

A PLURALIST THEORY OF THE EQUAL PROTECTION CLAUSE

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The Constitution is intimately connected with social “groups.” Although both the Constitution and the socially relevant groups have changed radically over more than two centuries, at least one general idea has been constant, and it is reflected in both the Constitution’s structure and its deliberative background (“original meaning,” if you will). My argument in this Article is that the Constitution assumes a particular normative theory about groups in politics, and this theory is pluralism. I am using “pluralism” to mean a political regime along the following lines: successful government must induce all “relevant” (i.e., socially important) groups and their members to invest in and commit to government as a forum for their protection and for their engagement in politics.¹

Part I of this Article will lay out the Constitution’s evolution as a document facilitating the operation of a democratic-pluralist regime. Part II derives from this documentary history and the original purpose of the Equal Protection Clause a pluralist theory of groups and equal protection. Part III will suggest the virtues of such a theory and apply it to some current cutting edge constitutional issues.

I. THE EVOLVING CONSTITUTIONAL STRUCTURE AND ITS COMMITMENT TO PLURALIST ENGAGEMENT

Even though the Framers held a variety of views about the nature and role of social groups in governance, the Constitution as a document has had a stable understanding of their role. The Constitution’s relatively stable meta-principle is that all relevant social groups should channel their energies into legislative politics, either at the national or local arena. A vigorous politics of group engagement will often be acrimonious, but a contentious politics is much better than

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¹ For useful statements of the normative foundations of democratic pluralism that are roughly along these lines, see ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967); ADAM PRZEWORSKI, *DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA* (1991); Nicholas R. Miller, *Pluralism and Social Choice*, 77 *AM. POL. SCI. REV.* 734 (1983).

feuds and strife outside of politics.² Corollaries to this principle include the following precepts that ought to guide pluralist democracies:

- participatory deliberation, the ideal that policymaking should be the product of open debate among officials accountable to an array of different groups, all of which have formal access to the institutions of deliberation and implementation;
- minority protection, the notion that government ought not be a mechanism for majority groups to entrench a permanent political marginalization of an outnumbered minority;³ and
- libertarian neutrality, or protections against government processes being deployed against minority group members, thereby undermining their sense of security within the political regime.

For the purposes of this Article, with its focus on equality protections, the second corollary, minority protection, is the most important, but I shall say a few words about all three.

A. *The Constitution of 1789*

The Constitution of 1789 was drafted and adopted to replace the dysfunctional governance structure of the Articles of Confederation. Its most celebrated feature was the creation of a puissant national government, while simultaneously preserving the States as centers of power and accountability. For my purposes, what is most important is that the Framers also grasped the essential features of pluralist democracy and sought to entrench it through the *structure of governance*.

² Starting with THOMAS HOBBES, *LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL* (Michael Oakeshott ed., Basil Blackwell 1946) (1651), social contract theorists have opined that the core purpose of government is to save us from the “brutish” state of nature by providing protection and peaceful means for social interaction and dispute resolution. Modern commentators sometimes forget the Hobbesian notion that the government is obliged to provide protection and public forums for *all* its citizens; any failure to provide as much for any salient group of citizens would, in Hobbes’s view, justify its departure or even rebellion, as the social contract was nullified for those in the group. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 197–98, § 222 (Ian Shapiro ed., Yale Univ. Press 2003) (1689) (expanding the role of government to include the protection of private property and opining that a regime attacking citizens’ property rights would justify the people in “resum[ing] their original liberty”).

³ See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 4–5 (1994) (articulating the historically recognized need to avoid pure majoritarianism); Robert A. Dahl, *Pluralism Revisited*, 10 *COMP. POL.* 191, 201 (1978) (noting that “a search ought to be made for mutually beneficial and mutually acceptable outcomes” between the majority and minority); Michael Parenti, *Power and Pluralism: A View from the Bottom*, 32 *J. POL.* 501, 530 (1970) (implying it would be desirable for less stratification to exist in society).

In making this argument, I recognize that the Framers did not have the same understanding of pluralism or even the groups that we have today. My argument is only that the broad precepts of what we would call democratic pluralism are instinct in the Constitution's structure and were explicitly invoked to support its ratification.

In the 1780s, Americans would not have conceptualized groups as we do today, and the pertinent categories would have been different. Rather than the race-based group categories that we consider important nowadays, early Americans would have considered conflicting groups to fall along these lines of political cleavage: regional and state loyalties and rivalries; religious identities and antimonies (like Protestant versus Catholic); and economic and social class divisions, as between debtors and creditors, merchants and farmers, and the like. Irrelevant to American politics in 1789 would have been persons of African descent, Native Americans, women, and men who did not have either land or money. In our modern eyes, none of these exclusions is defensible, but they defined American politics—and American constitutionalism—at the time of the Framing.

Once groups are understood in this way, a fundamental commitment of the Constitution becomes clear: policy decisions affecting these salient groups will be made by legislators elected by voters drawn from these groups or, in the case of the United States Senate, elected by the States themselves. For national law, this commitment is made by Article I, Section 7 (the bicameralism and presentment requirements for federal statutes) and the Supremacy Clause in Article VI. For state law, this commitment is made by Article IV's guarantee of a "Republican Form of Government."⁴

The most prominent defenders of the Constitution understood that a representative democracy could be selectively oppressive. In James Madison's terms, *factions*, which are temporary alliances of various groups, will tend to gang up on minorities such as property owners, an important group in the Lockean pluralism of the eighteenth century.⁵ The Framers knew their European history, which had many examples of a majority imposing its religious views on minority religions. This was always a disaster for the country in question—whether it was the England of Bloody Mary (1553–58) or the France of Louis XIV (1685). Governmental policies marginalizing or persecuting minorities were disastrous for democracy because (in modern par-

⁴ U.S. CONST. art. IV, § 4.

⁵ THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961). Specific page references to the *Federalist* will be to the 1961 Clinton Rossiter edition.

lance) they raised the stakes of politics, fed private inter-group bitterness, and drove minority groups away from politics. As Madison put it shortly before the Philadelphia Convention, “equality . . . ought to be the basis of every law,” and the law should not subject some persons to “peculiar burdens” or grant others “peculiar exemptions.”⁶

Madison and his then-ally Alexander Hamilton recognized factional politics as a serious threat to the whole enterprise of American government, and their Constitution articulated three different kinds of protections against the permanent marginalization and oppression of important property, religious, and other groups. Most of the protections were structural. The main idea was that the Constitution’s separation of powers in Articles I through III would head off “unjust and partial laws,” to use Hamilton’s phrase.⁷

First, the Framers expected that Article I, Section 7 would instantiate deliberative politics with wide-ranging group input before legislatures could create new statutes. No national statute could be enacted unless it was approved in the same form by: (1) the popularly elected House of Representatives; (2) the Senate, whose members were chosen by state legislatures; and (3) the President, the national executive official. The existence of these vetogates, each with a different electoral constituency, gave some assurance to the politically relevant minorities (i.e., property owners and the States themselves) that statutes burdening them would be subject to scrutiny in three differently constituted bodies. Madison famously argued that “[a]mbition must be made to counteract ambition,” by which he meant that separation of powers *and* federalism assured minorities of different situses for opposing partial and unjust laws.⁸ Deliberative politics at the state level was, theoretically, the promise of the Guarantee Clause in Article IV.

