sexual orientation is not a suspect classification, like race, or a quasi-suspect one, like gender. It is difficult for these defenders to dispute the core claim that sexual orientation traditionally has been deployed by state actors to implement anti-gay prejudices and not to advance legitimate public policies. Instead, the defenders of traditional marriage usually argue for two additional requirements for suspect, or quasi-suspect, classification status: the trait that is the basis for the classification must be immutable, and the group harmed by the classification must be politically powerless to remedy their harm through the normal political process.

Deferring to other scholars for analysis of the immutability argument, this Article will analyze the political powerlessness argument. Part II will lay out the intellectual and political background of the argument. Part III will demonstrate, through a close analysis of U.S. Supreme Court equal protection precedent, that political powerlessness is neither necessary nor sufficient for a classification to meet the Court’s requirement for heightened scrutiny. To the contrary, the U.S. Supreme Court will not announce heightened scrutiny to protect a totally powerless minority group against pervasive discrimination. Part IV argues that, as a normative matter, political powerlessness ought not play a critical role in equal protection doctrine. Indeed, the most sensible understanding of equal protection law would urge courts to exercise the utmost caution in equal protection cases and not apply strict scrutiny until the disadvantaged group has become an accepted part of the pluralist process.

II. HISTORY: EMERGENCE OF POLITICAL POWERLESSNESS AS A CONSIDERATION IN EQUAL PROTECTION LEVEL-OF-SCRUTINY CASES

The idea that minorities need protection from tyrannical majorities has been part of America’s constitutional tradition from the beginning. Among the general goals of the Constitution of 1789, as immediately amended by the Bill of Rights, was protection of property-owning and religious minorities against oppressive measures sponsored by temporary “factions.”⁵ In the nineteenth century, state and federal constitutionalism developed the principle that

3. Both federal and state courts have recognized “quasi-suspect” classifications that also require heightened scrutiny. *Infra* notes 30, 55.

4. *E.g.*, *In re Marriage Cases*, 183 P.3d at 465 (Baxter, J., concurring and dissenting). Even if Justice Baxter were correct that the exclusion of same-sex couples is not a sexual orientation classification, then it would be a sex-based classification subject to heightened scrutiny under the federal and virtually all state constitutions. *See generally* ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 54–67 (2002).

5. *See, e.g.*, THE FEDERALIST NO. 10 (James Madison) (arguing for republican governance as a bulwark against oppression of minorities by “factions”); *see also* U.S. CONST. amend. I (protecting the “free exercise” rights of religious minorities and barring the “establishment” of a majority faith).

the government was not authorized to adopt “class legislation,” namely, measures that penalize or tax one social group simply to benefit another.⁶

A key goal of the Equal Protection Clause of the Fourteenth Amendment was to provide authority for both Congress and the U.S. Supreme Court to attack class legislation at the state level. The Joint Committee on Reconstruction, which proposed the Fourteenth Amendment, opened its Report to Congress stating: “This deep-seated prejudice against color . . . leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.”⁷ During the ratification debates, supporters of the Fourteenth Amendment repeatedly announced that a central purpose of the Equal Protection Clause was to attack class legislation—especially laws adopted by southern legislatures to marginalize the new citizens of color.⁸

The Equal Protection Clause’s twin focus on class legislation and laws oppressing citizens of color may be read to reflect the precept that the U.S. Supreme Court should be especially scrutinizing of state laws harming citizens of color—and perhaps other groups—who were disabled by violence and other forms of coercion from protecting themselves in the state and local political processes. In *The Slaughter-House Cases*,⁹ the Court refused to apply the Equal Protection Clause to an economic monopoly claim, reasoning that “[t]he existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied” by the amendment.¹⁰ The Court applied this dictum to strike down a law barring people of color from jury service in *Strauder v. West Virginia*.¹¹ The law not only imposed a disability on citizens of color but also seemed to be creating a social caste of citizens effectively excluded from public life, including the political process. The Court understood the role of the federal courts as policing laws whose race-based classifications rendered state processes a mechanism for the play of social prejudices to assure the continued subordination of a historically disadvantaged class.¹² The Court extended this understanding of equal protection to the operation of a facially neutral ordinance applied to deny Chinese people permits to operate laundries in *Yick Wo v. Hopkins*.¹³ The Court warned that equal protection could be violated by administrative implementation of ra-

6. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 285–93 (1997).

7. H.R. J. COMM. ON RECONSTRUCTION REP. NO. 39-30, at xvii (1st Sess. 1866).

8. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 96–100 (1988); Saunders, *supra* note 6, at 285–93.

9. 83 U.S. 36 (1873). The plaintiffs in *The Slaughter-House Cases* claimed that a state statute that forbade slaughtering of animals within the city limits for the protection of the public health was unconstitutional. *Id.* at 59. The Court found that the state legitimately used its police power in enacting the statute, and thus it was constitutional. *Id.* at 81.

10. *Id.*

11. 100 U.S. 303, 307 (1880).

12. See *id.* at 310–11 (stating that courts have express authority to ensure that congressional legislation observes the rights and immunities provided in the Fourteenth Amendment).

13. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

cially neutral laws when administered in a way that cannot be explained “except [by] hostility to the race and nationality to which the petitioners belong.”¹⁴

For the next two generations, the U.S. Supreme Court essentially abandoned the Equal Protection Clause as a basis for protecting racial minorities who were excluded from any meaningful participation in the political process and who were at the mercy of political systems dominated by white racists. The New Deal Court, dominated by Justices appointed by President Franklin D. Roosevelt, revived interest in the Equal Protection Clause as a mechanism for protecting racial minorities. Americans in that era considered our country an exemplar of democracy and freedom, in contrast to the totalitarian Communists and Nazis. This self-image was incompatible with apartheid, which was undemocratic, unfree, and racist, effectively a mirror image of what we despised about the Nazis.¹⁵ The New Deal Justices were sensitive to this tension and resolved to set the Constitution against apartheid but without engaging in the same kind of undemocratic judicial activism that had characterized the *Lochner* era that the same Justices were renouncing.¹⁶

A tentative statement of the New Deal Court’s philosophy came in footnote 4 of the Court’s opinion in *United States v. Carolene Products Co.*¹⁷ Consistent with the Court’s renunciation of an activist role in reviewing social and economic legislation, the Court upheld a law regulating the sale of filled milk. In the footnote, the Court warned that such a deferential attitude would not necessarily apply to judicial review of laws “directed at particular religious . . . or national . . . or racial minorities.”¹⁸ The Court further wondered “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” and therefore justifying “more searching judicial inquiry.”¹⁹ The Court applied the *Carolene Products* dictum in *Skinner v. Oklahoma*²⁰ and used the Equal Protection Clause to strike down a sterilization statute that exempted white-collar criminals from its penalty.²¹

One can read the *Carolene Products* dictum and *Skinner* for the proposition that laws discriminating against racial minorities unable to protect them-

14. *Id.* at 374.

15. See generally EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973).

16. For documentation of these concerns by individual New Deal Justices, see David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another Look at United States v. Classic*, 90 *YALE L.J.* 741, 743–45 (1981). The *Lochner* era, roughly 1905–37, was a period when the U.S. Supreme Court aggressively reviewed economic legislation that limited the “freedom of contract” supported by business interests.

17. 304 U.S. 144, 152–53 n.4 (1938).

18. *Id.*

19. *Id.*

20. 316 U.S. 535 (1942).

21. *Id.* at 543; see VICTORIA NOURSE, *IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 148–50 (2008).

selves in local political processes should receive serious judicial scrutiny demanding a close connection between the discrimination and a legitimate public interest. Indeed, this synthesis of the origins, history, and a democracy-sensitive theory of the Equal Protection Clause is an excellent justification for *Brown v. Board of Education*, the Court's most famous equal protection decision.²² Although written as a statement of the fundamental right to public education, *Brown* and subsequent decisions striking down de jure racial segregation in other venues could be justified on substantive grounds (racial prejudice is an irrational state policy) or on democracy grounds (disadvantages to minorities unable to protect themselves in local political processes) or on both grounds.²³ In *Loving v. Virginia*,²⁴ the Court formalized the *Brown* line of cases, holding that race is a suspect classification that can be deployed by the state only when necessary to serve compelling state interests.²⁵

After *Loving*, other groups sought to persuade the Justices that their defining traits also should be understood as suspect classifications. The form of the argument was usually this: like people of color, our group has suffered from pervasive state discrimination founded on prejudice and unfair stereotypes; like race, our stigmatizing trait is not one whose deployment usually contributes to the public good; and like racial minorities, our group is not politically powerful enough to resist or repeal these unjust discriminatory laws.²⁶ This represented a concept that focused on harm, irrationality, and lack of a political remedy as the classic instance when equal protection analysis by judges ought to be particularly scrutinizing.

The American Civil Liberties Union's Women's Rights Project, led by Ruth Bader Ginsburg, made precisely these arguments in its successful campaign to invalidate laws classifying by gender. A plurality of the Court in *Frontiero v. Richardson*²⁷ maintained that gender is a suspect classification for Ginsburg's reasons. In the case, Justice Brennan's opinion recounted the long history of state discrimination against women, the irrationality of that discrimination, and, "perhaps most conspicuously," discrimination against women "in the political arena."²⁸ However, Justice Brennan later wrote a

22. 347 U.S. 483 (1954).