Second, the Framers believed that the system of checks and balances would protect minorities. The fact that statutory interpretation (Article III) and enforcement (Article II) were in the hands of officials different from those creating the statutory duties had two virtues. One was that law application by different institutions created incentives for legislators to adopt wise and temperate laws, as burdensome discriminatory statutes could be turned against the groups sponsoring them. Another virtue was that the judiciary would directly nullify “unjust and partial laws”⁹ through narrow interpretation or

6 James Madison, Memorial and Remonstrance Against Religious Assessments, *reprinted in* 2 THE WRITINGS OF JAMES MADISON, 183, 186 (Gaillard Hunt ed., 1901) (1785).

7 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 470.

8 THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 322.

9 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 470.

even constitutional invalidation. Following that idea, nineteenth century state judges developed a jurisprudence trimming back and sometimes invalidating “partial” laws applying “special” benefits or obligations on certain groups.¹⁰ Although not as important as the structural protection, the Constitution also contained a few specific protections, chiefly the bar to bills of attainder by both federal and state legislatures.¹¹

Third, the Framers believed that the constitutional structure would help ensure the perseverance of liberty for all groups. The vetogates implicated in Article I, Section 7 meant that it would be very hard for the federal government to create new legal burdens without significant public need. As Hamilton emphasized, the judiciary would provide a neutrality that would reassure minorities—especially landowners, merchants, and minority religions—that they could not be unfairly burdened.¹² Madison’s emphasis was federalism: the existence of state centers of power would provide a “double security” for everyone’s liberty and keep the national Congress honest.¹³

B. *The Bill of Rights, 1791*

Opponents of the Constitution maintained that the structural protections extolled by Madison and Hamilton were insufficient to protect minorities against unfair or even persecutory legislation. Their arguments had enough traction to impel Federalists supporting the Constitution to promise supplementation of the Constitution with rights-conferring provisions. True to their word, the Federalists delivered on their promise with the Bill of Rights, which was ratified by the States by 1791. Their rights-conferring strategy reaffirmed and deepened the Framers’ original pluralism-facilitating ideas, discussed above.¹⁴

¹⁰ See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247 (1997) (noting that state courts adopted a doctrine against partial or special laws). Some early state constitutions had explicit assurances along these lines. *E.g.*, PA. CONST. of 1776, ch. I (Declaration of Rights), § V (“[G]overnment 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 . . .”).

¹¹ U.S. CONST. art. I, § 9, cl. 3 (barring Congress from enacting bills of attainder); U.S. CONST. art. I, § 10, cl. 1 (outlining a similar bar applicable to state legislatures, but also including ex post facto laws and bills creating titles of nobility).

¹² THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 5, at 469.

¹³ THE FEDERALIST NO. 51 (James Madison), *supra* note 5, at 323.

¹⁴ On the regime created by the Bill of Rights, see generally AKHIL R. AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY (2005); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

The authors and ratifiers of these first ten amendments fully accepted the Constitution's premises that public policy is created primarily through statutes adopted by the people's elected representatives in the legislature *and* that all salient groups would be encouraged to take their fights and their agendas into the arena of legislative politics. Likewise, they accepted the three precepts above for protecting minority interests, but supplemented the Constitution's structural strategy for assuring a healthy pluralism with a rights strategy; their expectation, of course, was that the two strategies would be mutually reinforcing.

First, the Framers of the Bill of Rights created explicit rights allowing citizens to mobilize themselves politically, and thereby have an influence on legislative and other government deliberations contemplated by Article I, Section 7 and the Guarantee Clause. This was an important, and perhaps the primary, inspiration for the First Amendment's protections for free speech, petitioning the government, and freedom of assembly.¹⁵ Hence, the deliberation entailed in republican law creation would be informed by popular input and feedback. The Supreme Court has also interpreted the Second Amendment as protecting an individual's right to bear arms, in part as an insurance against oppressive legislation.¹⁶

Second, the Framers of the Bill of Rights provided explicit rights-conferring protections for minorities against discriminatory statutes or implementation. Recall that, for these Framers, the most salient "minorities" were creditors, property owners, and religious minorities. Creditors and property owners were subject to confiscatory statutes, and the Takings Clause in the Fifth Amendment was a protection for their interests: their property could not be taken except for a "public use" and must be accompanied by just compensation. Religious minorities, the objects of the most stakes-raising politics in Europe and England in the early modern period, were the beneficiaries of the Constitution's first elaborate minority-protection scheme: the Free Exercise Clause barred the federal government from persecuting religious minorities, and the Anti-Establishment Clause barred the federal government from creating a state religion such as the

¹⁵ Although not a work of history, for the best statement of the First Amendment, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

¹⁶ See *District of Columbia v. Heller*, 128 S. Ct. 2783, 2789 (2008) (explicating the Second Amendment's history to support the notion that an armed citizenry was an important assurance of popular liberties against government oppression).

Church of England, which could force minorities to support a religion they found odious.¹⁷

Third, the Bill of Rights expanded the Constitution's libertarian protections with an enforceable Due Process Clause in the Fifth Amendment (which, like the other provisions, only applied to the federal government). That provision has traditionally been read to assure minority persons a fair hearing before an impartial judge before the State could deprive them of life, liberty, or property. If the federal government went after such persons in a criminal proceeding, the rights protections of the Fourth, Fifth, Sixth, and Eighth Amendments kicked in, making it much more difficult for the federal government to invoke the State's most serious sanctions in these circumstances.

C. Reconstruction Amendments, 1866–1871

In the two generations between the Constitution of 1789 and Reconstruction, the United States changed dramatically. The biggest social change was the creation of a potentially important new social group—namely, the slaves, who were freed by the Emancipation Proclamation (1863) and the Thirteenth Amendment (1866). The Reconstruction Framers believed that these new African American citizens would immediately be subject to discrimination and even persecution by former slave States. Thus, the immediate purpose of the Reconstruction Amendments was pluralistic: to integrate citizens of color into the body politic and head off the tendency of the former slave States to go after citizens of color with “partial and unjust laws” that would have made Hamilton blanch.¹⁸

Early drafts of the Fourteenth Amendment explicitly focused on the freed slaves or racial minorities, but none of these drafts gained enough political traction to advance in Congress. Instead, the text that Congress sent to the States for ratification was non-raced; its provisions were phrased generally, and the expectation of the Framers was that their individual rights protections would not be limited to

17 For a general discussion along these lines, see ARLIN M. ADAMS & CHARLES J. EMMERICH, *A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES* (1990).

18 On the politics of the Abolitionists and their connection with the Reconstruction Amendments, see MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988); JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951).

persons of color.¹⁹ More important, the Reconstruction Framers saw themselves as elaborating upon the already-existing constitutional structure and expanding it to protect a new cluster of social groups against *state*, and not just federal, oppression. Unlike the 1789 and 1791 Framers, the Reconstruction Framers were not focused on property-owning or religious minorities, whose protection they took for granted; they wanted to extend the Constitution to protect the new African American citizens against the southern Black Codes that threatened to reduce them to slave status despite the Thirteenth Amendment's restrictions on doing so. The class legislation focus was not limited to the Black Codes and theoretically included any kind of law that took rights or property from Group A to benefit Group B without any serious advancement of the public interest.²⁰

As the Bill of Rights had done in 1791, the Fourteenth Amendment of 1868 created rights-based protections that contributed to the constitutional project of supporting pluralist democracy by ensuring deliberation involving a variety of groups, protecting minorities against majority overreaching, and guaranteeing core liberties against rash invasion.

First, the Reconstruction Amendments gave bite to the participatory precept underlying the unenforceable Guarantee Clause. Accordingly, the Fourteenth Amendment barred the States from denying certain "privileges or immunities" to their own citizens. The Privileges or Immunities Clause was probably intended to extend the First Amendment protections for free speech and press, assembly and petition, and religious freedom to the States.²¹ The Fifteenth Amendment, barring the States from denying citizens the vote on account of race, was meant to head off the likely effort of southern States to close off their legislatures from the influence of the freed slaves.

Second, the Equal Protection Clause of the Fourteenth Amendment imposed a new equality obligation upon the States. What was the nature of that obligation? Senator Jacob Howard (who introduced the Fourteenth Amendment in the Senate) said that the pur-

¹⁹ Saunders, *supra* note 10, at 276–85 (tracing the drafting history of the proposed Fourteenth Amendment, from early drafts focusing on race to the more generally phrased drafts that formed the basis for the amendment ultimately proposed by Congress).

²⁰ NELSON, *supra* note 18, at 176–78; Saunders, *supra* note 10, at 271–93.

²¹ See Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1081–82 (2000) (proposing a reassessment of history to determine whether and to what extent the Fourteenth Amendment applies the guarantees of the Bill of Rights to the States). To be sure, the matter remains much disputed.

pose of the Equal Protection Clause was to abolish “all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.”²² This view was widely shared among the sponsors and supporters of the Fourteenth Amendment in both Congress and the ratifying legislatures.²³ Such a purpose went beyond race-based class legislation, but the 1868 Framers were not precise, and probably not of one mind, in laying out precisely what the language permitted and what it prohibited.²⁴

Third, the Due Process Clause expanded the libertarian/neutral precept to state governments. (Recall that the Fifth Amendment’s Due Process Clause applied only to the federal government.) Senator Howard’s class legislation idea was also linked to the Due Process Clause, partly because the notion of a neutral rule of law is naturally akin to an aversion to special legislation, and partly because some state court judges based their class legislation cases on state due process clauses.²⁵

²² CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard); *accord id.* at 174 (statement of Rep. James Wilson) (stating that in republican government, there can be “no class legislation” and no laws that “legislate against [one class] . . . for the purpose of advancing the interests” of another class).

²³ *See* Saunders, *supra* note 10, at 285–93 (examining in detail both congressional and ratification debates supporting the idea that the core goal of the Equal Protection Clause was to codify the antebellum state cases invalidating special and partial laws).

²⁴ On the confusion of the 1868 Framers’ expectations, see NELSON, *supra* note 18, at 176–78.

²⁵ CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Jacob Howard) (announcing the no-class-legislation principle as reflected in the latter two clauses of Section 1); Saunders, *supra* note 10, at 286–87.

TABLE 1. THE EVOLVING CONSTITUTION AND PLURALISM

Value	Constitution of 1789	Bill of Rights, 1791	Reconstruction Amendments, 1866–71
Participation and Deliberation	Guarantee Clause, art. IV; Bicameralism & Presentment, art. I, § 7	Free Speech, etc., I Amend.; Armed Citizens, II Amend.; Jury, VI–VIII Amends.	Privileges or Immunities Clause, XIV Amend.; Right to Vote, XV Amend.
Minority Protection	Separation of Powers; Federalism; No Bills of Attainder	Religion Clauses, I Amend.; Takings Clause, V Amend.	No Involuntary Servitude, XIII Amend.; Equal Protection Clause, XIV Amend.
Libertarian Neutrality	Independent Judiciary, art. III, § 1	Due Process Clause, V Amend; Criminal Procedure, IV, V, VI & VII Amends.	Due Process Clause, XIV Amend.

Table 1 maps the Constitution's pluralism-facilitating provisions. Note that the constitutional guarantees expanded along three dimensions: from structural protections to inclusion of rights-conferring provisions; from particular rights (such as religion) to more generalized rights statements; and from guarantees applicable solely to the federal government to those applicable to the States. As the sociology of groups changed, and as the American experience developed, the Constitution expanded. Its expansion was sedimentary, as the old protections remained even as new protections were added. This Article only focuses on the minority protection provisions, and the Equal Protection Clause in particular, but this part of the Constitution needs to be understood in light of the larger constitutional picture.

My argument is that the Fourteenth Amendment updated and generalized the pluralism-protective features of the Constitution. Specifically, constitutionalizing the no-class-legislation principle of the Jackson era, the Equal Protection Clause sets boundaries on the dynamic process of lawmaking to assure that it will be pluralism-facilitating. The meta-purpose of constitutional equality protections is to encourage both established and emerging groups to *want* to participate in the democratic political process and not want to drop out.

II. A PLURALISM-FACILITATING THEORY OF EQUAL PROTECTION REVIEW

This Part moves from the structural constitutional history examined above to a workable and realistic theory relating the Equal Protection Clause and constitutional history to the relationship between government and social groups. The constitutional history, including notions grounded upon original meaning, plays three important roles in my theory. First, the history provides a conceptual purpose for the Equal Protection Clause: the bar to “class legislation.” What does that mean, as applied to modern circumstances? This is obviously a harder project, but the difficulty is an inevitable one and so cannot be ignored or facilely glossed over. My theory for developing the consequences of the no-class-legislation purpose of the Equal Protection Clause rests upon the pluralistic meta-purpose of the Constitution itself: the State must provide security for all salient social groups and must provide a sufficient incentive for all such groups to advance their agendas within the forums provided by the State.²⁶

Second, the history provides three different, and mutually reinforcing, constitutional corollaries that help assure conditions conducive to a flourishing democratic pluralism: open deliberation where a wide variety of groups participate, a presumption of equal treatment and minority protection, and neutrality with a libertarian bias. Structurally, therefore, I read the Fourteenth Amendment not only in light of its generative debates, but also in light of the Constitution’s longer history. I would link the Equal Protection Clause not only with Reconstruction’s larger project of integrating citizens of color into American politics, but also with the Bill of Rights’ project of respecting religious pluralism through both a free exercise right and an anti-establishment norm. Reasoning by analogy from the Religion Claus-

26 For background, 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).

es as well as the anti-Black Code feature of the Equal Protection Clause provides a law-based mechanism for applying the generally phrased latter clause to other groups.

Third, the history suggests anchors that can be starting points for the process of reasoning by historical analogy to modern circumstances. Accordingly, my theory understands equal protection playing different roles depending upon the status of the social group. A pluralistic democracy enjoys a dynamic relationship with social groups, which are themselves evolving. I focus on the important pluralist phenomenon of social groups that go through the following cycle, from: (1) irrelevance, when society views their defining traits as malignant variations from the norm; to (2) visibility but marginality, when society views their defining traits as tolerable but inferior variations from the norm; to (3) full participation, when society views their variations as benign and there is no single norm. Each stage in the cycle provides a background norm against which the no-class-legislation principle can be applied. History provides examples the Framers considered core illustrations of the no-class-legislation principle, and these examples enable us to reason by analogy to modern circumstances.