23. *E.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 788–819 (1991); *see, e.g.*, *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54 (1958) *aff'g* 252 F.2d 122 (5th Cir. 1958) (affirming the Fifth Circuit's decision that a municipal corporation's refusal to make the facilities of a public park available to Negro citizens was a violation of equal protection); *Gayle v. Browder*, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala. 1956) (ruling that ordinances for segregation on motor buses was a violation of due process); *Mayor & City Council of Balt. City v. Dawson*, 350 U.S. 877 (1955), *aff'g* 220 F.2d 386 (4th Cir. 1955) (holding it was unconstitutional for the city to enforce racial segregation at public beaches).

24. 388 U.S. 1 (1967).

25. *Id.* at 11.

26. For the classic exposition of "like race" arguments for strict scrutiny, see Serena Mayeri, *Constitutional Choices: Legal Feminism, and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755 (2004) (articulating feminists' argument that gender is like race).

27. 411 U.S. 677 (1973).

28. *Id.* at 686 (Brennan, J., plurality opinion). Other Justices concurred in the plurality's result without reaching the suspect classification issue. *Id.* at 691 (Stewart, J., concurring); *id.* (Powell, J., concurring).

majority opinion in *Craig v. Boren*²⁹ that recognized gender as a quasi-suspect classification and neither acknowledged nor renounced the political representation analysis.³⁰

Echoes of the *Carolene Products* dictum were important in the Court's other equal protection cases of the 1970s. In *Graham v. Richardson*,³¹ the Court ruled that state laws discriminating against aliens should be subject to strict scrutiny. Citing *Carolene Products*, the Court reasoned: "Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."³²

In most cases, the Court declined to recognize new suspect or quasi-suspect classifications, and when it did so, the Court sometimes mentioned the possibility of remediation within the political process. In *San Antonio Independent School District v. Rodriguez*,³³ a school funding case, the Court held that "residence in districts that happen to have less taxable wealth than other districts" did not qualify the alleged discrimination as relying on a suspect classification.³⁴ Justice Powell's majority opinion contrasted this "large, diverse, and amorphous class" not entitled to strict scrutiny with one entitled to strict scrutiny, because protected members are "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."³⁵ *Rodriguez* was the first U.S. Supreme Court case to use the term "political powerlessness" of the affected group as a consideration of whether a classification is suspect.³⁶ Following and quoting this language from *Rodriguez*, the Court in *Massachusetts Board of Retirement v. Murgia*³⁷ ruled that age-based classifications are not suspect, in part because all of us look forward to old age; hence, there is no need for the "extraordinary protection" of heightened judicial review.³⁸

In a grand elaboration of *Carolene Products* and a comprehensive defense of the Warren Court's equal protection jurisprudence, Dean John Hart Ely published *Democracy and Distrust* in 1980.³⁹ Exactly as the *Carolene Products* Court recognized, aggressive judicial review should be the exception and not the rule—and an exception that is justified when the democratic political process has broken down in some significant way. What constitutes

29. 429 U.S. 190 (1976).

30. *Id.* at 191–210.

31. 403 U.S. 365 (1971).

32. *Id.* at 372.

33. 411 U.S. 1 (1973).

34. *Id.* at 28 (upholding public school funding rules that rewarded rich districts and had significantly underfunded black and Latino districts).

35. *Id.* For Justice Powell's own measured skepticism about the *Carolene Products* notion that judicial review should correct dysfunctional operations of the political process, see Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982).

36. *Rodriguez*, 411 U.S. at 28.

37. 427 U.S. 307 (1976).

38. *Id.* at 313–14.

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

a breakdown in the democratic process that justifies judicial intervention? Dean Ely said this:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.⁴⁰

Dean Ely's theory was a brilliant justification for the Warren Court's aggressive judicial review of race-based apartheid in the American South and provided a principled justification for declining to extend strict equal protection scrutiny to age and other classifications where the normal political process should provide a remedy. This "representation-reinforcing" theory was inconsistent with most of the Court's gender discrimination cases; however, Ely maintained that only pre-Nineteenth Amendment gender discriminations met his test of a malfunctioning democracy.⁴¹

Although the Supreme Court did not follow Ely's theory on gender discrimination and other issues explored below, the Elysian framework for equal protection had, at the very least, rhetorical bite after 1980. In *City of Cleburne v. Cleburne Living Center*,⁴² the Court ruled that mental disability is not a suspect classification in part because federal legislation protecting people with disabilities against unfair discrimination "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."⁴³

The gay rights cases of the last generation have sparked a debate about the role of political powerlessness in equal protection scrutiny. Scholars concluding that sexual orientation is a suspect classification have followed Ely in emphasizing that gay people have been subject to pervasive social prejudice and, as a result, legislatures have not only ignored their interests but demonized this group unfairly.⁴⁴

In its first major equal protection case involving gay rights, the Court in *Romer v. Evans*⁴⁵ invalidated a state constitutional amendment that preempted local ordinances protecting gay people against discrimination. Suggesting the influence of *Carolene Products*, Justice Kennedy's majority opinion stated that the amendment reflected "animus" against gay people and therefore had no rational basis.⁴⁶ In a hard-hitting dissent, Justice Scalia

40. ELY, *supra* note 39, at 103. For a more aggressive analysis of *Carolene Products*, emphasizing the importance of "prejudice" in the second prong of Ely's theory, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

41. See ELY, *supra* note 39, at 164–70.

42. 473 U.S. 432 (1985).

43. *Id.* at 445.

44. E.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

45. 517 U.S. 620 (1996).

46. *Id.* at 632, 634–35. The Court expressed concern that the amendments made it much more difficult for an unpopular minority to secure routine legal protections. See *id.* at 629–31.

made his own representation-reinforcing point: “Homosexuals” are not the kind of defenseless minority that the Court was protecting in the anti-apartheid cases; “homosexuals” are well-educated, richer than the average American, concentrated in big cities with great sway over elite opinion, and therefore they exercise “political power much greater than their numbers, both locally and statewide.”⁴⁷ Thus, this politically powerful minority should be left to the normal political process to seek equality rights. Indeed, Justice Scalia ended his dissent with the complaint that the Court’s intervention in the so-called “culture wars” reflected raw class bias: the elite legal profession’s adherence to gay rights, in contrast to the “plebeian” attitudes of elected legislators who have declined to provide broad equality rights to this excessively powerful minority.⁴⁸

Justice Scalia continued this theme in *Lawrence v. Texas*,⁴⁹ in which he dissented from the majority’s invalidation of Texas’ law criminalizing consensual and private “homosexual conduct.” Toward the end of his dissenting opinion, he complained that the majority opinion “is the product of a Court, which is the product of a law-profession culture, that has largely signed onto the so-called homosexual agenda,” and that “homosexuals” have had legislative successes in repealing sodomy laws and other items on their “agenda.”⁵⁰ He also warned that the logic of the Court’s opinion required the states to recognize “homosexual marriages.”⁵¹ In the wake of *Lawrence* and Massachusetts’ recognition of same-sex marriages, lawsuits have been filed in state courts seeking invalidation of laws excluding gay couples from civil marriage.

Responding to arguments for strict scrutiny of marriage exclusions under state constitutions, state attorneys general have faced a dilemma. “Like race” arguments are very strong for gay rights, because the state has pervasively and intensely discriminated against gay men, lesbians, and bisexuals for a century, and almost all of the discrimination has been irrational, if not worse. These assertions are hard to deny, which sets up a prima facie case for suspect, or quasi-suspect, classification status under both the U.S. Constitution and most state constitutions. In light of this, state attorneys general have followed three strategies. First, they argue that same-sex marriage bars are not really sexual orientation classifications. This is a poor argument. Surely, an exclusion that affects only gay couples can be considered sexual orientation discrimination.⁵² Also, if bars to same-sex marriage are not sexual orientation classifi-

47. *Id.* at 645–46 (Scalia, J., dissenting). “It is also nothing short of preposterous to call ‘politically unpopular’ a group that enjoys enormous influence in American media and politics, and which . . . though composing no more than 4% of the population had the support of 46% of the voters on Amendment 2.” *Id.* at 652.

48. *Id.* at 652–53.

49. 539 U.S. 558 (2003).

50. *Id.* at 602–03 (Scalia, J., dissenting).

51. *Id.* at 604–05.

52. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356 (1883) (treating a nationality-neutral rule for laundry businesses as ethnicity-based because its operation fell overwhelmingly on businesses run by people of Chinese ethnicity).

cations, they are surely gender classifications, and gender is quasi-suspect under federal law and suspect under most state constitutions.⁵³ Second, defenders of “traditional marriage” often say that a suspect classification must be immutable and that sexual orientation is a matter of choice. This is a poor argument as well. As a practical matter, it is not clear that sexual orientation is a matter of choice—and in any event, sexual orientation is less mutable than religion and alienage, both of which are suspect classifications.⁵⁴

The most popular strategy by defenders of “traditional marriage” to the demand for strict, and presumably fatal, scrutiny of same-sex marriage bars has been that gay people are not politically powerless, and therefore that sexual orientation should be treated the same as age and disability classifications were in *Murgia* and *Cleburne*. The highest courts of California, Connecticut, and Iowa have rejected the political powerlessness argument and have ruled that sexual orientation is a suspect or quasi-suspect classification.⁵⁵ The highest courts of Maryland and Washington also have rejected arguments that sexual orientation is a suspect classification, primarily on the ground that sexual minorities are no longer politically powerless; both courts pointed to ordinances and statutes protecting gay men, lesbians, and bisexuals from private and public discrimination.⁵⁶

Because many states have amended their constitutions to limit civil marriage to one man and one woman, the level-of-scrutiny debate is being pushed into federal courts. After their supreme court invalidated bars to same-sex marriage, California voters ratified Proposition 8, which amended their state constitution to override the court. In 2009, attorneys Ted Olson and David Boies filed a federal constitutional challenge to Proposition 8 in *Perry v. Schwarzenegger*.⁵⁷ They argue for strict equal protection scrutiny, under U.S. Supreme Court precedent, both because Proposition 8 denies gay couples a fundamental right to marry and because it relies on a suspect classification, namely, sexual orientation.⁵⁸ Representing the defenders of Proposition 8,

53. *Craig v. Boren*, 429 U.S. 190, 210 (1976).