Reading the no-class-legislation purpose through the lens of pluralist theory generates the following rough typology for applying the Equal Protection Clause to new and unforeseen cases:

- State distinctions will not be class legislation if they reflect a natural distinction whose legal recognition serves the public interest. Thus, the 1868 Framers did not consider women to be a politically relevant group, even though many women themselves objected to that understanding.²⁷ The general idea is that where there is no socially recognized, and pluralistically important, group penalized by state distinctions, there is little work for the Equal Protection Clause to do. Following the Framers, the Supreme Court for generations treated statutory sex discriminations as not presenting strong equal protection concerns.
- The no-class-legislation principle has much more bite once a group is accepted as politically relevant, even if it remains socially marginal. This was precisely the status of the freed slaves; even most Republicans believed that black citizens were inferior to white citizens. But the goal of Reconstruction was to inte-

²⁷ See Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1475 (2001) (noting women's rights groups' opposition to the Fourteenth Amendment).

grate these new citizens into American politics, and the Equal Protection Clause contributed to that purpose by legitimizing the Civil Rights Act of 1866 and overriding the Black Codes. Although the Framers decidedly felt that law could reflect race-based distinctions, such as the remedial program of the Freedman's Bureau, they wanted to override any such race legislation that entrenched black citizens as a subordinate caste.²⁸ The general idea is that a marginal but politically relevant group must be tolerated and cannot be subject to legislation that seeks to entrench an outcaste status for that group.

- The no-class-legislation principle has the most bite for minority groups that have become socially accepted participants in our pluralist democracy; this was the goal for African Americans in the twentieth century. This was more or less the status of minority religions in 1868, and the Framers intended the Fourteenth Amendment to apply the Religion Clauses to the States. Where the public law background norm was benign variation, as it was for religion, the State could not openly discriminate at all. My suggestion is that, for a minority group fully accepted in the pluralist heaven, the no-class-legislation principle merges into the free exercise and anti-establishment principles. Precisely, legislation penalizing a salient group in favor of the majority is class legislation in the free exercise sense, while legislation providing special benefits for the majority group alone is class legislation in the establishment sense.

Consider these stages of a group's normative status in our polity in greater detail; in the course of discussion, I shall use sexual minorities as a template for applying these basic ideas.²⁹

A. *Stage One: Libertarian and Deliberation-Participatory Protections*

Anybody can announce himself a member of a group, and Americans can be classified, and self-classified, in myriad ways. The Framers of the Fourteenth Amendment, as well as those of the Bill of Rights, did not understand their protections as applying to any conceivable "class" of Americans; my theory identifies a limiting princi-

²⁸ See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 755 (1985) (noting that Congress rejected various race limitations in social welfare programs).

²⁹ For a more comprehensive look at how the law treats sexual minorities, see WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) [hereinafter *ESKRIDGE, GAYLAW*], and WILLIAM N. ESKRIDGE, JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003* (2008) [hereinafter *ESKRIDGE, DISHONORABLE PASSIONS*].

ple. In policing “special” or “partial” legislation, the Equal Protection Clause ought to focus on groups that are socially and politically relevant as players in our democratic-pluralist politics. A social group is *not* politically relevant when society understands its defining trait to be a malignant variation. Just as alcoholics and child molesters are politically irrelevant today (they might be understood as “groups” but are not recognized political players), so were cross-dressers and “degenerates” (later called “inverts” or “perverts” or “sexual variants”) in 1868, when the Fourteenth Amendment was ratified. Putting it another way, degenerates et al. were considered regulatory objects and not subjects by those who held power in 1868, just as those who hold power today do not consider alcoholics a legitimate social group that is a legitimate player in the pluralist political process. Hence, legislation singling out “degenerates” or “perverts” for sterilization, as a number of jurisdictions did in the early twentieth century, did not in that period (as in 1868) mobilize serious equal protection concerns.³⁰

The Equal Protection Clause is concerned with politically relevant groups, and so its bite is going to be weak for persons who are not members of a recognized group—but that does not mean that outcasts from politics do not concern a pluralist theory of the Fourteenth Amendment. Quite the contrary, as the 1789, 1791, and 1868 Framers *all* recognized, a source of the dynamism of pluralist politics is the emergence of new politically salient groups. Pluralist theory demands that the State remain neutral and open to the emergence and salience of new social groups, and the Fourteenth Amendment protects this process at the state level.

Thus, the Fourteenth Amendment insists that the State provide “due process” to *all* persons, however squalid society deems them to be. A social leper in 1868 (the degenerate) may be part of a thriving and widely accepted social group in 2009 (the gay community). A State that imprisons and executes a social pariah without evidence of serious wrongdoing, with evidence procured through illegal means, without allowing the person to cross-examine witnesses against him, or through a corrupt process where the decisionmakers prejudged his guilt because of his pariah status, is no better than a dictatorship and is antithetical to the Constitution generally and the Due Process Clauses in particular. Due process reflects the Constitution’s libertarian bias, and it is a bias that applies to the squalid miscreant, the innocent outsider, and the respectable citizen alike.

³⁰ *E.g.*, 1909 Cal. Stat. 1093–94 (permitting the sterilization of “moral and sexual pervert[s]”).

The Fourteenth Amendment has also been read to guarantee pariahs something more positive, namely, the right to protest their status, to publish materials seeking tolerance from the majority, and to form political groups to seek legal changes through legislation, administrative change, and so forth.³¹ While nine pariahs out of ten may be usefully treated as marginal, the tenth one may be the germ of a group to come—and it is imperative that the State induce all ten pariahs to make their case within the pluralist system rather than going underground or otherwise moving outside of the system.

Although the Equal Protection Clause provided no protection (equal or otherwise) for degenerate, inverted, perverted, or homosexual Americans for most of our history, even these despised and feared persons enjoyed significant constitutional protections against government oppression. For a dramatic example, between 1946 and 1961, state and federal governments created an anti-homosexual regime that precisely paralleled the one created by Nazi Germany in the previous period (1933–1945)—yet America’s anti-homosexual Kulturkampf never became a Nazi-like Holocaust (a mass imprisonment, torture, and extermination of homosexuals as well as Jews and gypsies), in part because of the recognized constitutional due process and free speech protections enjoyed even by accused homosexuals.³² This is to be celebrated not just for humanistic reasons, but also for pluralism-based reasons: a persecutorial society is one that invites internal corruption, undermines opportunities for social cooperation, and creates political anger and dangers of retaliation.

B. Stage Two: No Class Legislation (Narrow Sweep)

The admonition against class legislation has some bite for social groups that are junior partners in America’s great and (after 1850) rapidly expanding pluralist pantheon. By junior partners, I mean that the minority has emerged as a coherent social group, and the

³¹ The protections in text were originally understood as falling within the Privileges or Immunities Clause, see CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Jacob Howard) (noting the amendment “relates to the privileges and immunities of citizens”), but the Supreme Court relocated these protections into the Due Process Clause. *E.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (applying the First Amendment to the States under the aegis of the Due Process Clause).