54. For a thorough analysis of the scientific literature on what “causes” sexual orientation and a demonstration that rights should not turn on immutability, see EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* (1999).

55. See *In re Marriage Cases*, 183 P.3d 384, 444 (Cal. 2008) (holding that sexual orientation is a suspect classification); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431–61 (Conn. 2008) (holding that sexual orientation is a quasi-suspect classification); *Varnum v. Brien*, 763 N.W.2d 862, 889–96 (Iowa 2009) (holding that sexual orientation is a quasi-suspect classification); see also *Dean v. D.C.*, 653 A.2d 307, 309 (D.C. 1995) (Ferren, J., concurring and dissenting) (concluding that summary judgment was not proper because gay people may be sufficiently hampered in the political process to fit the political powerlessness prong of the Supreme Court’s criteria for suspect classification).

56. See *Conaway v. Deane*, 932 A.2d 571, 609–14 (Md. 2007); *Andersen v. King Cnty.*, 138 P.3d 963, 974–75 (Wash. 2006). A plurality opinion for the New York Court of Appeals ignored both the immutability and political powerlessness arguments and rejected strict scrutiny on the ground that sexual orientation is a relevant trait that the state rationally can take into account for family law purposes. *Hernandez v. Robles*, 855 N.E.2d 1, 10–11 (N.Y. 2006) (plurality opinion).

57. 704 F. Supp. 2d 921 (N.D. Cal. 2010) (accepting the Olson-Boies arguments and ruling that Proposition 8 is unconstitutional) (appeal pending).

58. For a roadmap of the arguments in *Perry*, see William N. Eskridge, Jr. & Darren Spedale, *Who Will Win the Gay Marriage Trial? A Roadmap to the Routes to Victory for Both Sides*, SLATE, Jan. 29, 2010,

Charles Cooper argues that the fundamental right to marry applies only to “traditional couples” and that sexual orientation is not a suspect classification. His main, albeit not only, argument for the latter proposition is that gay men, lesbians, and bisexuals are not politically powerless.⁵⁹ In August 2010, Judge Walker accepted the Olson-Boies arguments for strict scrutiny and rejected Cooper’s arguments, including his political powerlessness argument.⁶⁰ Because this case—or something similar—will reach the U.S. Supreme Court in the foreseeable future, this is a good occasion to evaluate the cogency of the argument that political powerlessness is a necessary predicate for suspect, or quasi-suspect, classifications under the federal Equal Protection Clause and analogues in state constitutions. Moreover, other social groups, such as transgendered and intersexual people or even polygamists, may encounter the same political powerlessness argument if they seek judicial recognition that their identifying trait is a suspect or quasi-suspect classification.

III. POSITIVE DOCTRINE: IS A GROUP’S POLITICAL POWERLESSNESS NECESSARY TO SUPPORT HEIGHTENED SCRUTINY FOR DISCRIMINATION AGAINST THE GROUP?

The short answer is no.

The U.S. Supreme Court has articulated three requirements for suspect classifications: (1) the class defined by the classifying trait must be a coherent social group, (2) the class must have suffered from a history of state discrimination based upon the classifying trait, and (3) the classifying trait must be a factor that generally does not contribute to legitimate public policies. In *Rodriguez*, an early statement of the modern analysis, the Court did not consider the residents of school districts with lower-than-average incomes to be a coherent social group, and thus that proposed classification failed the first requirement.⁶¹ The Court’s other suspect classification cases rise or fall on the second and third requirements.

As far as I can tell, immutability and political powerlessness never have made a difference in the Court’s ultimate determinations. Thus, the Court has recognized suspect classifications in cases where the disadvantaged groups are not politically powerless and, in some instances, where the disadvantaged groups are political powerhouses. Conversely, as a matter of timing, the Court almost never recognizes suspect classifications until after the disadvantaged group has emerged from political powerlessness. Ultimately, this part will demonstrate that the political powerlessness argument has it exactly backwards as a matter of describing the Supreme Court’s equal protection precedents.

<http://fray.slate.com/id/2242957/>.

59. See *id.* For updates on Cooper’s arguments in defense of Proposition 8 in Perry, see PROTECTMARRIAGE, www.protectmarriage.com (last visited Dec. 18, 2010).

60. *Perry v. Schwarzenegger*, 704 F. Supp. 921 (N.D. Cal. 2010) (appeal pending).

61. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973).

*A. Heightened Scrutiny Turns on the Irrationality
and Squalid History of Legislative Use of the Classification,
Not the Political Powerlessness of the Class*

On the one hand, when the Court has recognized a suspect or quasi-suspect classification, it has in the large majority of cases ignored the political powerlessness of the affected class. Race, nationality, and ethnicity are the classic examples of suspect classifications. *Loving v. Virginia*—the precedent formally creating the double standard of strict and rational basis scrutiny—said not a word about the political power of the group affected by the state anti-miscegenation law struck down in that case.⁶² Instead, the Court relied on the invidiousness of the classification itself and implicitly upon the NAACP’s showing that miscegenation bans were a legacy not only of apartheid but of the slavery era.⁶³ Even after the political powerlessness language emerged, as early as *Rodriguez*, the Court’s equal protection jurisprudence continued to justify heightened scrutiny for race-based classifications by reference to the traditional requirements.

In *Palmore v. Sidoti*,⁶⁴ for example, the Court overturned a Florida judgment terminating a parent’s custody of her child because she was married to a man of another race. The Court summarily reversed for this simple reason: “Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.”⁶⁵ Chief Justice Burger’s opinion for the Court said nothing about the political powerlessness of racial minorities—and indeed such a statement would have been out of line in 1984. Not only had racial minorities persuaded Congress, a generation earlier, to adopt the Civil 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.⁶⁶

A decade after *Palmore*, the U.S. Supreme Court ruled in *Adarand Constructors, Inc. v. Peña*⁶⁷ that race-based preferences in federal contracting law were subject to the same strict scrutiny dictated by *Loving*.⁶⁸ Justice Stevens’

62. *Loving v. Virginia*, 388 U.S. 1 (1967). *Loving* stated that race-based classifications are “invidious” and therefore usually not proper bases for state policy. *Id.* at 10; see also *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (stating that race ought to be “irrelevant” to legitimate state policy almost all the time but upholding the race-based curfew in that case).

63. *Loving*, 388 U.S. at 10–11; Brief for Appellants at 15, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (arguing that the miscegenation ban was a legacy of the slavery era and was an irrational, prejudice-based policy). To the same effect were *McLaughlin v. Florida*, 379 U.S. 184, 191–93 (1964) (striking down Florida’s law barring interracial cohabitation) and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (striking down the District of Columbia’s law requiring racial segregation in public schools), both of which earlier had held that racial classifications are “constitutionally suspect.”

64. 466 U.S. 429 (1984).

65. *Id.* at 432.

66. See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (allowing remedial race-based set-asides in federal contracting program).

67. 515 U.S. 200 (1995).

68. *Id.* at 221–31 (expanding *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to a municipal preference plan based upon race)). I consider *Adarand*—and not *Croson*—the key rejection of a political powerlessness requirement for heightened scrutiny, because the race-

dissenting opinion in *Adarand* argued that race should not be such a suspect classification when it was being deployed to remedy harms to racial minorities:

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.⁶⁹

The former, Justice Stevens maintained, is inconsistent with both equality and democracy, while the latter is entirely democratic and worthy of respect by a representation-reinforcing Court.⁷⁰ The majority disagreed, however, and race to this day remains a suspect classification even when it disadvantages politically powerful majorities.⁷¹ If political powerlessness was a requirement for strict scrutiny, almost all of these affirmative action cases were wrongly decided.

Perhaps just as wrong would be the Court's rationale in gender discrimination cases: women, the class disadvantaged by most gender discriminations, are not politically powerless, nor are they even a minority. Yet gender has been a quasi-suspect classification since *Craig v. Boren*. The plurality opinion in *Frontiero* remains the Court's leading statement for why gender-based classifications should be subject to heightened scrutiny. Justice Brennan's opinion emphasized the squalid history of gender-based classifications and their irrationality. As evidence, Justice Brennan pointed to the fact that Congress overwhelmingly endorsed the Equal Rights Amendment in 1972 and repeatedly renounced gender's relevance in workplaces, schools, and public programs through a series of landmark statutes.⁷² 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. Moreover, the Court's gender discrimination cases often involved male plaintiffs who were disadvantaged by gender-based state policies, such as Oklahoma's rule that eighteen- to twenty-year-old women could purchase three percent beer but same-aged men could not—the policy struck down in *Craig v. Boren*.⁷³ At almost half of the population, and by far the

based plan in *Croson* was adopted by a city where blacks were arguably the dominant political group; the statute evaluated in *Adarand*, by contrast, was adopted by Congress, which was more than ninety percent white.

69. *Adarand*, 515 U.S. at 247 (Stevens, J., dissenting).

70. *Id.*

71. *Id.* at 226 (majority opinion). The post-*Adarand* Court repeatedly has applied strict scrutiny to evaluate race-based preferences intended to remedy past racial discrimination. *E.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

72. *Frontiero v. Richardson*, 411 U.S. 685, 686–88 (1973) (Brennan, J., plurality opinion). Only Justice Rehnquist, in dissent, disagreed with Justice Brennan's case for heightened scrutiny; four other Justices concurred in Brennan's result without reaching this issue.

73. *See Craig v. Boren*, 429 U.S. 190, 210 (1976).

wealthier half, men are far from politically powerless.⁷⁴

Conversely, when a classification has no systematic history of squalid deployment and is rational in terms of modern policy, the Court invariably has denied heightened scrutiny for the classification. Thus, in *Lyng v. Castillo*,⁷⁵ 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.⁷⁶ In *Murgia*, the Court found that age is not a suspect classification. The primary reason given by the Court is that age is often a classification the state legitimately wants to consider. Youth is associated reliably with immaturity, and old age with disability, and courts should defer to legislative judgments as to precisely how lines might be drawn. In contrast with racial minorities, the aged "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotypical characteristics not truly indicative of their abilities."⁷⁷

Cleburne, which classifies mental disabilities, is the leading case that plausibly can be said to hold that political powerlessness is an essential factor for strict scrutiny, but analysis of that case suggests a more complicated holding.⁷⁸ Justice White's opinion for the Court explained that race, nationality, and alienage are suspect classifications triggering heightened judicial scrutiny because such factors are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny."⁷⁹ Justice White also noted that gender and nonmarital birth are quasi-suspect classifications, because both traits "'bear[] no relation to ability to perform or contribute to society.'"⁸⁰ Invoking *Murgia*, and the language quoted in the previous paragraph, Justice White observed that most classifications are not so consistently irrational that they should be subject to strict scrutiny.⁸¹

74. One could argue that eighteen to twenty year old men are politically much less powerful than men as a general category—but even eighteen to twenty year old men are not necessarily "powerless."

75. 477 U.S. 635 (1986).

76. *Id.* at 638.

77. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

78. See generally *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). *Rodriguez* cannot be read for that proposition, partly because the holding of the case was that the disadvantaged group was too amorphous and not coherent enough. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Justice Powell's majority opinion contrasted this "large, diverse, and amorphous class" (not entitled to strict scrutiny) with one whose members are "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" (and therefore entitled to strict scrutiny). *Id.* at 28 (emphasis added). Even this dictum does not support the notion that political powerlessness is a requirement for "extraordinary protection," at most, the dictum suggests that it is one of several alternative routes to heightened scrutiny. *Id.*

79. *Cleburne*, 473 U.S. at 440.

80. *Id.* at 440–41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (Brennan, J., plurality opinion)).

81. *Id.* at 441 (quoting *Murgia*, 427 U.S. at 313).

In the next part of his *Cleburne* opinion, Justice White listed reasons why mental disability does not fit with race and gender and, therefore, does not demand heightened scrutiny. First and foremost, people with mental disabilities have a reduced ability to cope with the world and to do various activities; the legislature should have wide discretion to decide precisely what rules should be applicable to people with different capacities.⁸² Second, Justice White noted state and federal laws protecting or assisting the disabled. These laws demonstrated that legislators “have been addressing their difficulties in a manner that belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.”⁸³ Third, the legislative response “negates any claim that the mentally [disabled] are politically powerless in the sense that they have no ability to attract the attention of the lawmakers.”⁸⁴

It is not entirely clear how to characterize the holding of *Cleburne*. In light of the gender discrimination cases, it probably cannot stand for the proposition that political powerlessness is a necessary premise—a requirement—for heightened scrutiny. In light of the subsequent affirmative action race cases, *Cleburne* probably has been overruled on this point if it were read to support political powerlessness as a requirement of heightened scrutiny. A more supportable holding of *Cleburne* is that a classification cannot be suspect if it is often appropriate for legislatures to consider the classification and legislators often have deployed it in rational ways. This is especially true when legislators have deployed it to protect the disadvantaged minority, as through protective laws. This reading reconciles *Cleburne* with *Craig* and *Adarand*, because divergent Court majorities have concluded that gender and race are almost never appropriate classifications for legislators to deploy and that the history of prejudice- or stereotype-based legislation using race and gender classifications overwhelms the more recent history of anti-discrimination laws.

B. The Relevant Consideration Is Not Political Powerlessness, but Is Instead a Sliding Scale of Political Vulnerability Because of Prejudice

There is another lesson of *Cleburne* that resonates with the deep history of the U.S. Supreme Court’s equal protection jurisprudence. Especially if read in light of previous cases, *Cleburne* helps explain how the Justices have understood the “political powerlessness” consideration. To begin with, the Court’s opinion in *Cleburne* suggests that “political powerlessness” plays three roles in figuring out which classifications are suspect. Consider the different inquiries:

82. *Id.* at 442–43.

83. *Id.* at 443.

84. *Id.* at 445.

- **Motivation.** Are laws disadvantaging this minority ordinarily laws motivated by prejudice or stereotypes, or do they typically reflect impartial judgments pertaining to good public policy?

- **Remediation—Repeal.** Can this minority secure the attention of local, state, and federal legislators to consider repeal or reform of outdated laws discriminating against the minority?

- **Remediation—Preemption.** Can the minority secure the attention of Congress to consider national legislation that preempts outdated laws discriminating against the minority?

In short, the Court is interested in the minority's political salience both at the time discriminatory laws are enacted and at future times when they can be repealed.

Moreover, all the inquiries regarding political powerlessness are connected to the Court's concern that prejudice and, especially as illustrated by the gender discrimination cases, stereotyping infects the political process. *Cleburne* echoes the Court's dictum in *Carolene Products*: "more searching judicial inquiry" may be justified when "prejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."⁸⁵ Prejudice can affect a group's political power in the following ways, from the most to least egregious:

- **Demonization Problems.** If there is a great deal of prejudice against a minority, the majority will tend to scapegoat the minority, with gratuitous legislation penalizing the minority for harms to which it had not contributed. If a minority is demonized, the public response often will be punitive or quite disproportionate to the alleged mischief.

- **Segregation/Exclusion Problems.** A less severe political disability arising out of prejudice against a minority is exclusion from ordinary legal institutions, usually without solid reasons. Apartheid had this feature, as have the exclusions of blacks, women, and openly gay people from the armed forces.⁸⁶

- **Pariah Problems.** "Pariah" groups are ones that legislators can safely ignore. Often disliked or despised minorities cannot even get the attention of legislators, because their issues are hot potatoes and/or other groups will not form coalitions with this minority.

85. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

86. See Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499 (1991).

The majority in *Cleburne* held that people with mental disabilities suffered from none of these political disabilities: legislators did not demonize or segregate them, nor did disability rights groups have difficulty finding political allies; rather than prejudice, the Court found sympathy to be the dominant trope for people with disabilities in the political process.

Even under this complicated analysis of the role of political powerlessness in *Cleburne*, the U.S. Supreme Court's opinion, read in the context of the Court's suspect classification case law, still places front and center the Court's finding that mental disability is a trait that legislators legitimately may consider when crafting public policy. This is what makes *Cleburne* like *Murgia* (age discrimination, no heightened scrutiny) and unlike *Craig* (gender discrimination, intermediate scrutiny) and unlike *Loving* and *Adarand* (race discrimination, strict scrutiny).

The foregoing analysis of the U.S. Supreme Court's suspect classification case law supports the notion that sexual orientation is a suspect or quasi-suspect classification, because (1) the classification defines a coherent social group that (2) has been subject to pervasive and often vicious discrimination, and (3) the classification is one that has proven unreliable, indeed counterproductive, on the merits and is not a legitimate consideration for state policy.⁸⁷ To the extent that gay people's lack of "political power" is relevant, it lends some support to a finding of suspect classification. There can be no doubt that considerable prejudice against gay people still exists in the United States and that prejudice affects the political process: proposals to exclude gay people from civil marriage remain popular, and gay rights groups remain pariahs in most of the country. At the federal level, there is a tepid law protecting gays and other groups against hate crimes, and Congress may enact a job discrimination law protecting sexual minorities in the near future. On the other hand, a 1993 statute excluded gay people from the armed forces until it was repealed in late 2010,⁸⁸ and a 1996 statute excludes gay couples from the more than 1,100 provisions of federal law relating to marriage or spoushood.⁸⁹

In short, the case for suspect classification status is much stronger for sexual orientation than it was for age or mental disability, and it is somewhat stronger than it was for gender and nonmarital children. The case for more searching judicial inquiry when legislators deploy sexual orientation classifications becomes more compelling than gender-based and remedial race-based

87. Admittedly, factor (3) is loaded with normative judgments, but ones that I have supported in detail elsewhere. See ESKRIDGE, *supra* note 44, at 13–97 (recounting sad history of gay discrimination with few if any positive results); see generally WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAW IN AMERICA, 1861-2003, 73–108 (2008) (recounting in greater detail the anti-homosexual Kulturkampf, from 1946 to 1969, when many lives were ruined and critical social problems left unaddressed because of anti-gay hysteria).