³² See ESKRIDGE, *GAYLAW*, *supra* note 29, at 57–97 (discussing “how post-World War II American law went much further than prewar law to suppress gay subculture and how antigay Kulturkampf (state war of subcultural suppression) contributed to the closet”). See generally Richard A. Posner, *Ask, Tell*, NEW REPUBLIC, Oct. 11, 1999, at 52 (analyzing Eskridge’s account of “gaylaw,” the law’s treatment of homosexuals and other “gender nonconformists,” in the book, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET*, *supra* note 29).

majority considers the group's trait to be a tolerable and not malignant variation. This was the normative step taken for blacks by Reconstruction; even Republicans who harbored racist views that blacks were inferior to whites believed that racial variation was tolerable and ought not be the basis for class legislation suppressing blacks. Likewise, "homosexuals" evolved into "gays" in large northern cities in the 1960s and 1970s, but it was not until the 1990s that most Americans came to view homosexuality as a tolerable (but still icky) variation from the norm.

From a pluralist perspective, the emergence of a new social group clamoring for inclusion in ordinary politics is occasion for both celebration and concern. That gay people took their case for decent treatment to local and state legislatures and judges is exactly what makes pluralist democracy a great engine for adjusting politics to new social dynamics. And the success of gay people sends an affirming signal to the next social groups. But even as established groups are forced to deal with the new one, they can be expected to push back and reassert traditional statuses in the face of new challenges. Sometimes the majority groups push back too hard. Where should the line be drawn? In retrospect, most of us now believe that the first Justice Harlan, rather than the Court, got the line right in *Plessy v. Ferguson*, for example.³³ A regime that thoroughly segregated blacks from whites was class legislation even if one believed, as Harlan did, that blacks were an inferior race: the fates of the different races are linked, and apartheid not only fueled race-based animosity, but also impeded cooperation and useful interaction among persons of different races.³⁴

For a more recent example, the response of America's most traditionalist States to the emerging gay social group was to reaffirm the notion that sodomy is a serious offense against society and should be the basis for civil as well as criminal disabilities—but traditionalists created a new crime of "homosexual" and not heterosexual sodomy, lest their project affect married and other heterosexual Americans who practice oral or anal sex. Hence, the Supreme Court in *Bowers v. Hardwick* suggested (in the context of a completely nondiscriminatory sodomy law) that the State could certainly criminalize homosexual,

³³ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (Harlan, J., dissenting).

³⁴ *See id.* at 557–59 (objecting to the Court's ratification of segregated railroad travel and arguing that a forced separation of the races is bad politics because the fates of the two races are interlinked).

but probably not heterosexual, sodomy.³⁵ The Court seventeen years later overruled *Bowers* in *Lawrence v. Texas* based upon a sea change in America's pluralist landscape³⁶: by 2003, gay people had graduated from utter pariahs to a nervously accepted social group, and the Court required Texas to follow the new consensus. Although it was characterized as a due process opinion, *Lawrence* also exploited the core goal of the Equal Protection Clause: the State cannot subject a thriving social group to a network of legal exclusions and discriminations that push its members outside the normal channels of politics.³⁷

An earlier Supreme Court case also illustrates this precept. In *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that, read literally, sought not only to revoke anti-discrimination laws protecting gay people, but also to deny gay people ordinary protections against mistreatment by the State.³⁸ The Colorado amendment echoed our country's lengthy history of pervasive discrimination against, and violence toward, gay people—a link the Court sought to disrupt. Correctly reading American political culture to have moved from hostility as regards to “homosexuals,” toward a culture of tolerance, the Court essentially ruled that the amendment was a queer version of the old Black Codes: an effort by family values conservatives to consign “homosexuals” to be a permanent underclass.³⁹ Dissenting Justices made the logical point that this reading of equal protection was inconsistent with *Bowers*, a notion the Court followed seven years later when it formally overruled *Bowers*.⁴⁰

Other pluralism-protecting Supreme Court decisions support my notion that the “class legislation” concern of the Equal Protection Clause has been, and should be, read through the lens of democratic pluralism. A harbinger of *Romer* was the Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, which invalidated the application of a zoning ordinance to close down a home for mentally disabled persons.⁴¹ Pluralism-monitoring is on the face of the Court's

35 478 U.S. 186 (1985). *Bowers* was analyzed in detail by ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 29, at ch. 8.

36 539 U.S. 558, 559–60 (2003).

37 *Id.* at 574–75 (recognizing the equal protection claim as tenable and closely linked to the Court's own privacy analysis); *id.* at 579–85 (O'Connor, J., concurring in the judgment) (invalidating the Texas Homosexual Conduct Law solely on equal protection grounds).

38 517 U.S. 620, 630 (1996). *But see id.* at 636–38 (Scalia, J., dissenting) (strongly disputing the majority's understanding of the Amendment 2's plain meaning). *See generally* ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 29, at ch. 9 (analyzing the Supreme Court's “regime-shifting” opinion in *Romer v. Evans*).

39 *See Romer*, 517 U.S. at 630–35 (majority opinion).

40 *Id.* at 636–51 (Scalia, J., dissenting).

41 473 U.S. 432 (1985).

opinion, which recognized people with disabilities as a social group that state and federal legislatures had recognized as a worthy part of society, but without insisting upon completely equal treatment, because the identifying trait was one that did often bear on one's capacity for participation in politics, governance, and society.⁴² Nonetheless, the city's harsh application of its zoning law struck the Court as having no relationship to legitimate public policy concerns and was, instead, a state implementation of private "prejudice."⁴³ *Cleburne* stands for the proposition that any law targeting a salient social group because of prejudice is class legislation unacceptable under the Equal Protection Clause.

Another example of class legislation is the Texas law struck down in *Plyler v. Doe*.⁴⁴ The law barred children of illegal aliens from receiving public education in the State.⁴⁵ Although the law may have reflected prejudice, like the laws later invalidated in *Cleburne* and *Romer*, the Court found particularly troubling the promise that such a law would create a permanent "underclass" of young people (many of whom were themselves citizens, because they were born here) denied education and engagement in American society.⁴⁶ There were plenty of ways Texas could discriminate against illegal aliens, but excluding the next generation of Americans (no longer "aliens") from our culture is exactly the wrong way to discriminate. Again, the permanent subordination of a potentially thriving social group might have reminded some of the Justices of the Reconstruction-era Black Codes.

C. Stage Three: No Class Legislation (Broader Sweep)

Gay people, persons with disabilities, and aliens as well as their children are important social groups that the Equal Protection Clause will sometimes protect, but most Americans still consider their variation from the norm at best *tolerable*, and far from *benign* or completely normal. Most parents, for example, would be strongly disappointed, and some would be hysterical, if their beloved daughter decided to marry a lesbian, a disabled person, or the offspring of an (illegal) alien. Advocates for such minority social groups want to persuade those Americans that they are wrong: the lesbian, the differently ab-

⁴² See *id.* at 442–46.

⁴³ *Id.* at 446–50; *accord id.* at 451–55 (Stevens, J., concurring) (arguing for a sliding-scale approach to equal protection).

⁴⁴ 457 U.S. 202 (1982).

⁴⁵ *Id.* at 205.

⁴⁶ *Id.* at 219–20; *accord id.* at 236–42 (Powell, J., concurring).

led, or the progeny of an illegal visitor can be just as good a spouse as the heterosexual, the fully able, or the progeny of a legal citizen. Indeed, such a person might actually be the very best spouse for this particular daughter.

None of these groups has yet persuaded Middle America of such normative claims, but other groups have been successful. The civil rights and the women's rights movements have persuaded Americans that race and gender variation are *benign* and not just tolerable; race or (usually) sex has no bearing on one's ability to participate in the workplace and other forums. Once their fellow Americans accepted that proposition, and the former out-group became a political in-group, the no-class-legislation principle demanded more than it did in *Romer*, *Cleburne*, and *Plyler*. Once women and people of color assumed roles as salient social groups whose voices matter in America, then any law that formally discriminates against those groups demands serious judicial scrutiny, as potential class legislation that takes rights or property from one group to another without a sufficient justification in the public interest. Justices engage in intense debates about what public interests justify sex or, especially, race classifications, but they are in accord that the State must advance strong justifications.⁴⁷

The normative migration of a group's trait from tolerable to benign status is a movement the Supreme Court can easily detect and has done so in earlier regime shifts. Although opinion polls can be useful confirmatory evidence, the usual barometer for a judicial audience is and ought to be widespread adoption of statutes to that effect. The adoption of statutes not only confirms the status of the group as a normal player in the pluralist political arena, but also suggests that the group has persuaded super-majorities of their claims to full participation and respect. Thus, the discrediting of race as a legitimate classification culminated in *Loving v. Virginia*, where the Court struck down state laws barring different-race marriages.⁴⁸ Although Americans today regard *Loving* as a constitutional gimme, it was in fact rendered so *only* after Congress had adopted anti-discrimination super-statutes in 1964 (the Civil Rights Act) and 1965 (the Voting Rights Act), and all the States outside the South had re-

47 *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that government racial classifications must be analyzed by reviewing courts under strict scrutiny to evaluate the validity of the government's use of race in a certain context); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that the government must demonstrate an "exceedingly persuasive justification" to defend sex discrimination).

48 388 U.S. 1 (1967).

pealed their own anti-miscegenation laws.⁴⁹ Likewise, feminists won heightened scrutiny for sex-based classifications *only* after they had revealed their political muscle in a series of anti-discrimination laws adopted by Congress in 1964 and 1972.⁵⁰

You do not need opinion polls to know that there has *not* been such a normative shift as regards homosexuality or even physical disability. Most States still do not have anti-discrimination laws that include sexual orientation, and the laws that protect the disabled (such as the Americans with Disabilities Act of 1990) allow discrimination for various social and business justifications.⁵¹ Under a pluralist-facilitating theory, it would be a mistake for the Supreme Court to consider these traits to be suspect classifications. Homosexuality will in the foreseeable future likely be a trait that most Americans will consider benign as a matter of public policy. And when that day comes, there will be a federal anti-discrimination law, as well as similar policies at the state level. If that happens, the Supreme Court will sweep away the remaining anti-homosexual discriminations.

Table 2 below maps out the constitutional rights practically available to different social groups (categorized according to the normative acceptability of a defining trait).

49 See RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 244–80 (2003) (detailing the repeal of and attack on antimiscegenation laws in the United States).

50 See *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (opinion of Brennan, J.) (arguing for strict scrutiny for sex discrimination, based upon congressional legislation announcing that such discrimination ought to be illegitimate in our modern pluralistic democracy); JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS 202–04* (1975) (noting 1971–72 as an *annus mirabilis* for the Equal Rights Amendment and a series of important congressional sex discrimination statutes).

51 See generally WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2d ed. 2004) (providing an analysis of sexual orientation discrimination laws and the Americans with Disabilities Act).

TABLE 2. THE DYNAMICS OF PLURALISM AND THE FOURTEENTH AMENDMENT

Status of Group in American Society	Due Process Protection	First Amendment Protection	Equal Protection of the Law
Marginal (trait a malignant variation)	Criminal procedure important, as group members are targeted for criminal prosecution	Potential First Amendment rights, albeit uneven judicial enforcement	Little if any scrutiny under the Equal Protection Clause
Emerging as Salient (tolerable variation)	Criminal procedure protections + Privacy rights	Broad First Amendment rights, with judicial enforcement	Anti-Caste Idea: Group cannot be rendered outlaws
Fully Participating Group (benign variation)	Criminal procedure protections + Privacy rights	Full First Amendment rights, with judicial enforcement sometimes against minorities	Clean-Up: Courts will clear away discriminations not addressed by political process

III. DEFENSE AND APPLICATION OF A PLURALIST THEORY OF EQUAL PROTECTION

A. *Virtues of a Pluralist Theory of Equal Protection*

I would claim three different kinds of virtues for the foregoing pluralist theory of groups and the Fourteenth Amendment: rule of law, democratic theory, and practicality.

To begin with, such a pluralist theory finds support in the evolving structure of the Constitution and in the original purpose of the Fourteenth Amendment itself, for the reasons suggested above. Indeed, a pluralist theory has a better connection with structural and historical

constitutional materials than John Hart Ely's more aggressive theory arguing that the Equal Protection Clause should protect "discrete and insular minorities."⁵² Stated somewhat differently, a pluralism-facilitating theory has the rule-of-law advantages of: (1) carrying out the original purposes of the Fourteenth Amendment in a manner consistent with (2) the constitutional structure and (3) other commitments of the constitutional deliberations, namely: (a) pragmatism, or an avoidance of mechanical rules and adoption of an adaptive approach; (b) caution, or an aversion to giving federal judges a broad veto power over state legislation, and a deference to congressional judgments; and (c) political functionality, or a devotion to an integrated United States where the stakes of politics do not get so high that they drive groups out of the system.

In my view, a bigger advantage of pluralism-facilitating theory is that it is responsive to a huge problem faced by all democracies: their fragility when the emotional stakes get too high. Political scientists, ranging from Adam Przeworski to Stephen Holmes to Lani Guinier, warn us that pluralist democracy is fragile, in part because its stakes tend to get out of hand.⁵³ Certain that they are right about the important issues of the day, reigning majorities have a tendency to censor opposing views, to create ambitious legal regimes of exclusion for some minorities they find obnoxious or distasteful, and to leave in place obsolescent discriminations. These tendencies create unnecessary frictions in a pluralist democracy, and the theory outlined here provides a modest antidote to these destructive tendencies.

Finally, pluralism-facilitating theory has a big advantage in that it helps explain the Court's eclectic case law—going well beyond racial, ethnic, and religious minorities as the beneficiaries of the Equal Protection Clause. Specifically, the Court has invalidated laws that either seek to create, or have the potential effect of creating, new outcaste

52 JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980). For important critiques of Ely's theory, see, for example, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980), and Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 *YALE L.J.* 1037 (1980).