88. 10 U.S.C. § 654 (1993).

89. Defense of Marriage Act, 1 U.S.C. § 7 (1996).

classifications once political powerlessness arguments are considered.

There is one last point to consider, doctrinally: Can genuine political powerlessness be a reason not to apply heightened scrutiny? Surprisingly, the answer is yes.

*C. The Court Avoids Heightened Scrutiny for Classifications
When the Class Is Totally Powerless*

If a minority group is politically powerless in the deepest sense, the foregoing analysis suggests that its powerlessness owes something to widely held prejudices, emotional hatred that others have for the group and its members. Deep powerlessness owing to pervasive prejudice means that the minority will not only be a pariah group that others will shun when forming alliances, but the group also will be subject to exclusions from important state benefits and institutions and will be demonized and scapegoated. Gay people in most of the United States today are not totally powerless in this deep sense—but they were in the period of the anti-homosexual Kulturkampf from 1946 to 1969.⁹⁰ Would the case for sexual orientation as a suspect classification be a stronger one if it had been brought in 1967, right after *Loving v. Virginia*?

It is clear the answer is no. The same year the Warren Court ruled that race-based classifications must be subject to strict scrutiny, it decided the opposite way for sexual orientation, suggesting that sexual orientation minorities are a suspect group that judges should go out of their way to exclude and penalize. The issue in *Boutilier v. Immigration & Naturalization Service*⁹¹ was whether a Canadian immigrant should have been excluded, and hence later deported because he was “afflicted with psychopathic personality” disorders.⁹² The record in the case revealed that Clive Michael Boutilier was a man of normal psychological profile, according to unrefuted expert affidavits, and had enjoyed consensual sex with men and women. The Warren Court concluded that (1) Boutilier was a “homosexual;” (2) “homosexuals” are afflicted, as a matter of law, with “psychopathic personality” disorders, regardless of medical expert testimony in an individual case; and therefore (3) it was lawful for the Immigration and Naturalization Service to deport Boutilier for that reason.⁹³ Thus, the Court certainly did not treat sexual orientation as a suspect classification—and instead went out of its way to apply murky statutory language to exclude and penalize a bisexual or gay man.⁹⁴

90. The Kulturkampf Period (1946-1969) was a period when gay people were subjected to imprisonment because of their consensual activities, monitored and hunted like dogs by the police, excluded from the civil service and the armed forces, deported if they were immigrants, and denied licenses and even places to socialize. See ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 87, at 73–108.

91. 387 U.S. 118 (1967).

92. *Id.* at 118. For further discussion, see Marc Stein, *Boutilier and the U.S. Supreme Court's Sexual Revolution*, 23 LAW & HIST. REV. 491 (2005).

93. *Boutilier*, 387 U.S. at 122–23.

94. *See id.*

One sad lesson from *Boutilier* is that if a minority group is totally powerless, because of social prejudice or pervasive stereotyping, the Equal Protection Clause will not protect that group.⁹⁵ The reasons are obvious. If social prejudice is so pervasive, will not judges themselves be prejudiced, to some extent, against the minority group? Chief Justice Warren and Justice Black, leaders of the Warren Court revolution in race and criminal procedure, were prejudiced against gay people.⁹⁶ It was easy for such judges to believe that all males who have ever had sex with men were “homosexuals,” that “homosexuals” are “psychopaths,” and that judges should support state pogroms against such “psychopathic” people. Even if judges believe a polity is unfairly persecuting a decent minority, the judiciary is the weakest branch, and a broad pronouncement that anti-minority laws all will be subjected to heightened scrutiny is one that would trigger a social and political backlash against the judiciary. Hence, it is safer for judges to provide more targeted protections, for speech and procedural fairness, and not the wholesale support of equal protection strict scrutiny.

As *Boutilier* suggests, the U.S. Supreme Court was hostile to gay people so long as they really were political pariahs and demons all over America. *Romer v. Evans*—decided by a much more “conservative” bunch of Justices than those who voted in *Boutilier* or even those who voted in *Bowers v. Hardwick*⁹⁷—afforded gay people some assurance of equal protection but only after public opinion had decisively turned away from utter intolerance and toward a more tolerant, albeit not accepting, view of gay people.⁹⁸

Although we do not have precise polling data for earlier eras, it is safe to say that this is roughly the pattern for other groups now protected by the Equal Protection Clause. During the apartheid era, roughly from *Plessy* in 1896 to *Brown* in 1954, most Americans harbored and were unashamed of their racist prejudices—and the U.S. Supreme Court’s equal protection jurisprudence did virtually nothing to protect people of color against blatant race-based classifications.⁹⁹ *Brown* was possible only because many whites abandoned or grew ashamed of openly racist prejudices. Recall that *Brown* did not

95. The libertarian First Amendment and the procedural protections of the Due Process Clause should provide some basic protections, but the Equal Protection Clause will not.

96. See HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 128 (1975) (Justice Black considered homosexuals to be predatory and best purged from civil society); ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 87, at 88–108 (Chief Justice Warren, while California governor from 1943 to 1953, led an ambitious anti-homosexual pogrom in world history that on paper rivaled that of Nazi Germany from 1933 to 1945).

97. 470 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

98. The turning point for public opinion apparently was reached in the 1990s, at precisely the point in time *Romer* was decided. See Jeni Loftus, *America’s Liberalization in Attitudes Toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762 (2001).

99. For excellent accounts documenting the parallel civil rights campaigns for social recognition and legal equality, see DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY (2004); ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984). For a briefer and more popular account, see ADAM FAIRCLOUGH, BETTER DAY COMING: BLACKS AND EQUALITY 1890-2000 (2001).

apply strict scrutiny—that did not come until *Loving*, decided after civil rights groups had demonstrated their ability to form coalitions and prevail in the political process through enactment of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Women and people with mental disabilities have had similar experiences as racial minorities have had. So long as women were totally powerless, in large part because they did not have the right to vote, the U.S. Supreme Court was utterly unresponsive to their equal protection claims.¹⁰⁰ Indeed, the big surprise I find in these cases is that the U.S. Supreme Court did not strike down gender discrimination on constitutional grounds until 1971 in *Reed v. Reed*.¹⁰¹ Decided on the eve of Congress' endorsement of the Equal Rights Amendment by huge bipartisan margins, *Reed* and then *Frontiero* opened the floodgates of equal protection challenges against gender discrimination. Likewise, in the era of eugenics, when people with mental disabilities were considered degraded threats to the survival of the human race, judges as learned as Justice Holmes and Justice Brandeis dismissed equal protection claims of the disabled as frivolous.¹⁰²

The hypothesis that emerges from these cases is that, as a matter of its own practice, the U.S. Supreme Court will not provide a high level of equal protection scrutiny when the state is deploying a suspicious classification against a minority that is totally powerless. Heightened scrutiny will be possible only once the minority group has shown some political power, albeit not enough to sweep away all of the encrusted, and irrational or unproductive, discrimination against its members.¹⁰³ The reason for this phenomenon is that the U.S. Supreme Court's main focus in determining suspect classifications is the rationality of the classification, not the ability of the minority to head off new legislation or repeal existing laws. And, "rationality" is a cultural judgment more than a purely legal one. Race was a "rational" ground for state policy in a culture where most citizens believed that one race was inferior to the other and hysterically feared racial mixing. Today, one battle between the conservative and moderate wings of the U.S. Supreme Court concerns whether race ever can be a rational ground even for remedial state policy. This battle is a substantive debate, involving the correct understanding of what counts as prejudice, what contributes to racial stereotyping, and what is a good strategy for integrating blacks into the larger society.

100. See *Minor v. Happersett*, 88 U.S. 162 (1874) (indicating women have no right to vote); *Bradwell v. Illinois*, 83 U.S. 130 (1873) (deferring to the Illinois legislature's decision to deny women admission to the Illinois Bar, thus indicating women have no constitutional right to practice law).

101. 404 U.S. 71 (1971).

102. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (characterizing equal protection arguments for disabled people who were sterilized by the state as "the usual last resort of constitutional arguments" in a majority opinion written by Justice Holmes and joined by Justice Brandeis).

103. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term-Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

IV. NORMATIVE: SHOULD POLITICAL POWERLESSNESS BE NECESSARY FOR HEIGHTENED SCRUTINY?

There can be little doubt that a theory of suspect classifications including some kind of political powerlessness requirement for heightened scrutiny is not consistent with the U.S. Supreme Court's equal protection case law. Because all state constitutions, either as written or as interpreted by states' highest courts, have adopted a similarly broad array of classifications subject to heightened scrutiny, the positive analysis in Part III is applicable to state constitutional analyses as well (such as the analyses in the same-sex marriage cases). The question remains, however, whether this doctrinal consensus is right as a normative matter: Should judges find suspect or quasi-suspect classifications only when the stigmatized minority group is politically powerless? Consider the nature of constitutional rights, the institutional legitimacy of the judiciary, and the purpose of the Equal Protection Clause. All point in the same direction: political powerlessness should not be a requirement for strict scrutiny. That is not to say that this criterion ought to be irrelevant. Political powerlessness may cast light on the perseverance of prejudice and stereotyping that harm the minority, and it may be a prudential consideration in the U.S. Supreme Court's exercise of its power of judicial review when applying the Equal Protection Clause.

A. *The Nature of Constitutional Rights*

A political powerlessness requirement for equal protection strict scrutiny would create a strange kind of constitutional right. Under the Fourteenth Amendment to the U.S. Constitution and under the analogous provision of their state constitution, citizens all have a right to the equal protection of state and municipal laws. Consider the following hypothetical. Citizens A, B, and C live in Texas. Assume that the State of Texas adopts a law requiring that a hairdresser be licensed by the state; among the conditions of the license are that the hairdresser: (1) be trained in an acceptable manner, (2) maintain a safe and sanitary work environment, and (3) not be a known "homosexual."¹⁰⁴ Citizen A is denied a license because he does not have the requisite training, and Citizen B is denied a license because Texas regulators conclude that her facility is not safe and sanitary. Both citizens have a constitutional right to the equal protection of the state licensing laws, which means they can demand that the state justify its "discrimination" against them by reference to a public purpose that their license-denial serves. Because having a state license is not a fundamental right and the training and sanitary criteria of the

104. The last requirement is not entirely hypothetical. In Texas, a hairdresser's license traditionally has been contingent on his or her not engaging in "illegal conduct," 1949 Tex. Laws ch. 415, § 1, which in Texas includes "homosexual conduct" within the home. TEX PENAL CODE ANN. § 21.06(a) (West 1994). Although in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Court ruled that the Texas Homosexual Conduct Law cannot be enforced any longer, the law remains on the books.

statutory scheme are not suspect classifications, the state's justification is evaluated according to the rational basis standard, which tolerates a wide range of regulatory interests and gives the state great leeway in selecting criteria that legislators and administrators think appropriate to the subject matter. Almost any federal judge would rule that Texas may place these restrictions on hairdresser licenses, and the equal protection rights of Citizens A and B have not been violated.

But suppose that Texas denies Citizen C a license because he is an openly gay man. He has the same constitutional right to demand justification as Citizens A and B, but may have more success in his equal protection claim because the state is deploying a fishier classification. Whether he succeeds probably depends on whether the U.S. Supreme Court or the Texas Supreme Court considers sexual orientation to be a suspect or quasi-suspect classification. In this sense, Citizen C will have more success in pursuing his equal protection rights than Citizens A and B did, but the applicable doctrinal analysis is the same for all three citizens.

Now assume, further, that "political powerlessness" of the affected group is a necessary condition for heightened scrutiny. The nature of the equal protection right changes dramatically for Citizen C. If he is denied a hairdresser's license in 1943, when gay people were totally powerless in both Texas and in the United States, he has a strong equal protection claim, because sexual orientation is more likely to receive strict scrutiny, at least as a matter of theory. But if he brings the claim in 2010, when gay people are no longer powerless in either Texas or the United States, he has a weak equal protection claim, because sexual orientation will not be a suspect classification. So, when Citizen C brings suit makes a decisive difference not in the facts of his case—his own sexual orientation, the state justifications for excluding him, and the evidence that the state relies on—but rather in the legal test that the Court would apply to the facts of his case. These circumstances describe an odd constitutional right.

While it is not unknown for the U.S. Supreme Court to overrule earlier precedents and thereby change the applicable constitutional analysis over time, as the Court did in *Lawrence v. Texas*, it is unprecedented for the Court to say that the standard of scrutiny changes based on political circumstances of a group. The oddness of such a constitutional rule is even more apparent if I change the hypothetical. Let us implausibly speculate that the U.S. Supreme Court in 1943 ruled that sexual orientation is a suspect classification, because (1) sexual minorities are a coherent but politically powerless social group (2) who have been subjected to pervasive and harmful discrimination because of their sexual orientation, (3) which is an irrational classification usually invoked because of prejudice and stereotyping and not good public

policy.¹⁰⁵ Can Texas in 2010 add new discriminations against gay people and argue to the Supreme Court that it should overrule the 1943 decision because an essential premise—political powerlessness—is no longer true?

Stare decisis may save the 1943 precedent, but then we have the strange state of affairs that by 2010 the Equal Protection Clause is brigaded with suspect classifications originally adopted to protect powerless social groups—while those groups, racial minorities, women, gay people, are no longer politically powerless. Can one honestly say, under these circumstances, that political powerlessness is really a necessary condition for heightened scrutiny? Under such circumstances, the political powerlessness criterion is, at best, a screening device used to prevent the Court from overloading the political system with suspect classifications. But such a state of affairs raises its own equal protection concerns: majorities (women) and minorities (blacks, Latinos, and gays [under my hypothetical]) who enjoyed early success in securing heightened scrutiny get better equality protections than new minorities (language minorities and perhaps transgendered people). Is this fair? Is this discrimination in the apportionment of heightened scrutiny among groups a violation of the Equal Protection Clause?

Consider another variation. Assume that Texas legislators amend the hairdresser law to deny licenses to openly straight people. Such a law might pass the rational basis test but certainly would not pass heightened scrutiny.¹⁰⁶ If political powerlessness were a necessary condition for heightened scrutiny, however, only homosexuality, or perhaps bisexuality, would be a suspect classification. Heterosexuality should not be such a classification, because straight people are politically powerful; if enough straight people wanted to be hairdressers, they could certainly secure the attention of the Texas Legislature and probably could get the law repealed.

These variations on the hairdresser hypothetical suggest the normative power of the positive point that dominates Part III: the overriding feature of equal protection suspect classifications is the irrationality of those classifications. Are they ordinarily deployed by legislators in ways that serve the public interest, or are they usually invoked by legislators seeking to penalize people they despise or to pander to local prejudices and stereotypes? If understood in this way, the equal protection right shared by Citizens A, B, and C looks like other constitutional protections: everyone enjoys a right not to be discriminated against because of a personal trait that has no bearing on proper public policy.

By rejecting a political powerlessness requirement for equal protection heightened scrutiny, the U.S. Supreme Court will reaffirm the neutrality of

105. The text sets forth a doctrinal framework for suspect classifications that is a modification of the *Rodriguez* framework set forth earlier, except that I have added “political powerlessness” is a feature of factor (1).

106. For example, Texas might argue that gay people are “better” hairdressers. I am not sure this is true, but it is possible for a rational legislator to accept this.

equal protection analysis that has been a stable part of the Constitution. The original framers of the Constitution of 1789 understood that everyone had a right to be free of “partial” or “factional” laws.¹⁰⁷ Most state constitutions incorporated that idea in important “common benefits” provisions of their declarations of rights. As the Pennsylvania Constitution of 1776 put it: “Government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or sett [sic] of men, who are a part only of that community.”¹⁰⁸ Note that this original constitutional understanding not only had no “political powerlessness” requirement but was antithetical to such a requirement. The idea was that everyone would be treated the same, subject to criteria serving the common good.

Consistent with this understanding, judges between 1787 and 1868 believed that “class legislation”—targeting one minority group, often property owners—is deeply inconsistent with our fundamental rights and hence unconstitutional.¹⁰⁹ The Equal Protection Clause did not abandon that commitment—instead, it built on that commitment against class legislation, expanded to include not only the freed slaves, but also other racial and ethnic groups, without any significant mention of the political powerlessness of such groups.¹¹⁰ Today, equality is a bedrock freedom that all Americans take for granted, and that is a good thing. It is the glue that binds us all together in reciprocal benefits and obligations. Such a reading contributes to the robustness of our democracy for “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.”¹¹¹ A reading of equal protection that excludes groups found not to be politically powerless is strongly inconsistent with this history.

B. *The Institutional Interest of the Judiciary*

Legal process theorists, from Justice Frankfurter through Professor Alexander Bickel through Dean Ely, are concerned with the tension between judicial review by unelected judges and the democratic premises of legislation.¹¹² Unless a statute clearly violates the Constitution, there is a legitimacy

107. See THE FEDERALIST NO. 10 (James Madison) (structure of the republic will discourage “factional” laws); THE FEDERALIST NO. 78, (Alexander Hamilton) (judicial review will discourage “partial or unjust” laws). See generally Saunders, *supra* note 6 (describing the continuous line of case law discouraging “class legislation” in the early republic).

108. PA. CONST. of 1776, art. I, § 5 (1776), amended by PA. CONST. of 1790, art. I, § 2 (1790) and PA. CONST. of 1838, art. IX, § 2 (1838), www.law.gmu.edu/assets/files/academics/founders/penn-constitution.pdf.

109. See Saunders, *supra* note 6, at 247.

110. Excellent surveys of the drafting and ratification debates and their focus on “class legislation” as the object of the Equal Protection Clause are available. See, e.g., NELSON, *supra* note 8, at 176–78; Saunders, *supra* note 6, at 271–93 (describing the drafting and ratification of the Fourteenth Amendment, with a focus on the anti-class legislation idea).

111. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); *accord Cruzan v. Dir. Mo. Dept. of Health*, 497 U.S. 261, 300–01 (1990) (Scalia, J., concurring).

112. For the connection between “legal process” theories of law (emphasizing comparative institutional

concern with invalidation by unelected judges. This “countermajoritarian difficulty” inspired Dean Ely’s theory of judicial review: given the open-textured nature of most of the Constitution’s core rights, including equal protection, unelected judges should leave most majoritarian legislation alone and should only strike down laws that reflect the poor operation of the political process, which an unelected judiciary is well-situated to monitor the way a referee monitors a sporting event.¹¹³ One can argue from the representation-reinforcement premise that heightened equal protection scrutiny should be reserved for minority groups that are politically powerless—but there are many problems with such an argument from the institutionalist perspective of legal process theory that underlies Dean Ely’s own theory of judicial review. Thus, Dean Ely’s theory itself should not be read to support a political powerlessness requirement.