53 See GUINIER, *supra* note 3 (arguing that the winner-take-all approach to United States elections creates a "tyranny of the majority"); STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 202–08, 222–27 (1995) (discussing the importance of gag rules in liberal democracies); PRZEWORSKI, *supra* note 1, at 19, 36–37 ("Some institutions under certain conditions offer to the relevant political forces a prospect of eventually advancing their interests that is sufficient to incite them to comply with immediately unfavorable outcomes. Political forces comply with present defeats because they believe that the institutional framework that organizes the democratic competition will permit them to advance their interests in the future.").

groups. This explains the Court's limited interventions in *Plyler* (children of illegal immigrants), *Cleburne* (people with disabilities), and *Romer v. Evans* (gay people).⁵⁴ Indeed, this theory helps explain why the Court was right to reject a privacy argument for homosexual sodomy in *Bowers v. Hardwick* while recognizing such a right in *Lawrence v. Texas*.⁵⁵ In the former case, the Court was properly reluctant to take the issue away from a volatile political process deeply skeptical of homosexuality, while the latter case gave the Court an opportunity to confirm the country's regime shift away from treating homosexuality as a malignant variation and toward treating it as a tolerable one.⁵⁶

My theory, or something like it, is probably the best explanation of the Court's sex discrimination cases. Today, the Court treats sex as a (quasi) suspect classification, and almost all sex discriminations have been invalidated. This regime has virtually no support in the Constitution's text and the original meaning of the Equal Protection Clause, and is in some tension with the defeat of the Equal Rights Amendment. It is also contrary to representation-reinforcement theory, for women are neither a minority nor an insular group, and indeed their interests are well-represented in the political process. What justifies the Court's jurisprudence is pluralist democracy: women after 1945 have come to consider themselves a social group having common interests and have demanded fair treatment by the American government. The Court did not take the lead in advancing women's agenda of anti-discrimination laws, affirmative protections for violence against women, and family-supportive laws. But once legislators and executive officials took the lead and public feedback supported those measures, then the Court swept away the primary atavisms of the earlier period, when a woman's place was, legally as well as socially, in the home.

For this last reason in particular, pluralism-facilitating theory appeals to the Court's own self-interest in ways that neither original meaning nor representation-reinforcing theories can honestly accomplish. If the Court had upheld the dozens of sex-discriminatory laws it struck down in the 1970s, as dictated by original meaning or representation-reinforcing review, the Justices would have come under tremendous fire and the Court's institutional legitimacy would have taken a hit. The reason would have been that most people

54 *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982).

55 *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

56 See ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 29, at ch. 10 (discussing sodomy law in the context of *Lawrence v. Texas*).

would have thought it obvious that the literal guarantee that no State shall deny “any person the equal protection of the laws” meant that women could not be forced by the State to change their names upon marriage, that women could not be excluded or even given an easy exit from jury service, and so forth. More importantly, the Americans whose views on such issues were the most intense tended to be those who believed that such discriminations were core violations of their rights as citizens—while most Americans who supported those discriminations felt less strongly. In those circumstances, where the loudest voices would have condemned the Court and those supportive would have been muted or even silent, a string of decisions upholding blatant sex discriminations would have been a public relations disaster for the Court. Even *Bowers v. Hardwick* suffered from this asymmetry, and a Court filled with conservative Republicans was eager to overrule it.

Consider also how a pluralism-facilitating theory works in connection with several cutting-edge constitutional issues. By and large, pluralism-based theory urges caution on the part of the Supreme Court in equal protection cases.

B. *Same-Sex Marriage*

There are many constitutional arguments for same-sex marriage, and I have written in favor of all of them as a matter of reasoning from Supreme Court precedent and from the original purpose of the Equal Protection Clause.⁵⁷ I think these are persuasive arguments, yet for the most part they are better addressed to legislatures and state judges rather than to the United States Supreme Court. The issue is far from ripe for Supreme Court review—and a nationwide judicially imposed requirement of marriage recognition would be a train wreck in a polity where Congress, almost all state legislatures, and dozens of state constitutions have legislated, repeatedly, that marriage is a union between one man and one woman.⁵⁸

The central idea of pluralist democracy, fully embedded in the Constitution, is the notion that elected representatives, accountable to the people, are the chief agents for making fundamental changes

⁵⁷ See generally WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT*, at chs. 5–6 (1996) (discussing the arguments in favor of same-sex marriage in the context of the Fourteenth Amendment and *Loving v. Virginia*).

⁵⁸ For an up-to-date survey of state bars to same-sex marriage, see Lambda Legal’s website, *Status of Same-Sex Relationships Nationwide*, <http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html> (last visited May 8, 2009).

in public policy. Recognizing same-sex marriages would be such a fundamental change, and it would be folly for judges to advance such a change without any legislative cooperation. (The Clinton-era Defense of Marriage Act represented Congress's and the President's strong opposition to such a change.) The central threat to pluralist democracy, indirectly recognized in the Constitution, is the possibility of the stakes being raised in ways that drive groups from politics; one way that the stakes of politics get too high is premature termination of public debate about an issue of deep concern to different groups. Given today's public opinion, judicial recognition of same-sex marriage would immediately raise the stakes of politics because it would effectively frustrate the successful efforts of traditional family values of Americans who seek to protect their old-fashioned understanding of marriage against modernization (and, in their view, degradation). Constitutionalizing the right prematurely would radicalize many of these Americans. Unless, of course, they were able to secure a constitutional amendment barring same-sex marriage—and then gay-friendly America would be embittered and radicalized.

The best argument for same-sex marriage under my theory is this one: because civil marriage entails hundreds of related legal duties and rights, the exclusion of lesbian and gay couples from this legal institution discriminates against those couples as regards to hundreds of rights and duties. Is this *class legislation* the core objective of the Equal Protection Clause's searching scrutiny? In my view, no. To begin with, most of the legal incidents of marriage can be created by contract, including support and fidelity obligations, inheritance rights, power of attorney, decision-making rights in the event of a partner's injury or death, joint ownership of property, and so forth. Civil marriage provides all these rights and duties without the need for private contracting, which is usually a great advantage, but as a formal matter of law, a large majority of the incidents of marriage are available to lesbian and gay couples.

By the way, a generation ago many States denied enforcement of contracts and wills involving lesbian and gay couples, usually because their relationship was founded on felonious sodomy.⁵⁹ Now that the Supreme Court has swept away consensual sodomy laws, and established tolerable sexual variation as the constitutional floor, this old regime has disappeared as a matter of open state policy. If there are

⁵⁹ E.g., Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981) (arguing that a homosexual testator bequeathing to his lover has a greater risk of having his testamentary plans overturned after death than a heterosexual testator giving to a spouse).

States that still effectively deny lesbian and gay people basic rights of inheritance, joint property ownership, and contracting, then a pluralism-facilitating theory strongly supports equal protection claims. The Equal Protection Clause was adopted, at the very least, to assure that state as well as federal courts are available for ordinary contract and property claims.