Recall that Dean Ely’s theory is grounded upon the *Carolene Products* dictum suggesting that deferential judicial review might not apply to laws “directed at particular religious . . . or national . . . or racial minorities” and that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” may justify a “more searching judicial inquiry.”¹¹⁴ From this part of the *Carolene Products* dictum, Dean Ely argues that more searching judicial review is justified when “representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.”¹¹⁵

Neither *Carolene Products* nor Dean Ely’s book suggests that a group needs to be “politically powerless” for a judge to conclude that the political process is malfunctioning. Instead, the focus is on the operation of prejudice to disadvantage the minority unfairly in the political process.¹¹⁶ Indeed, standard legal process analysis of institutional competence and legitimacy should press representation-reinforcing theories of judicial review away from the political powerlessness requirement.

Recall, from Part III, that the U.S. Supreme Court’s practice inverts the demands of the political powerlessness requirement. When a social group is totally powerless, the Court will not subject the group’s stigmatizing trait to heightened scrutiny. Once the minority has achieved some political power,

competence) and representation-reinforcing theory, see William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li to xcvi (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

113. See ELY, *supra* note 39, at 102–03.

114. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

115. ELY, *supra* note 39, at 103.

116. That is the primary argument of Ackerman, *supra* note 40.

then the Court may intervene with strict scrutiny,¹¹⁷ intermediate scrutiny,¹¹⁸ or rational basis with bite.¹¹⁹ The degree of scrutiny the Court will apply is driven by the Justices' judgment as to whether the classification defining the group is one that the state may legitimately take into account, or one that typically reflects prejudice or stereotyping.

It is in the U.S. Supreme Court's institutional self-interest to follow an approach something like the Court's actual practice—and the gay rights cases of the last generation illustrate why this is so. If the Court took the political powerlessness criterion seriously, it would get into hot water much more often. A political powerlessness requirement, if taken seriously, would encourage the Court to enforce over equality rights by generating decisions that would rile prejudiced majorities before powerless minorities could protect themselves against harmful backlashes. However fierce the southern backlash was after *Brown*, consider how ferocious it would have been if the Court had decided *Brown* fifteen years earlier, or if the Court had struck down the thirty anti-miscegenation laws in place in 1954.¹²⁰ This kind of thought experiment need not be hypothetical for gay rights issues. In 1993, a plurality of the Hawaii Supreme Court ruled that a same-sex marriage bar is “sex-based discrimination” subject to strict scrutiny; the court remanded the case for trial to determine whether the state's same-sex marriage bar could be justified under such heightened scrutiny.¹²¹ The reaction was immediate and ferocious. The mere possibility of gay marriage in the 1990s was enough to fuel a national anti-gay marriage backlash that is only now abating. In its wake came the unprecedentedly discriminatory Defense of Marriage Act of 1996 and dozens of new state statutes and constitutional provisions barring same-sex marriages and refusing to recognize out-of-state gay marriages.¹²² Even tolerant, liberal, multicultural Hawaii saw a strong backlash—and the Supreme Court of Hawaii beat a hasty retreat in 1998, when it vacated a lower court injunction and upheld a new law barring gay marriage in that state.¹²³

Here is a lesson of the Hawaii fiasco. When a constitutional court is too

117. For post-*Brown* race discrimination cases, see *Grutter v. Bollinger*, 539 U.S. 306, 308 (2005); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

118. For a post-*Craig* gender discrimination case, see *Virginia v. United States*, 518 U.S. 515 (1996).

119. For a pre-*Craig* gender discrimination case, see *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). For a post-*Romer* sexuality case, see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003), applying rational basis with bite to strike down state marriage exclusion for gay couples. For a post-*Cleburne* disability case, see *Heller v. Doe*, 509 U.S. 312 (1993).

120. For discussion on the fierce southern backlash to *Brown*, see NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1969); BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE (1961), and FRANCIS M. WILHOIT, THE POLITICS OF MASSIVE RESISTANCE (1973).

121. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (Levinson, J., plurality opinion).

122. For the public reaction in Hawaii and the rest of the country, see WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 22–42 (2002); David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19 (2000). For commentary on the Defense of Marriage Act, 1 U.S.C. § 7 (1996), see KOPPELMAN, *supra* note 4, at 124–140 (2002).

123. See generally Coolidge, *supra* note 122 (providing a detailed analysis of the Hawaii Supreme Court's hasty retreat after a renunciation of same-sex marriage in a 1998 voter initiative).

far ahead of public opinion on a divisive high-stakes issue—as the political powerlessness requirement encourages a court to be—then it risks a tremendous popular backlash. If such a backlash occurs, it threatens not only to undo the court’s constitutional ruling, but also to undermine the independence of the court itself.¹²⁴

A political powerlessness requirement, if seriously applied, would encourage the Court to underenforce equality rights because minorities seeking entry into the great American melting pot would be frustrated by political blockages reflecting prejudice, stereotypes, and good old-fashioned inertia. The requirement would be unfair to minorities. Blacks were politically powerless in the United States of the 1930s, when *Carolene Products* was decided. But, in the 1930s, racial minorities were not asking the U.S. Supreme Court to find race to be a suspect classification or to sweep away all race-based laws. This was not the civil rights agenda until after World War II, at the very point when racial minorities were securing some political influence at the national level, illustrated by President Truman’s decision to end racial segregation in the armed forces.¹²⁵ When *Brown* was decided in 1954, civil rights concerns were being addressed by the political process, but there was more than enough race-based prejudice to deny such citizens effective relief from the many discriminations against them.¹²⁶ If the U.S. Supreme Court had evaluated and upheld apartheid under the rational basis approach in the 1950s and 1960s based upon a political powerlessness requirement, what effect would that have had on the nation’s race relations? It is impossible to say for certain, but my bet is that social frustration would have boiled over into violence much earlier and more intensely than it did in the 1960s.

Consider *Lawrence v. Texas*. When Texas’ Homosexual Conduct Law was originally adopted in 1973, gay people were politically powerless in the state—so powerless that almost all gay Texans were in the closet, at least professionally. Such a social group will not generate a great deal of political organizing to start with, and whatever organizations form will concentrate on the extreme state policies, such as the consensual sodomy law struck down in *Lawrence*.¹²⁷ Once gay people were freed from criminal prosecution in a state like Texas, their political power would increase because gay and bisexuals Texans would come out of the closet. At some point, the social group’s legal agenda would include demands that all anti-gay discrimination be terminated—precisely the sort of demand that strict scrutiny is designed to deliver.

124. Even in moderate Iowa, voters reacted negatively to their supreme court’s decision recognizing same-sex marriages as a state constitutional requirement, *Varnum v. Brien*, 763 N.W.2d 889 (Iowa 2009). Three justices who supported marriage equality were voted out of office in 2010, the first time Iowa voters had done that in more than a generation.

125. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948) (establishing the President’s Committee on Equality of Treatment and Opportunity in the Armed Services)

126. E.g., ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* (2002) (painful account of the barriers to federal legislation making race discrimination illegal).

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

But usually, such demands are not seriously made until the social group already has achieved a level of tolerance by the body politic. In this way, the political powerlessness requirement for heightened scrutiny acquires a Catch-22 feature: equal protection doctrine would offer heightened scrutiny before the social group is ready to ask for it—but then would deny heightened scrutiny when the social group is able to nullify criminal laws placing a brand of inferiority on group members and, from that, presses an equal protection agenda. Catch-22s are not necessarily violations of the Constitution—but they are socially destructive, as I shall argue in Part IV.C.

C. The Pluralist-Protecting Purpose of Equal Protection

Two questions remain: What is the affirmative constitutional purpose of the Equal Protection Clause? What positive role should it play in American governance? Dean Ely's theory suggests that the purpose of equal protection is to protect the operation of the democratic process, but I have argued that the more obvious purpose is to protect the orderly emergence and assimilation of new groups into this country's pluralist democracy.¹²⁸ A pluralism-protecting theory of equal protection is hostile to the political powerlessness requirement for heightened scrutiny.

A pluralist political system is one whose goal is the accommodation of the interests of as many salient groups as possible, without disturbing the ability of the state and the community to press forward with collective projects.¹²⁹ In a pluralist democracy, social, economic, and ideological groups compete for the approval and support of representatives and the electorate. The polity, in turn, encourages groups to participate in the marketplace of politics. The twentieth century saw an evolution of American pluralism, responsive to identity-based social movements. Those movements sought to change public opinion about norms involving race, gender, sexual orientation, and disability and worked through the political process to change the law. But, those movements also reflected a multicultural pluralism, in which an increasing array of groups or subgroups sought to create their own quasi-autonomous communities within the larger culture.¹³⁰

Although the Framers of the Constitution did not anticipate our modern pluralism, they appreciated that social groups would become disenchanted with government when the system becomes embroiled in bitter disputes that frustrate the reasonable expectations of contending social groups. Groups will disengage when they believe that participation in the system is pointless due

128. See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279 (2005).

129. E.g., ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); Nicholas R. Miller, *Pluralism and Social Choice*, 77 *AM. POL. SCI. REV.* 734–35 (1983).

130. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIPS* (1995); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1990).

to their permanent defeat on issues important to them or due to their perception that the process is stacked against them, or when the political process imposes fundamental burdens upon them or threatens their group identity or cohesion.¹³¹ The Framers intuitively understood a basic precept of stable democracies: the state must avoid premature resolution of primordial issues that both evenly and intensely divide the body politic.¹³² At the founding of our nation, religion was the classic example of such divisive high-stakes politics; the Religion Clauses of the First Amendment sought to lower the stakes of religion-based politics by assuring that no religion would be persecuted nor would any religion be formally established as the official state faith.¹³³

A major problem for the multicultural-pluralist polity is how to manage the emergence, conflict, and normative triumph of identity-based social movements. In the twentieth century, successful movements followed this pattern: (1) minority group challenges consensus that its distinguishing trait (color, sex, sexuality) is a malignant variation from the norm; (2) society revises consensus to allow that the minority trait is a tolerable variation but not as good as the norm (whiteness, maleness, heterosexuality), which encourages the minority to insist on full equality; finally, (3) society revises consensus to recognize that the minority trait is a benign variation and that there is no single norm.¹³⁴ Traditionalists resist these claims; for some, adherence to traditional status entitlements itself becomes central to their identities.

At each stage, the stakes of politics will threaten to get too high. The stakes are raised, however, in different ways during each stage.¹³⁵ In Stage One, when a new group is emerging, the status quo will tend to suppress its message, disrupt its political mobilization, and perhaps attack its members through criminal laws. These are problems of insider lock-ins. In Stage Two, if the new group achieves a foothold in the political process, it will engage in intense, perhaps furious, debates with empowered groups over what the prevailing social norm should be. These are culture war difficulties. In Stage Three, if the new group persuades Americans that its members deserve (roughly) equal treatment, then it faces the difficult process of weeding out legal discriminations entrenched in the prior era. These are frictions arising from obsolete laws.

According to Adam Przeworski, “Constitutions that are observed and

131. My discussion of high-stakes politics, and its alienating effect on social groups, draws from ADAM PRZEWSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* 36–37 (1991).

132. See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 93–99 (1956) (arguing that a stable democracy requires that issues both evenly and intensely dividing society must not be decided prematurely, for that would alienate a significant social group and prove destabilizing).

133. Cf. STEPHEN HOLMES, *PASSIONS AND CONSTRAINT ON THE THEORY OF LIBERAL DEMOCRACY* 202–08, 222–27 (1995) (interpreting the Religion Clauses as an exemplar of governance meta-policies along the lines of “gag rules” to keep combustible issues off the public agenda).

134. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2069–72 (2002) (setting forth a detailed account of the interaction between emerging social movements, old majorities, and constitutional adjudications).

135. The analysis in this paragraph is taken from Eskridge, *supra* note 44.

last for a long time are those that reduce the stakes of political battles.”¹³⁶ Such constitutions “define the scope of government and establish rules of competition, leaving substantive outcomes open to the political interplay.”¹³⁷ Although Przeworski does not apply his insight to judicial review, his theory cautions that judges easily can raise the stakes of politics through review that is too aggressive—but often judicial review can have the effect of lowering the stakes of identity politics. Consider a few illustrations that are relevant to the political powerlessness requirement analyzed here.

In Stage One, when the emerging minority is despised and politically powerless, a stakes-lowering theory would say that judicial review should not recognize the relevant classification as suspect. This would have the effect of eliminating virtually all of the discriminations against the minority at the point in time when animus against the minority is widespread—such judicial activism would stimulate a terrible backlash by the fearful majority. Even under Dean Ely’s theory, judicial review would be more effective, with a much lower risk of backlash, if it were more targeted and libertarian in Stage One.¹³⁸ Enforcing the First Amendment to protect political organizing and expression against censorship would be a less risky judicial intervention than would strict equal protection review, and it would probably enable the emerging minority to object to discrimination against its members, refute stereotypes, expose prejudices as unfounded, and organize politically.¹³⁹

From a pluralism-facilitating point of view, heightened scrutiny for a minority group’s identifying trait should not come until late in Stage Two or, probably better, in Stage Three, when the minority is a visible and respectable presence in national politics; in other words, once the minority is no longer totally powerless politically.¹⁴⁰ Although many citizens will continue to harbor prejudice against or hold stereotypes about the minority, increasing numbers of citizens not identified by the trait will recognize the variation as tolerable or benign and not relevant to good public policy. Especially if judges are willing to nudge the political process by chipping away at old discriminations, legislatures will be more careful before they discriminate and may even repeal

136. PRZEWORSKI, *supra* note 128, at 36.

137. *Id.*

138. For an example, drawn from California judges during that state’s anti-homosexual Kulturkampf, see William N. Eskridge, *Foreword: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785, 1789–96 (demonstrating no one in public culture could even admit that “homosexuals” were entitled to equal treatment, but that far-sighted judges were able to provide due process and First Amendment protections for sexual minorities during that dark period).

139. See ESKRIDGE, *supra* note 44, at 145–48 (when “homosexuals” were politically powerless, judges still protected free press and speech rights, which were more efficacious than premature equality rights would have been); Richard A. Posner, *Ask, Tell*, NEW REPUBLIC, Oct. 11, 1999, at 52 (agreeing with this point and urging it as a model for most minorities).

140. As the experience of gay people in California illustrates, judicial protection of minority speech and organization will help the minority group to refute stereotypes, undermine prejudice, and persuade the majority that its members pose no serious threat to society. See Eskridge, *Marriage Cases*, *supra* note 138, at 1796–1802. Of course, whether the minority group is successful depends on the group’s ability to persuade the younger generation that their claims are correct.

old laws that burden the minority.¹⁴¹ If the body politic's experience with the increasingly visible and politically active minority is a good one, continuing discriminations against the minority will become irritants to a growing part of the body politic, usually younger people who view old discriminatory attitudes as ridiculous, and their demise would be upsetting to a smaller portion of the general population. It is during late Stage Two or perhaps Stage Three that judges should sweep away the minority-harming classification. Although the minority at that point is no longer politically powerless, it still faces burdens in the legislative process, and judicial review can usefully reverse that burden of inertia, so that discriminatory treatment and not law reform must be justified. The core reason for aggressive judicial review is that a consensus of informed opinion has concluded that variation regarding the classification is actually benign and should not be the basis for government policy.

V. CONCLUSION

The implications of the foregoing analysis for *Perry v. Schwarzenegger* are quite clear and disturbing for both sides. Contrary to Charles Cooper and other defenders of Proposition 8, there is no political powerlessness requirement for heightened scrutiny under the federal Equal Protection Clause, nor should there be. Such a requirement is a woeful misreading of American legal and cultural history, U.S. Supreme Court precedent, and political theory, and should not be imposed upon the Constitution. On the other hand, and contrary to Ted Olson and David Boies, a minority still subject to pervasive, even if declining, social prejudice and stereotyping in large swaths of the country is not in a good position to seek heightened scrutiny from the U.S. Supreme Court. Specifically, gay marriage—the last big state discrimination against sexual minorities—is still too controversial for the U.S. Supreme Court to impose upon the entire nation as a matter of federal equal protection law.

This analysis poses a dilemma for the Ninth Circuit, which heard the appeal in *Perry*.¹⁴² The best resolution would be for the case to be mooted through California's revocation of Proposition 8 in 2012.¹⁴³ Failing that, the Ninth Circuit is in a tough position. As a matter of doctrine, sexual orientation should be a suspect classification: gay people have been objects of pervasive and crippling state discrimination; sexual orientation has no bearing on people's ability to contribute to society and public projects; and there is no political powerlessness requirement, but if there were, gay people may qualify

141. *E.g., id.* at 1798–1800 (describing the California Legislature's repeal of the state's consensual sodomy law, so that gay people are not automatic outlaws); *id.* at 1805–06 (describing the legislature's enactment of anti-discrimination measures, following pioneering court rulings).

142. In early December 2010, the Ninth Circuit heard oral arguments in *Perry v. Schwarzenegger Oral Arguments*, C-SPAN (Dec. 6, 2010), available at <http://www.c-spanvideo.org/program/Perryv>.

143. Advocates of marriage equality are planning to place the issue on the ballot in California again in 2012. If Proposition 8 were revoked by another initiative, then the *Perry* case might be mooted.

at the federal level. But that is the dilemma. Properly understood, because of widespread prejudice, the political weakness of gay people is what makes it risky for the Ninth Circuit (which includes Idaho and Montana, culturally conservative states), and perhaps the U.S. Supreme Court, to sweep away most or all sexual orientation discriminations.

In my view, the Ninth Circuit and the U.S. Supreme Court should find some way to duck the suspect classification issue so that it is not resolved nationally.¹⁴⁴ Gay marriage is still an issue best left for state-by-state resolution, much as interracial marriage was until the 1960s. The U.S. Supreme Court has a number of procedural mechanisms whereby the Justices can leave any Ninth Circuit disposition in place. The Justices of course can deny review of the Ninth Circuit's judgment; even if review is granted, a majority can dismiss the appeal as moot if California voters revoke Proposition 8 in the interim; and even if the Court were to reach the merits of an appeal, there may be narrow grounds for deciding that it does not require the Justices to rule that sexual orientation is a suspect classification.

¹⁴⁴ Thus, I have filed an *amicus* brief in *Perry* arguing that the district court's opinion can be affirmed without reaching the suspect classification issue.