There are some rights that cannot be created by contract, such as the right of the surviving partner to sue for her own injuries in tort cases, but they are many fewer than the former group. It is notable that (as of May 2009) eleven States and the District of Columbia provide most of these noncontractable rights to lesbian and gay couples, through statewide marriage, civil unions, or domestic partnership. All but one of these States are in the Northeast and West Coast portions of our country, the two regions where our polity has moved toward the norm that homosexuality is a benign variation and there is no single norm for sexuality.⁶⁰ A pluralism-facilitating theory of those *state* constitutions would support a claim that the State must provide some legal institution for lesbian and gay couples.⁶¹

But for the nation as a whole, a pluralism-facilitating theory insists upon a wide berth for public deliberation. So long as this identity-invested issue divides the country both intensely and evenly, there should be no national resolution.⁶² And there should be constitutional tolerance for a variety of alternatives, such as civil unions. Are these not, critics maintain, just like apartheid, a “separate but equal” regime fundamentally at odds with the Equal Protection Clause, especially as construed in *Romer*?⁶³ From a pluralism perspective, that is an absurd argument. Apartheid was a regime of strict separation of the races, generated by prejudice and enforced with violence. Civil unions are a huge step toward integration of lesbian and gay couples into the larger polity, not a separation. Indeed, civil unions and domestic partnerships are a kind of “equality practice” that helps prepare the way for normalization of homosexuality in polities that have

60 Lambda Legal, *supra* note 58.

61 *E.g.*, *Baker v. State*, 744 A.2d 864 (Vt. 1999) (requiring the legislature to create an institutional form to provide lesbian and gay couples with the legal incidents of marriage, but not necessarily the name).

62 *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 93–99 (expanded ed. 1956) (arguing that a “polyarchy” needs to minimize situations where big issues divide the polity both evenly and intensely).

63 *See* MICHAEL MELLO, LEGALIZING GAY MARRIAGE (2004) (arguing, by an openly straight author, that civil unions are an unacceptable “separate but equal” regime).

adopted those compromises through their legislative processes, after deliberation and public accountability.⁶⁴

Moreover, civil unions serve as a potential bridge between gay people and social conservatives. They are a compromise that allows each group what it most desires: civil support for same-sex partnerships (the primary need for lesbian and gay Americans), but without invoking the hallowed institution of marriage (a point of greatest concern for social conservatives). More importantly, civil unions constitute a compromise that is also a social experiment, for they create a growing population of quasi-married lesbian and gay couples, often with families. After experience with civil unions, will the gay rights movement still insist on marriage? Will social conservatives find that gay relationships have the adverse effects predicted for society?

C. *Voluntary Race-Conscious Integration School Plans*

Another form of equality practice has been going on in local school boards for the last generation. Disappointed that public schools remain largely segregated by race decades after *Brown*, parents, administrators, and experts have been devising plans to integrate or reintegrate schools. Such plans usually include race-based criteria. For example, Seattle School District No. 1 sought a better racial mix for its ten high schools and, to that end, developed new pupil assignment criteria. The main sorting mechanism was parental choice, but one of the tiebreakers when too many parents opted for a popular school was to prefer pupils whose race would contribute to that school's racial diversity. Concerned parents sued the school district on the ground that the race-based tiebreaker violated the Equal Protection Clause. A 5-4 majority of the Supreme Court agreed and struck down the plan in *Parents Involved in Community Schools v. Seattle School District No. 1*.⁶⁵

Chief Justice John Roberts's opinion for a plurality of Justices has been faulted for disrupting the democratic process without firm support in standard legal sources, namely, constitutional text, original meaning, and precedent.⁶⁶ Like other Supreme Court opinions over-

64 See WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) (arguing for "equality practice," incremental and often legislatively driven change, as a way to ensure legal rights and equal treatment by the State for same-sex couples).

65 127 S. Ct. 2738, 2746-68 (opinion of Roberts, C.J.); *id.* at 2788-97 (Kennedy, J., concurring in part and concurring in the judgment).

66 See *id.* at 2800-37 (Breyer, J., dissenting) (asserting a scorched-earth assault on the Chief Justice's factual assumptions and legal reasoning).

turning remedial race-based programs, *Parents Involved* can also be criticized for treating a helping hand the same as the back of the hand across the face. Justice Stevens once put the point this way:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.⁶⁷

Justice Stevens's point is consistent with the original purpose of the Equal Protection Clause; what my theory adds is that *Parents Involved* is in tension with the pluralistic themes in the Fourteenth Amendment, the Constitution of 1789, and the Bill of Rights. Thus, the Seattle plan seems like the precise obverse of the "class legislation" that was the Equal Protection Clause's core purpose to monitor. Unlike class legislation, which was traditionally partial and exclusionary, the Seattle plan was inclusive and embracing. Unlike class legislation, which was often a mechanism for entrenching a social group as an underclass, the Seattle plan sought to reverse trends which threatened some communities of color with becoming an underclass. (The contrast with *Plyler v. Doe* could hardly be more striking.) Unlike class legislation, which was traditionally engineered by a majority group to enhance its own power, the Seattle plan was engineered by a pluralist multi-racial coalition of educators, parents, and elected school board members who were genuinely seeking the public interest. Speaking for a majority of breast-beating, original-meaning Jus-

⁶⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting). See generally Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (arguing "for a large expansion of our current commitment to cultural diversity on the ground that law schools are political institutions"); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (concluding that "affirmative action should generally be retained as a tool of public policy because, on balance, it is useful in overcoming entrenched racial hierarchy," and arguing that "division within the civil rights coalition is not the *only* conflict permeating the affirmative action controversy"); Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986) ("[T]he Court has approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past."); Patricia J. Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990) (assessing the significance of *Metro Broadcasting* in regard to group claims, and analyzing the "costs of pitting individual rights against group interests at a moment in our history when such groupings as race and class intersect so that race increasingly defines class and the property interests of large numbers of white individuals are understood to be in irreconcilable tension with the collective dispossession of large numbers of people of color").

tices, the Chief Justice's opinion was conspicuous in its historical amnesia.

My theory suggests a greater appreciation, however, for Justice Kennedy's concurring opinion. (The Chief Justice spoke for the Court in striking down the Seattle plan, but not as to all the points of equal protection analysis.) On the one hand, Justice Kennedy agreed with the four dissenters that diversity, as well as remedying the effects of past discrimination, can justify some race-based preferences.⁶⁸ My pluralism-facilitating theory of equal protection strongly supports that point and would insist that a stable majority of the Court adhere to it in subsequent cases. But my theory also takes a critical point from Justice Kennedy: race is a sensitive criterion, and the Seattle plan in particular used the criterion crudely, categorizing everyone as white or nonwhite and ignoring other criteria that would have yielded greater diversity than a criterion grounded upon a crude racial sorting.⁶⁹ For example, under the Seattle plan a school, where 60% of the students had Northern European ancestry and 40% African ancestry, would be considered just as diverse as a school with 60% Northern European, 20% Latino, 5% African, and 5% Asian ancestries. Justice Kennedy was right to be concerned about such a plan. He also worried that the Seattle plan yielded no more, and perhaps less, diversity than a plan considering students' economic backgrounds.

A pluralism-facilitating reading of *Parents Involved* would emphasize the features of the case that troubled Justice Kennedy. Such a reading is supported not only by ordinary principles of precedent, which would view Justice Kennedy's opinion as the controlling one on these disputed points of law, but also principles of pluralism. If there is a silver lining from *Parents Involved* (this remains to be seen), it is that school boards should be encouraged to create more constructive plans that invite a more pluralistic public school system not dominated by pure race-based preferences.

68 *Parents Involved*, 127 S. Ct. at 2788–98 (Kennedy, J., concurring in part and concurring in the judgment).

69 *Id.* at 2792–97.